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*(subject to editorial corrections)**

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. 1: DISCHARGE OF JURY

_____

McCLOSKEY J

I REPORTING RESTRICTIONS

[1] Section 4(2) of the Contempt of Court Act 1981 provides:

> "*In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.*"

I consider that any report of the hearings to which this discrete ruling relates (conducted on 7th and 8th January 2010) or any report of this ruling could potentially jeopardise the fairness of the Defendants' trial, with the result that the test enshrined in Section 4(2) is, in my view, satisfied. Accordingly, I make a reporting restrictions order relating to (a) the aforementioned hearings and (b) this ruling, to the effect that publication of both will be postponed until delivery of the jury verdict herein or further order.

II THE ISSUE

[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.

[3] The issue to which this ruling relates arises in the following way. Both before and after the swearing of the jury herein on the first day of trial, 7th January 2010, conventional warnings and instructions were given to panel members. These entailed (*inter alia*) placing emphasis on the importance of bringing to the attention of the court any factor which could conceivably have a bearing on the impartiality of any individual. This exercise was conducted by drawing to the attention of all panel members the contents of the indictment, highlighting the names of the Defendants, the locations where the offences are alleged to have occurred, the names of the three injured parties identified in the indictment and the date of the alleged offences. The associated instruction given to panel members was couched in terms which would be considered conventional. This resulted in several of them being excused, prior to the jury being sworn.

[4] Following the swearing of the jury, before the Defendants were placed in their charge the instruction was repeated, albeit in briefer terms and an adjournment was granted for the purpose of enabling those sworn to reflect further on whether they should properly bring to the attention of the court anything bearing on their suitability to try the case. Nothing ensued and, approximately three-quarters of an hour later, the prosecution case was opened by Mr. Hunter QC (appearing with Mr. Russell). When this was completed, the court adjourned for lunch. Almost immediately thereafter, a note was brought to my attention, couched in the following terms:

> *"Juror No. … is from … … and knows the name 'X' but no one in the dock"*.

[I have deleted the individual juror's number and the urban residential area in question, while 'X' is the surname of two of the victims named in the indictment].

[5] The note was duly copied to the parties' legal representatives and this stimulated argument in consequence. An adjournment ensued. On the morning of the second day of trial, a further - unwritten – communication from the same juror was brought to my attention, emanating from one of the jury keepers. The thrust of this (while somewhat vague) was that by virtue of where the juror lives and his familiarity with one of the Defendant's fathers, he felt unable to serve as a member of the jury. In the circumstances prevailing, it seemed to me that, in the abstract, the options available were the following:

(a) To take no action, leaving the jury intact.

(b) To discharge the juror concerned, without further enquiry and to continue the trial with a jury of eleven members.

(c) To discharge the entire jury and swear a new jury, followed by recommencement of the trial.

(d) To make further enquiries of the juror concerned, by an appropriate mechanism, prior to taking any of the three courses outlined above.

Ultimately, the fourth of these options stimulated most reflection and debate and generated certain questions which are considered in this ruling.

[6] On behalf of the prosecution, Mr. Hunter QC acknowledged the breadth of the discretion available to the trial judge in matters of this kind. Having done so, he submitted that it would be in the public interest for the trial to continue, unless the court were satisfied of the existence of a risk to the integrity of the fairness of the trial. He accepted that the two communications in question raised an issue of possible bias, or partiality, on the part of the juror concerned. He pointed out that one option was simply to discharge the juror and continue with a reduced jury, as the legislation expressly contemplates this course. With regard to the option of the court investigating the communications further, he acknowledged the extent of the discretion in play, while submitting that it should be exercised reasonably and in a manner which would not compromise the fairness of the trial. Mr. Hunter further submitted that one course open to the court would be to conduct a recorded interview of the juror in the trial judge's chambers, disclosing the transcript thereof to the parties thereafter. He accepted that as a general proposition the anonymity of jurors should be preserved as far as possible.

[7] On behalf of the first-named Defendant, Miss McDermott QC (appearing with Mr. Campbell) expressed a degree of concern about the communications and espoused the stance that any further investigation of the juror by the trial judge should be conducted in open court, both visibly and audibly. On behalf of the second-named Defendant, Mr. Weir QC (appearing with Mr. McAlinden) advanced the primary submission that the circumstances did not give rise to any requirement to either interview or discharge the juror concerned. His secondary submission reflected that of Miss McDermott.

III RULING

[8] I begin with the governing principles. While the importance of a jury being entirely impartial is a longstanding feature of the common law, it has been reinforced by Article 6 ECHR, given effect in domestic law by the Human Rights Act 1998, in an era of sophisticated technology and mass communication. In the contemporary setting, the modern jury is in some ways the antithesis of its predecessor of several centuries ago, as highlighted by Campbell LJ in ***Regina –v- Fegan and Others*** [unreported]. See also ***Regina –v- McParland*** [2007] NICC 40,

paragraph [20] especially. I consider that the modern law differs in no material respect from the pronouncement of Maloney CJ almost a century ago, in ***Regina –v- Maher*** [1920] IR 440:

> "*The rule of law does not require it to be alleged that either A or B or any number of jurors are so affected, or will be so affected; but if they are placed under circumstances which make it reasonable to presume or apprehend that they may be actuated by prejudice or partiality, the court will not, either on behalf of the prosecutor or traverser, allow the trial to take place in that county … **It is a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion***".

[Emphasis added].

In this sphere, *perceptions* are all important: the immutable rule that justice should not only be done but should manifestly and undoubtedly be seen to be done resounds strongly in this particular sphere. The importance of the Article 6 right to a fair trial before an independent and impartial tribunal was emphatically underlined by the House of Lords in the early stages of its now extensive Human Rights Act 1998 jurisprudence. In ***Brown –v- Stott*** [2003] 1 AC 681, Lord Steyn stated:

> "And *it is a basic premise of the Convention system that only an entirely neutral, impartial and independent judiciary can carry out the primary task of securing and enforcing Convention rights*".

In ***Millar –v- Dickson*** [2002] 1 WLR 1615, Lord Bingham stated, in paragraph [26]:

> "*It is a safeguard which should not, least of all in the criminal field, be weakened or diluted, whatever the administrative consequences*".

[9] It has been held that the Article 6 requirement of independence and impartiality applies fully to juries: see ***Pullar –v- United Kingdom*** [1996] 22 EHRR 391, paragraphs [29]-[30]. The duty of enquiry which this can impose on the court in an appropriate case was recognized in ***Remli –v- France*** [1996] 22 EHRR 253, paragraphs [46] – [48]. In considering whether the composition of a jury poses any threat to the fairness of a given trial, the test to be applied is that of apparent bias, as expounded by the House of Lords in ***Porter –v- Magill*** [2002] 2 AC 357: would a fair-minded and informed observer conclude that, having regard to the particular factual matrix, there was a real possibility of bias? I remind myself that the hypothetical and informed observer is a balanced person, not unduly sensitive or excitable and possessed of all relevant information pertaining to the factual matrix under scrutiny. In ***The Queen –v- Connor and Mirza*** [2004] 1 AC 1118, the

question formulated by Lord Hope was whether the juror had "*knowledge or characteristics which made it inappropriate for that person to serve on the jury*": see paragraph [107]. The word "bias", in this context, must be properly understood: I consider that it connotes a material predisposition or prejudice on the part of the individual, an inclination to be swayed by something other than evidence and merits. I would also draw attention to the "*starting point*" noted by Lord Rodger in ***Connor and Mirza,*** paragraph [152]:

> "*The risk that those chosen as jurors may be prejudiced in various ways is, and always has been, inherent in trial by jury …*
>
> *Similarly, the law supposes that, when called upon to exercise judgment in the special circumstances of a trial, in general, jurors can and do set their prejudices aside and act impartially.* ***The recognized starting point is, therefore, that all the individual members of a jury are presumed to be impartial unless there is proof to the contrary ...***".

[My emphasis].

[10] Practitioners in this field will also be familiar with the exposition of the correct doctrinal approach contained in the judgment of Hart J in ***The Queen –v- Grew and Others*** [2008] NICC 6, paragraphs [45] – [50] especially. Other decisions belonging to this sphere include ***The Queen –v- Mackle and Others*** [2007] NIQB 107 and ***The Queen –v- Lewis and Others*** [2008] NICC 16. It is trite that where an application of this kind is made, an asserted risk to the fairness of the trial which is flimsy or fanciful will not suffice. However, the converse proposition applies with equal force. The court is required to make an evaluative judgment based on all the information available. This requires, to borrow the words of Lord Mustill (albeit in a different context), the formation of "*what is essentially an intuitive judgment*" (***Doody –v- Secretary of State for the Home Department*** [1993] 3 All ER 92, p. 106e). In making this judgment, the court will endeavour to apply good sense and practical wisdom. Ultimately, the court's sense of fairness, as this concept has been explained above, and its grasp of realities and perceptions will be determinative.

[11] I shall address, firstly, the question of further investigation by the court of the juror's communications. It is clear from the Strasbourg jurisprudence that in circumstances where the court has been apprised of a risk of jury bias, one of the critical questions concerns the steps taken in consequence and the remedial measures, if any, deployed. In ***Remli –v- France*** (*supra*), the trial judge failed to investigate a suggestion that one of the jurors had been overheard making racially antagonistic remarks about the Defendant. The European Court said:

> "*[48] Article 6(1) of the Convention imposes an obligation on every national court to check whether, as constituted, it is an 'impartial tribunal' within the meaning of that provision where, as in the instant case, this is disputed on a ground*

> *that does not immediately appear to be manifestly devoid of merit. In the instant case* [the court] *did not make any such check, thereby depriving* [the Applicant] *of the possibility of remedying, if it proved necessary, a situation contrary to the requirements of the Convention. This finding, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction, suffices for the court to hold that there has been a breach of Article 6(1)*".

In contrast, in ***Gregory –v- United Kingdom*** [1998] 25 EHRR 577, the active investigation by the trial judge of a comparable suggestion, which included a clear direction to the jury to decide the case on the evidence, free from any prejudice formed the cornerstone of the European Court's dismissal of an asserted infringement of Article 6. The decision in ***Sander –v- United Kingdom*** [2001] 31 EHRR 1003 went the other way, illustrating the proposition that in certain circumstances a warning of this kind will not suffice: see paragraphs [26]-[34]

Further, the opinion of Lord Bingham in ***The Queen –v- Abdroikov*** [2006] 1 Cr. App. R1 repays careful reading, particularly paragraphs [6] – [7] and [23]:

> "*It must in my view be accepted that most adult human beings, as a result of their background, education and experience, harbour certain prejudices and predilections of which they may be conscious or unconscious. I would also, for my part, accept that* ***the safeguards established to protect the impartiality of the jury, when properly operated, do all that can reasonably be done to neutralise the ordinary prejudices and predilections to which we are all prone***".

[My emphasis].

Equally of note is Lord Carswell's statement:

> "*[67] Unconscious prejudices and bias can be insidious in their operation on people's minds, but the number and diversity of people on a criminal jury constitute a safeguard against such prejudice or bias on the part of any one juror exercising sufficient influence to determine the outcome of the trial. To a certain extent they are inescapable in human society, but it is generally reckoned that they are balanced out in the jury's deliberation and subsumed in the general attempt to reach a consensus.*"

See also Lord Rodger, paragraphs [32] – [34], with the emphasis on the jurors' oath and the duties imposed on the presiding judge.

[12] In the present case, the contents of the juror's note may fairly be described as cryptic and somewhat opaque. The reaction which the note generates instinctively is an impulse to enquire further. If a putative juror – to be contrasted with a sworn juror – had brought this to my attention during the exercise conducted prior to swearing of the jury, this would inevitably have elicited certain questions on the part of the court, in an attempt to explore and expose the basis, meaning and thrust of the written words. While enquiries of this kind are habitually conducted in open court, in the presence of the Defendants and the legal representatives of all parties, they are not uncommonly carried out in a confidential manner, without objection. At the stage which this trial has now reached, the jury has, of course, been sworn and the trial has begun. This raises the question of how the court should properly conduct an exercise of the kind mooted in paragraph 4(d) above, at this juncture, if minded to do so.

[13] At the conclusion of submissions from and exchanges with counsel, the following possible courses of action were exposed:

(a) Questioning of the juror concerned by the trial judge in open court, both audibly and visibly, in the presence of the legal representatives of both prosecution and defence, but no one else.

(b) Questioning of the juror concerned by the trial judge in chambers, recorded by a stenographer, with the transcript to be disclosed to the parties' legal representatives thereafter, before making any ruling.

(c) A response in writing by the trial judge to the juror's written communication, incorporating questions such as:

  (i) 'Please explain, in writing, as fully as possible the contents of the note'.

  (ii) 'Are you satisfied that you can serve on this jury fairly, impartially and without undue pressure?'

It seems to me no coincidence that option (a) emerged as the *first* of the courses which the court might properly pursue.

[14] It is undeniable that in many cases any questioning of a duly sworn juror by the trial judge should be conducted both visibly and audibly, in the presence of the parties and their legal representatives. In such a case, I consider that, as a general rule, there could be no sustainable objection to excluding all others – to include witnesses and other jury members – from the courtroom. While it would lie within the discretion of the trial judge to permit interested representatives of the press to be present, it seems very probable that a reporting restrictions order under Section 4(2) of the Contempt of Court Act 1981 would ensue (see paragraph [1], *supra*). It is suggested in Blackstone's Criminal Practice 2010 (paragraph D 13.61) that a public

examination of a juror of this kind could potentially occur where the court deems it necessary to enquire into possible bias or misconduct on the part of a juror. While I do not question this as a general proposition, I consider that there are no hard and fast rules in this respect. In principle, it would appear that the other two courses mooted above – a recorded interview by the judge of the juror in chambers, followed by dissemination of the transcript to the parties, *or* an exchange of written communications between the judge and the juror to be concerned, also to be disclosed to the parties – could be adopted in an appropriate case. However, considerations of transparency and fair trial would be to the forefront of the trial judge's mind at all times. Accordingly, any misgivings in either of these respects would militate against the two aforementioned courses. Overall, it would be for the trial judge to select the method which appears most suitable in the particular circumstances prevailing.

[15] While the kind of problem which arose concerning the jury in the present case is not unprecedented, it would appear that, anecdotally at least, it does not commonly occur. In ***The Queen –v- Orgles*** [1993] 4 All ER 533, Holland J, delivering the judgment of the Court of Appeal, observed that the jury complications which confronted the Recorder during the course of the trial were "*unexpected*", continuing (at p. 537i):

> "*It was unusual (it is not encompassed within the joint experience of the members of this court); there was no precedent to guide him; and counsel could not provide an agreed submission*".

In that case, two members of the jury complained, independently of each other and of the other jury members, that there was friction amongst the jurors, affecting their concentration. In the presence of the other ten jurors, the trial judge questioned each of the jurors concerned in open court. The upshot was an assurance from all of the jurors that they felt able to continue. In its judgment, the Court of Appeal provided some general guidance, prefaced by the following observations:

> *"(a) Each member of a properly constituted jury has taken an individual oath to reach a true verdict according to the evidence; or has made an affirmation to the like effect.*
>
> *(b) Circumstances may subsequently arise that raise an inference that one or more members of a jury may not be able to fulfil that oath or affirmation.*
>
> *(c) Normally such circumstances are external to the jury as a body. A juror becomes ill; a juror recognises a key witness as an acquaintance; a juror's domestic circumstances alter so as to make continued membership of the jury difficult or impossible; so far, we give familiar, inevitably recurring circumstances. Less frequent, but regrettably not*

unfamiliar, is the improper approach to a juror, alternatively a discussion between a juror and a stranger to the case about the merits of the case, in short, that which every jury is routinely warned about.

(d) Occasionally, as in the instant case, the circumstances giving rise to the jury problem are internal to such as a body. Whereas the duty common to all its members normally binds the twelve strangers to act as a body, such cannot always occur. From time to time there may be one or more jury members who cannot fulfil the duty, whether through individual characteristics or through interaction with fellow jury members.".

The following guidance is then provided:

"(e) However the circumstances arise, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial, to that end exercising at his discretion his common law power to discharge individual jurors (to a limit of three: see s 16 of the Juries Act 1974), or a whole jury (see R v Hambery [1977] 3 All ER 561, [1977] QB 924).

(f) The question arises as to whether and in what circumstances that duty should be exercised by the trial judge in the absence of the jury as a body. As to this, first, there is no doubt but that the judge's discretion enables him to take the course best suited to the circumstances (see R v Richardson [1979] 3 All ER 247, [1979] 1 WLR 1316 for an extreme course) and frequently it is appropriate to commence and continue the inquiry with the juror concerned separated from the body of the jury. Such a course cannot readily be faulted if the circumstance giving rise to the inquiry is external to the jury as a body; indeed if the problem is an approach to a juror, alternatively some external influencing of a juror, only such a course is feasible. The 'infection', actual or potential, of one juror must be prevented if possible from spreading to the rest of the jury, and it is common form to have the individual juror brought into open court with the rest of the jury absent so that the trial judge may make an inquiry in the presence of the accused and counsel without jeopardising the continued participation of the rest of the jury.

(g) However, in our judgment, such separation of a juror for the purposes of an inquiry cannot be justified if the circumstances are internal to the jury. It may be that just

one member of the jury is complaining about all or some of the rest, or, as here, two members, but the problem is not the capacity of one or more individuals to fulfil the oath or affirmation, but the capacity of the jury as a whole. When this type of problem arises, then the whole jury should be questioned in open court through their foreman to ascertain whether, as a body, it anticipates bringing in a true verdict according to the evidence. It will be a matter for the judge's exercise of discretion as to how he reacts to the response, that is whether he makes no order, whether he discharges the whole jury, or whether he discharges individual jurors up to three in number."

The following discrete passage is worthy of emphasis:

> " *As to this, first,* ***there is no doubt but that the Judge's discretion enables him to take the course best suited to the circumstances*** ."

[16] In ***Orgles,*** the court emphasized that, in the particular circumstances of that trial, the proper course for the trial judge was to make enquiries of all of the jurors, collectively. However, interestingly, the court did not consider the action taken by the trial judge a material irregularity and quashed the convictions on other grounds. The judgment does not speak directly to the circumstances which arose in the present case. Nor does it encompass any consideration of the second and third mechanisms mooted in paragraph [12] above. However, the orientation of the judgment, which clearly favours the public examination option, is unexceptional and accords with what one might expect to be the instinctive reaction of a majority of trial judges in situations such as that which arose in the present case. Notably, the *flexibility* of the responses available to the trial judge features in the opinion of Lord Rodger in ***Connor and Mirza***: see paragraphs [156] and [157].

[17] Where any substantial issue regarding a juror's anonymity and rights under Article 8 ECHR arises, it seems to me that there is a balancing exercise to be performed. On the one hand, the court must respect every Defendant's right to a fair trial and the various constituent elements which this right entails. I consider that these include, as a general (though not inflexible) rule, an expectation that all aspects of the proceedings will be transacted openly [cf. generally Lester and Pannick, Human Rights Law and Practice, 3rd edition, paragraph 4.6.28-30 and 4.6.40-43]. As regards the express terms of Article 6, two elements are engaged. The first is the right to a hearing in one's presence. The second is the right to a hearing in public. Specifically, the European Court of Human Rights has held that this right implies the ability to hear and follow the proceedings, to understand the evidence and arguments, to instruct lawyers and to give evidence: see ***V and T –v- United Kingdom*** [1999] 30 EHRR 121, paragraphs [85] – [91] especially. However, these pronouncements were made in a somewhat different context (the trial of children

charged with serious offences) and do not speak directly to the issue arising in the present case. Moreover, the European Court evidently did not consider the open administration of justice to be an absolute value or requirement: see paragraph [87]. This seems to me consonant with the attribute of balance which Article 6 has consistently been recognised as possessing.

[18] On the other hand, the anonymity of jury members must also be respected by the court, which must simultaneously be astute to act in a manner which does not infringe a juror's rights under Article 8 ECHR, having regard to the court's obligations as a public authority under Section 6 of the Human Rights Act 1998. I acknowledge, of course, that Article 8 is one of the qualified protected Convention rights and that questions of legitimate aim (in this case, protection of the Defendants' Article 6 rights) and proportionality could conceivably arise.

[19] Given the paramountcy of every Defendant's right to a fair trial, I am prepared to accept that this will typically prevail over any countervailing privacy or anonymity claims of jurors. However, it is clear that these claims should not be dismissed lightly, taking into account the importance which the legislature has attributed to juror anonymity, as evidenced by the recent statutory reforms in this field. See, in this respect, ***Re McParland's Application*** [2008] NIQB 1, paragraphs [25] – [27] and [41] – [52] especially. One of the arguments which prevailed in that case was based on the emphasis in the House of Lords decision in ***The Queen –v- Hand C*** [2004] 2 AC 134 on the characterisation of prosecuting counsel as a minister of justice. This prompts me to observe that, absent cause shown to the contrary, every trial judge is, presumptively, fair and impartial: this is the thrust of Lord Rodger's observations in ***Connor and Mirza,*** paragraph [152]. This seems to me to support the suggestion that, in certain circumstances – which one would not attempt to define or prescribe - there could no sustainable objection to a trial judge questioning a sworn juror visibly, but not audibly, in open court, an issue of impartiality or misconduct having arisen. In appropriate cases , where a conflict of rights arises ,inviting a fair and balanced compromise, the accommodation might well entail simply discharging the juror concerned , or the entire jury, without further enquiry in open court - an uncomplicated solution at or close to the beginning of the trial, but more difficult at a later stage.

[20] Returning to the present case, I have concluded, taking the two communications together, that the juror concerned is in fear. I distinguish this from the level of discomfiture and/or pressure which one might expect most jurors to typically experience in a trial of this nature. Having reached this conclusion, it follows that no further investigation of the communications is required. I acknowledge the general principle that a trial should be conducted by a complete jury of twelve members, unless there is good reason to proceed otherwise. Significantly, the present trial has only just begun, occupying about half a day and no evidence has been adduced thus far. Balancing all of these factors, I conclude that in these circumstances the appropriate course is to discharge the jury sworn yesterday and to proceed with the trial one working day hence, when a new jury

panel will be available. While this of course gives rise to some disruption and delay, these are of comparatively minor proportions in the circumstances.

[21] I would add, that in the particular circumstances of the present case, I was of the opinion that an audible and visible examination in open court of the juror concerned would have been inappropriate, for two reasons. Firstly, if the juror had been disposed to engage fully, it would have been difficult to couch the questions in a manner which would not have jeopardised the person's anonymity and compromised his Article 8 rights. The second is that the juror might have been unwilling to engage – a real risk here, in my view - with the result that significant information could have been suppressed. In this respect, it is appropriate to highlight that citizens who perform jury service do so in the expectation that while they may be obliged to join a corps of eleven others to try a fellow citizen, they do not expect to have to undergo a public interrogation (in the correct sense of the word), albeit this may be unavoidable in some instances. The present case also illustrates why appellate courts not infrequently emphasize the deference which must be accorded to a trial judge in the exercise of discretion in matters of this kind (see Archbold 2010, paragraph 4-263 and, as an illustration, ***The Queen –v- Monodou and Limani*** [2005] 2 Cr. App. R6, paragraphs 95-96 especially). From the moment of receipt of the first juror communication, I had a distinctly uneasy feeling about the matter, which was duly fortified when the second communication materialised.