Neutral Citation no. [2007] NICC 52 | *Ref:* **COGC5900**

Judgment: approved by the Court for handing down | *Delivered:* **07/09/07**
*(subject to editorial corrections)**

BELFAST CROWN COURT

THE QUEEN

v

C

COGHLIN J

[1] C ("the accused") has been arraigned on two separate Bills of Indictment. The first Bill contains 16 counts including offences of rape, attempted rape, indecent assault, wounding, assault occasioning actual bodily harm, false imprisonment and assault alleged to have been committed between 28 November 2005 and 1 December 2005. The second Bill contains 3 counts alleging the offences of causing grievous bodily harm with intent, assault occasioning actual bodily harm and false imprisonment alleged to have been committed between 21 and 24 January 2005, 1 January and 31 December 2003 and 1 June and 31 August 2005 respectively. It is alleged that the accused committed each of the offences contained in both indictments against his long-time partner, the injured party, and he has pleaded not guilty to all of the counts.

[2] The injured party made statements of complaint to the police on 1 December and 5 December 2005. She was born profoundly deaf and can neither speak nor hear. She relies entirely upon sign language and lip reading and, consequently, it was necessary for her to provide her statements of complaint with the assistance of an interpreter. As a consequence of these complaints the accused was arrested and interviewed by the police and during interview he denied all allegations. He was remanded in custody on 2 December 2005.

[3] A medical examination of the injured party carried out on 30 November 2005 and supplemented by photographs taken on 1 December 2005 indicated some 17 areas of injury generally consistent with the injured party's allegations. The accused and the injured party have been living

together for approximately 20 years and, during the course of an application for bail, I was informed that there are many entries on the domestic violence register relating to this relationship going back as far as 1998. Furthermore, it is common case that, on 11 July 2000, the accused was convicted of one offence of assault and 3 offences of assault occasioning actual bodily harm on the injured party. On 4 October 2001 the accused was convicted of a further offence of assault occasioning actual bodily harm on the injured party.

[4] On 9 February 2007 the Crown applied to join both Bills of Indictment in a single Bill and the accused applied for bail. Mr McMahon QC and Mr McCrudden appeared on behalf of the Crown while Mr Weir QC and McAlinden represented the accused. I gave directions for the hearing of the joinder application and refused to grant bail. Upon that occasion my attention was drawn to a further statement made by the injured party on 25 January 2007 in which she said as follows:

> "I have made a number of previous complaints to police, namely Detective Constable Pilson, in relation to my partner C. I have been to see C in prison and I told him I wanted to withdraw my complaints. I feel that we can put this behind us and I realise that I love him. We have been together 20 years and I want to continue being with him. I do not want to continue with my complaint. In relation to the allegations of rape from November 2005 I can state that this did not happen and I was lying when I made these allegations. In relation to the other allegations regarding the cigarette burns and burning my legs I still maintain that these did happen. I am not in fear of C and I have not been asked or influenced to make this statement. The complaint of tying me up was a lie. I made this up."

[5] The hearing was resumed on 26 February 2007 and, upon that occasion, I was informed by Mr McMahon QC on behalf of the Crown that, as a consequence of a further consultation with the plaintiff on 21 February 2007, the prosecution had been reviewed and a decision had been taken not to proceed to trial with any of the counts contained in either indictment. Mr McMahon QC then applied for an order that the indictments should be left on the file for a period of 12 months, not to be proceeded with without leave of the court or the Court of Appeal. Mr Weir QC objected to this course of action and submitted that the accused was entitled to a verdict from a jury. I gave further directions for a hearing of this application on 23 March 2007 and granted bail to the accused. I am grateful to both sets of counsel for their clear and well constructed oral and written submissions.

[6] In the course of his helpful submissions on behalf of the accused Mr Weir QC relied upon the fact that, prior to his release on bail on 26 February 2007, the defendant had been in custody since December 2005 and that he was entitled both at common law and in accordance with the Strasbourg jurisprudence to a fair and public hearing within a reasonable time. He referred to the importance of the principle that finality should be secured and uncertainty avoided particularly in the criminal law. In addition he emphasised the significance of the most recent statement made by the injured party on 25 January 2007 in the course of which she not only indicated her desire not to continue with her complaints but specifically admitted that she had lied about some of the most serious allegations supporting the counts in the indictment. In such circumstances, Mr Weir QC argued that the credibility of the injured party had been fatally undermined to such an extent that there was no realistic prospect of it becoming sufficiently restored to enable the prosecution to apply for leave to proceed with any of the counts contained in either indictment within a period of 12 months.

[7] The primary legal submission advanced by Mr Weir QC was that the power to order that certain counts upon an indictment should remain on the file for any period was limited to cases in which an accused had pleaded or been found guilty of a certain count or counts in a single indictment but not to others which might then be left on the file pending an appeal. A similar situation might arise where an accused has pleaded guilty to or been found guilty of the offences in one indictment and a second indictment to which he has pleaded not guilty is then left on the file. In such circumstances, according to Mr Weir QC, the consent of the defendant was crucial and he referred me to the passage contained in the 2007 edition of Archbold at paragraph 4-191 which reads as follows:

> "It is impossible to challenge such an order in the Court of Appeal (R v Mackell 74 Cr App R 27 CA), or by way of judicial review (R v Central Criminal Court ex parte Raymond 83 Cr App R 94 DC). The court should, therefore, proceed with caution if the agreement of a defendant to such an order is not forthcoming. In ex parte Raymond it was said that such an order is akin to an adjournment over which the trial judge has the final say. It should be confined to the circumstances contemplated, *ante* (i.e. sufficient pleas of guilty or findings of guilty taking the indictment (indictments) as a whole). It should never be made where the defendant pleads not guilty and the prosecution are disinclined to proceed, but are unwilling to offer no evidence; in such circumstances, the defendant's consent is

> insufficient reason for ordering a whole indictment to lie on the file (cf R v Central Criminal Court ex parte Spens, The Times Dec 31 1992, DC, …)."

Mr Weir QC did not accept that the judgments of Hart J in R v H [2006] NICC 5 and R v N [2007] NICC constituted contrary authority to this proposition. Even if either or both decisions did so, he pointed out that Hart J had stated in the course of giving judgment in H that it would be rare in practice to leave charges on the file not to be proceeded with without the leave of court in the face of an objection on behalf of the accused who was entitled to seek a verdict.

[8] On behalf of the prosecution Mr McMahon QC drew my attention to paragraph D11.36 of the 2007 edition of Blackstone's Criminal Practice where the relevant views of the learned authors are set out as follows:

> "Such a course is particularly appropriate where the accused pleads guilty to the bulk of the charges against him (whether contained in one indictment or several) but not guilty to some subsidiary charges. Leaving the latter on the file avoids the necessity of a trial (which would be a waste of time and money in view of the sentence likely to be imposed on the guilty pleas), but also avoids the accused actually being acquitted on the `not guilty' counts, which might seem inappropriate if the evidence against him is in fact strong. Contrary to what was previously understood to be the position, there is no objection to an entire indictment remaining on the file, as opposed to merely dealing with some counts of a multi-count indictment in that way (see Central Criminal Court ex parte Raymond [1986] 1 WLR 710 for a case where, as a result of R's conviction on one count of a severed 14-count indictment, the trial judge ordered that both the remaining counts of the original indictment and all counts of a completely separate indictment should lie on the file)."

The learned authors then indicate their view that whether to make such an order is a matter totally within the judge's discretion and is a decision that cannot be challenged by either party whether by way of appeal to the Court of Appeal or judicial review. In ex parte Raymond the accused had sought judicial review of such a decision but the Divisional Court, constituted by Woolf LJ, as he then was and Webster J, held that it did not have jurisdiction. The learned authors of Blackstone then proceed as follow:

> "Had the decision on jurisdiction gone the other way, the applicant in ex parte Raymond would have argued that a Crown Court judge should not order that counts lie on the file unless the defence agree to that course, and, in the absence of such agreement, he ought to require the prosecution to elect between proceeding to trial and offering no evidence. Although the court in ex parte Raymond heard full argument on the point, it ultimately refused to state its view or give any guidance on when orders to lie on the file are appropriate. This reticence was because of its primary decision that it did not in any event have jurisdiction to review the decision of the court below. It is thus still arguable in theory that orders to lie on the file should be dependent on the defence's consent but, whether that be right or wrong, there is nothing *in practice* to prevent a judge doing what the judge in Raymond's case did, that is, making the order in the face of defence objections."

The learned authors then proceed to suggest that the only situation in which the Crown Court or Court of Appeal is likely to give leave for a count or indictment ordered to lie on the file to be tried is if the accused's convictions on the other matters (i.e. the charges on the same or separate indictments to which he pleaded guilty or of which he was found guilty at the same time as the order to lie on the file was made) are quashed on appeal.

[9] The argument that an order of this type should not be made in the absence of consent on behalf of the defence was specifically considered by Hart J in the case of R v H when his attention was drawn to both passages from the leading criminal law text books to which I have referred above. In the course of giving judgment, he referred to the case of R v Preston Crown Court ex parte Frazer [1984] Crim LR page 624 as an authority that suggested that the Divisional Court had not seen anything improper in the judge making such an order despite the defendant's objection. The learned judge also referred to the well known passage from the judgment of Lord Devlin in Connolly v DPP [1964] 2 All ER 441 when he observed that:

> "… Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused."

Having done so, Hart J went on to say:

> "I agree with Judge McFarland that the court has a power to order that charges lie on the file not to be proceeded with without the leave of the court even though the defendant objects, although it would be rare in practice that it would be done in the face of such objection as the defendant is entitled to seek a verdict. However, the authorities to which I have referred suggest that the defendant's right to seek a verdict is not an absolute right."

[10] In N Hart J was asked to decide whether the power to order that charges on an indictment or a separate indictment should be left to lie on the file was limited to situations in which a relevant guilty plea had been entered or finding of guilt made as suggested by the passage from Archbold quoted above. A submission was advanced on behalf of the accused that a distinction should be drawn between cases such as R v Riebold [1965] 1 All ER 653, R v Thatcher [1967] 3 All ER 410 and R v Michael [1976] QB which concerned residual counts in cases in which pleas or findings of guilt had been made and entire indictments in which no such findings had been reached. Hart J did not consider that this was a valid distinction, observing that each count on an indictment was a separate matter and whether there was a single or more than one count was irrelevant, and I respectfully agree with his views.

[11] In my view the authorities clearly establish the existence of a discretion on the part of the trial judge as to whether to make an order that counts on an indictment should be ordered to lie on the file and not to be proceeded with without the leave of the court or the Court of Appeal. However, in common with all such discretions, such a power requires to be exercised judicially and rationally especially since in the case of this particular discretionary power there does not appear to be any available remedy for a dissatisfied accused by way of appeal or judicial review. Such a circumstance must in itself be rare in the body of our criminal law. I propose to take into consideration a number of factors some of which are general and some specific to the circumstances of this case. They include the following:

(a) Both at common law and in accordance with the Strasbourg jurisprudence the accused has a fundamental right to a fair trial within a reasonable time. However, this is a case in which the prosecution do not seek an open-ended order but one restricted to a finite period of 12 months.

(b) This is not one of the more usual cases in which a plea or finding of guilt has been made and the order is sought for the purpose of safeguarding the position in the event of a successful appeal.

(c) In both the written and oral submissions advanced on behalf of the accused Mr Weir QC emphasised the fact that in her most recent statement of 25 January 2007 the injured party had fully accepted that she had made false allegations against the accused in respect of serious offences. He argued that this was a factor which should weigh particularly heavily in the determination of the application since the complainant's credibility had been irretrievably damaged and, in the absence of any other significant evidence, there was no realistic possibility that the ability of the Crown to proceed with the prosecution would improve over the next 12 months. By way of response, Mr McMahon QC referred to:

> *(1)* The statement of M, a neighbour of the complainant, who described how the complainant had come to her door at about 7.00pm on 30 November 2005 in an upset condition making allegations against the accused of assault and forcible sexual relations. M stated that she had observed a number of marks of injuries on the person of the complainant at the time as a result of which she decided to contact the police.
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> *(2)* A statement from Dr Hall, a registered General Practitioner and Forensic Medical Officer specialising in child abuse and sexual offences, who examined the complainant at 10.15pm on 30 November 2005 and found multiple fresh injuries to her face, head, neck, ear, arm, breasts, abdomen, both legs and genital area suggesting assault rather than accident and consistent with the history that she received from the injured party.
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> *(3*) A statement from Dr Wylie who prepared a report from the notes of Dr Brown who examined the injured party at the Accident and Emergency Unit of Whiteabbey Hospital on 23 January 2005. The notes recorded that clinical examination confirmed the presence of partial skin thickness burns with blistering on both lower legs.
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> *(4)* A statement from the injured party's son confirming that she had showed him red blisters on her arms consistent with the application of cigarettes and alleging that the accused had apologised for his treatment of the injured party in his presence.
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> *(5)* It is also important to keep in mind the fact that while the complainant accepted in her recent statement that she had lied about the allegations of rape and being tied up by the accused, in the same document she reaffirmed that her allegations relating to the accused burning her with cigarettes and setting her legs on fire were true. In such circumstances, I do not accept that the complainant's credibility has been irretrievably damaged by her recent statement but rather that

it remains a matter to be determined by a jury in the context of all the other surrounding evidence.

(d) The accused has pleaded not guilty to all of the counts in both indictments and he is entitled to the presumption of innocence respect for which has long been regarded as an integral part of the right to a fair trial both at common law and according to the Strasbourg jurisprudence. However, I am satisfied that there is a prima facie case against the accused in respect of a number of counts contained in these indictments. Furthermore the fact that the accused's criminal record includes convictions relating to serious assaults upon the complainant, together with the contents of the domestic violence register, indicates to me that the complainant has been subjected to violence in the course of her relationship with the accused for a considerable period of time. Sadly the courts in this jurisdiction, particularly those concerned with criminal and family business, have long been familiar with the existence of such relationships and of the devastatingly destructive effect they are likely to have on the independence, confidence and self esteem of one partner or the other. The resultant dependency, the potential for which is significantly increased in this case by the injured party's disability, and withdrawal of allegations in the interest of resuming the relationship, despite its violent context, is a familiar pattern. Domestic violence is an insidious and corrosive malignancy that permeates all levels of society and in my view there is a clear public interest in ensuring that, in appropriate cases where there is prima facie evidence, the violent partner is made subject to the rigours of the criminal law. The prosecution bears the responsibility for securing that public interest and, having consulted with the complainant, they have advanced this application. In doing so they have advised the court that, in their view, there is not sufficient evidence to go to trial without the complainant but that they seek the order in case circumstances may alter during the next 12 months. In the case of H Hart J accepted that the greater courage gained from the support of her mother and the escape from the influence of her grandmother and brother, together with the passage of some time, constituted sufficient justification not to hold the young complainant to her original decision not to give evidence. I accept that in making the application the prosecution have acted responsibly after taking into account the nature of the offences, the available evidence and the general circumstances of the case. I reject the submission that the application is based simply on administrative convenience but I bear in mind Mr Weir QC's relevant submission that the court should be acutely aware of the limitation of its powers lest the exercise of discretion may be used as a means of achieving some form of "extra judicial probation". However, after taking into account all of the relevant factors, I am satisfied that this is an appropriate case in which to grant the application made by the prosecution. In doing so, it should be abundantly clear from the above remarks that my decision is based upon the specific circumstances of this particular case and should not be seen in any way as establishing a precedent.