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IN THE CROWN COURT IN NORTHERN IRELAND

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[BELFAST]

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THE QUEEN –v- MICHAEL PATRICK CLARKE
and
STEPHEN PAUL McSTRAVICK

_____

RULING NO. 2: ABUSE OF PROCESS

McCLOSKEY J

I INTRODUCTION

[1] The subject matter of this ruling is an application on behalf of the first Defendant, Michael Patrick Clarke, to stay his prosecution on the ground that it constitutes an abuse of the process of the court.

[2] The Defendants are jointly charged with the six offences specified in the Bill of Indictment. These consist of one count of robbery, three counts of false imprisonment and two counts of kidnapping. All of the offences are alleged to have occurred on 28th May 2008. The locations of this alleged offending are, in sequence, a private residence in County Down; premises on the Ravenhill Road, Belfast; and a public place at Duncrue Road, Belfast. Collectively, the alleged offences disclose a *soi-disant* "tiger kidnapping" scenario.

II THE APPLICATION

[3] The application centres on a defence complaint about the manner in which the prosecution have discharged their disclosure obligations under the Criminal Procedure and Investigations Act 1996 ("*the 1996 Act*"). Specifically,

complaint is made of how the prosecution have handled a request for the disclosure of certain video recorded evidence, first made in a solicitor's letter dated 19th November 2009, in the accompanying defence statement and repeated in subsequent correspondence. By Notice dated 15th December 2009, an application on behalf of the first-named Defendant under Section 8 of the 1996 Act was intimated seeking disclosure of, *inter alia*, materials described as "*surveillance of the Portside Inn*". By letter dated 16th December 2009, it was stated on behalf of the prosecution:

> "*Your client has accepted being present at the car park of the Portside Inn on 28th May 2008. Your client accepts that he is the person seen on item HAC1* [a camcorder recording of less than 5 minutes duration] *retrieving items from the salt box at the Portside Inn on the relevant date. Your client states that he was unaware of the contents of the items he retrieved from the saltbox, or the nature of the criminality of those other persons involved in this incident and that he was involved in this matter as he owed money to a criminal gang, the members of which he refused to name, and acted as he did to clear his debt to this gang*".

The letter further represented that the prosecution's duty of disclosure had been reviewed in light of the first Defendant's defence statement, as a result of which some further disclosure would be made. This was one of two letters from the Public Prosecution Service, dated 16th December 2009. By further letter dated 11th January 2010, the PPS represented:

> "*I confirm that the video footage referred to in the Statement of Harold Carse represents the totality of the evidential footage in this matter. No duty of disclosure attaches to any other footage.*"

The formulation of this last-mentioned sentence ("*any other footage*") hinted at the existence of additional video recorded materials, for the first time.

[4] The impetus for the present application is the disclosure by the prosecution of certain further materials to the defence during the currency of the trial. This disclosure was made on the third and fourth days of the trial. The court has been informed that these further materials consist of the following:

(a) Three DVDs.

(b) Two surveillance logs (Nos. 381 and 481), the latter in redacted format.

It is common case that all of these materials relate to observations and depictions of events at the "collection" point adjacent to the Portside Inn, Duncrue Road, Belfast on the date of the alleged offences. On the third day of trial, the court was also alerted to the possibility that the prosecution might seek to adduce these further video recordings in evidence. This possibility duly materialised, with the service of two Notices of Additional Evidence [Nos. 5 and 6 respectively] dated 19th January 2010, on the sixth day of trial. In the event, the additional evidence actually adduced by the prosecution, *in this respect*, was confined to the contents of six further witness statements, which, by agreement, were read to the jury. Each of the witnesses in question is a police officer and all of them describe their observations at the collection point and at certain other locations nearby, with particular emphasis on the movements of a red Volkswagen Golf GTI vehicle, during a period of approximately six hours, commencing at around 11.00am on 28th May 2008. For the record, this part of the evidence was adduced following an order made by the court under Sections 86 and 87 of the Coroners and Justice Act 2009.

[5] The thrust of this present application is that, by virtue of these matters, the first Defendant (in the language of the defence skeleton argument) "*cannot receive a fair trial*". It is submitted by Miss McDermott QC and Mr. Campbell that there has been a systemic failure in the disclosure process, to the extent that the first Defendant's right to a fair trial has been incurably blighted. The burden of this submission is that, having regard to the events outlined above and the sequence thereof, the court cannot be confident that the prosecution have properly and comprehensively discharged their duty of disclosure. It is submitted that the belated disclosure of these further materials, coupled with the equally belated service of two further Notices of Additional Evidence, reflect so poorly on the discharge of the prosecution's disclosure obligations that the court should conclude that the fairness of the first-named Defendant's trial has been irredeemably compromised. In developing these submissions, counsel reminded the court of the summary contained in Blackstone's Criminal Practice 2010, paragraph D9.5 (and following) together with certain passages in the 1996 Act Code of Practice and the related Attorney General's Guidelines on Disclosure (in particular, paragraphs 36 and 39).

[6] The replying submission of Mr. Hunter QC (appearing with Mr. Russell) on behalf of the prosecution encompassed a fairly substantial factual dimension, which was unsurprising in the circumstances. This included a comprehensive chronology of material events, which the court found informative and helpful. Based on this chronology, I consider that the key events were these:

(a) In November 2008, a Detective Sergeant made certain enquiries which, for reasons not entirely clear, failed to elicit the existence of the video recordings belatedly disclosed.

(b) On 8th January 2010, the date when the jury initially sworn to try this prosecution was discharged, the PPS Disclosure Officer viewed some of the video recordings, without the assistance of the surveillance log. I infer that this was the impetus for the letter dated 11th January 2010 noted in paragraph [3] above.

(c) On 13th and 14th January 2010, prosecuting counsel viewed the entirety of the video recordings and the surveillance log, in concert. In short, the whole of the new materials was considered by the entire prosecution legal team on this occasion.

This latter event stimulated a re-evaluation by the prosecution of the stance adopted in the earlier correspondence. The upshot was a fresh decision, to the effect that all of the new material would be disclosed. Disclosure duly ensued, followed by service of the Notices of Additional Evidence noted in paragraph [4] (*supra*).

[7] In the context set out immediately above, the written submission on behalf of the prosecution incorporated the following candid acknowledgement:

> "*The prosecution fully accepts that there has been a failure in the disclosure process, as appears from the above chronology and answers to questions*".

In short, it is accepted on behalf of the prosecution that the further materials belatedly disclosed should have been disclosed to the first Defendant before the trial commenced. It would appear that the main reasons for the tardy disclosure were, in summary, the belated production of the materials in question by the police to the PPS; an initial evaluation of these materials *in incomplete format* by the PPS Disclosure Officer; a comprehensive consideration by the entire prosecution team of the materials, carried out on the third day of trial; and, per Mr. Hunter QC, the limited resources of the PPS. It is evident that the final, fully informed evaluation of these materials by the prosecution team as a whole differs from the initial, less than fully informed assessment of the PPS Disclosure Officer.

III GOVERNING PRINCIPLES

[8] The principles to be applied by the court in its determination of this application are well established. They are summarised, for example, in the

recent decision of the Court of Appeal in ***Regina –v- McNally and McManus*** [2009] NICA 3, paragraphs [14] – [18]. I refer also to ***Regina –v- Murray and Others*** [2006] NICA 33, paragraphs [20] – [29] especially; ***Re Molloy's Application*** [1998] NI 78, per Carswell LCJ, p. 84f – 85f; and ***Re DPP's Application*** [1999] NI 106, per Carswell LCJ, paragraphs [31] – [33] especially. The decisions in this series of cases are binding on me.

[9] I would highlight in particular what Carswell LCJ stated in ***Re Molloy*** at p. 85e/f:

> "*In our opinion these authorities lead to the conclusion that the resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory jurisdiction may nevertheless be regarded as an abuse of the process of the court* ***if, but only if, it operates to affect adversely the fairness of the trial****. It is necessary in every case to look at the circumstances of the case and it lies within the discretion of the court to decide whether the procedure operates against the interests of the Defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in* ***Ex Parte Bennett*** *(at p. 63) that it is to be 'most sparingly exercised' and that of Viscount Dilhorne … that it should be exercised only 'in the most exceptional circumstances'".*

[Emphasis added].

In ***Re DPP's Application***, Carswell LCJ formulated three basic propositions, at paragraph [33]:

> "*1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …*
>
> *2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.*
>
> *3. The element of possible prejudice may depend on the nature of the issues and the evidence against the Defendant. If it is a strong case and* ***a***

> ***fortiori*** *if he has admitted the offences, there may be little or no prejudice …*".

[10] Most recently, in ***Regina –v- McNally and McManus***, the Court of Appeal stated:

> "[17] … *A judge should* ***never*** *grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue. Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the Defendant is avoided …*
>
> [18] *It appears to us that this examination must be conducted at two levels. The first involves an inquiry into the individual defects in the prosecution case or the police investigation and the measures that might be taken to deal with each. The second entails the weighing of the impact of the various factors on a collective basis. It does not necessarily follow that, because some steps to mitigate each item of potential unfairness can be taken, the stay must be refused. A judgment can still be made that the overall level of unfairness that is likely to remain is of such significance that the proceedings should not be allowed to continue. It is to be remembered, of course, that* ***the judge must be persuaded of this proposition by the defence, albeit only on a balance of probabilities***".

[Emphasis added].

[11] The concept of fairness in the context of the modern criminal trial has been explained by Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584, in a celebrated passage which bears repetition:

> "*The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this*

> *requires the court to consider a triangulation of interests.* ***It involves taking into account the position of the accused, the victim and his or her family and the public.***"

[Emphasis added].

Moreover, fairness will always entail a contextualised evaluation, tailored to the specific features and circumstances of the individual trial. Equally, an evaluative judgment on the part of the trial judge is required. This judgment must be formed at the stage when a complaint of abuse of process is canvassed. Furthermore, given these considerations, there is obvious scope for differing opinions. This truism is noted in the commentary in the Criminal Law Review, following the digest of the decision in ***Regina –v- JAK*** [1992] CLR 30, at p. 31:

> "*Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form different opinions*".

[12] Finally, I take into account a passage from the judgment in ***Regina (Ebrahim) –v- Feltham Magistrates Court*** [2001] EWHC (Admin) 130, paragraph [25]:

> "*(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the Defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.*
>
> *(ii)* ***The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded***".

[Emphasis added].

This passage was cited with approval by the Court of Appeal in ***McNally and McManus*** [*supra*], at paragraph [15], where it was described by the Lord Chief Justice as containing "*two important principles*".

IV CONCLUSIONS

[13] The factual framework within which this ruling must be made is set out in paragraphs [1] – [7] above. The proposition that the court must examine this framework and all of the materials and information which it incorporates in a critical fashion seems to me unexceptional. I have duly conducted a critical evaluation of this nature. I consider that the focus of the court's anxious scrutiny is mainly, though not exclusively, the default which occurred in November 2008. This was unquestionably reprehensible in nature. As a minimum, it smacks of inefficiency and also gives cause for concern about the disclosure officer's appreciation of the legal obligations in play – which are irreducible – and approach thereto. Every Defendant's right to a fair trial is simply far too important to be exposed to jeopardy in this way. The court sincerely trusts that there will be a review of systems, procedures and education, to the end that there will be no recurrence.

[14] To this framework I must apply the legal principles set out above. It was accepted on behalf of the first Defendant, correctly, that if this application is to succeed it must overcome a threshold of an elevated nature. Following careful consideration, I have concluded that this exacting threshold has not been surpassed. In my view, the impressionistic inference which lies at the heart of this application and which the court is invited to make is not justified. The lateness of the service/disclosure of the additional materials is clearly unsatisfactory. However, the very essence of the statutory disclosure regime gives rise to the possibility of reconsiderations, differing views and fresh judgments. Following critical examination, I am disposed to accept the explanation proffered on behalf of the prosecution. I am conscious that the overarching touchstone is the first Defendant's right to a fair trial. As the guardian of this right, I am satisfied that it has not been compromised by the events grounding this application. Notably, it is acknowledged (correctly) on behalf of the first Defendant that the belatedly disclosed materials, which now form part of the prosecution evidence to some extent, are capable of sustaining Mr. Clarke's defence. This I consider to be a factor of some substance. In short, notwithstanding the court's significant misgivings about the default which occurred in November 2008, I am satisfied that the first Defendant is enjoying and will continue to enjoy a fair trial. On the whole, I consider that this application falls measurably short of the threshold to be overcome, with the result that it must be refused.