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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

KEVIN CRILLY

HART J

[1] Captain Robert Nairac was abducted and murdered in May 1977 and several individuals have been convicted of various offences connected with these events. The prosecution now seek to have Kevin Crilly sent for trial on an indictment containing five counts relating to the abduction and murder of Captain Nairac, namely two counts of false imprisonment, two of kidnapping and one of murder.

[2] Rather than proceed in the conventional way by holding a committal hearing the prosecution have applied for leave to present an indictment by virtue of s. 2(2)(e) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 (the 1969 Act), that is by way of the so called "voluntary bill" procedure. This gives rise to three questions in the present case.

(i) Should the court permit the prosecution to proceed by way of a voluntary bill, or require the prosecution to seek to have Kevin Crilly returned for trial by way of a committal hearing before the Magistrates' Court?

(ii) If it is permissible to proceed by way of voluntary bill in the present case, has the court power to consider bad character and hearsay evidence at the voluntary bill stage?

(iii) If it is permissible to proceed by way of voluntary bill, is there sufficient evidence to justify Kevin Crilly being put on trial on these charges?

For convenience I shall refer to Kevin Crilly as the accused in this case. A number of the issues which arise in the present case relate to the nature of proceedings under the 1969 Act, some of which arise in the case of R v Black and this judgment is intended to be read in conjunction with my judgment in that case.

[3] Should the court permit the prosecution to proceed by way of voluntary bill or require the prosecution to proceed by way of committal? Committal proceedings before a Magistrates' Court have long been the almost invariable method in Northern Ireland by which a preliminary examination of the prosecution case is conducted in order that there may be a judicial determination as to whether there is sufficient evidence to justify a proposed defendant being put on trial on indictment on the charge(s) against him. However, it has never been the sole route, whether in Northern Ireland or elsewhere, and, as explained in R v Black, until 1969 the Grand Jury also retained that responsibility, even though by statute the Magistrates' Court already performed the same function when deciding whether to send an accused for trial on indictment.

[4] The importance of committal proceedings in the Magistrates' Court was threefold. First of all, the prosecution called its witnesses in the presence of the defendant who thus heard the evidence against him, and that evidence was recorded in the form of a deposition. Secondly, the defendant had the right if he chose to cross-examine prosecution witnesses and, if he wished to do so, to call his own witnesses, although the latter step was rarely if ever taken in practice. Thirdly, the resident magistrate had to decide whether the prosecution had established a sufficient case against the defendant after hearing any submissions from the prosecution and the defence. So well established had this procedure become that, as the High Court of Australia observed in Barton v The Queen [1980] 147 CLR at page 100:

> "It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair."

These remarks were referred to with approval by Lord Woolf in Brooks v DPP [1994] 1 AC at page 581.

[5] Mr Kerr QC (who appears on behalf of the prosecution with Mrs Kitson) recognised that to apply for a voluntary bill was an unusual procedure, and accepted the formulation of principle in *Blackstone* 2010 at D10.51:

> "Paragraph IV.35.3 of the *Consolidated Practice Direction* makes the point that the preferment of a voluntary bill is 'an exceptional procedure' and goes on to say that this procedure should be used only where 'good reason to depart from the normal procedure is clearly shown' and where 'the interests of justice, rather than consideration of administrative convenience, required."

[6] Mr John McCrudden QC (who appears with Mr Kearney for the accused) argued that the court should not permit the prosecution to put forward this case as an exceptional one because there was no good reason advanced for doing so, and were the court to permit such an application it would have the effect of depriving the defendant of the opportunity to cross-examine non-hearsay witnesses.

[7] It is necessary to bear in mind that, as I explained in Black, some inroads have been made in recent times into the previously almost invariable practice of sending a defendant for trial by way of committal proceedings. This has been done by the institution of the direct transfer method adopted in serious fraud cases and some children's cases, although such applications are not frequent in practice. It is also salutary to remember that the 1969 Act not only permits the prosecutor to apply for a voluntary bill, but s. 2(2)(f) preserves the right of the Attorney General to present a bill to the Crown Court. Were that to happen, it would have the effect of not only depriving the defendant of the opportunity to cross-examine the prosecution witnesses and, if necessary, call his own witnesses, but it is unclear whether the prospective defendant would even be entitled to appear before the judge and make submissions before the judge decided whether or not to grant the application.

[8] The Crown Court Rules do not specifically refer to the defendant having such a right because Rules 34, 35 and 36 of the Crown Court Rules (Northern Ireland) 1979 only provide for the defendant to have the opportunity to appear before the judge where, as in the present case, the application is made under s. 2(2)(e) of the 1969 Act. The absence of a provision such as that contained in Rule 36(6), (7) and (8) permitting an accused to appear before the judge and make oral submissions may be thought to indicate that there is no such right where the application is brought under s. 2(2)(f) by the Attorney General. Such an inference may be thought to be strengthened by the present Rule 36 only being enacted with effect from 24 March 2003, see SR2003/71. However, in Brooks v The DPP at p. 580 Lord Woolf, dealing with a comparable, but not identically worded, provision in Jamaica observed that:

> "The judge has a residual discretion which he can exercise in exceptional circumstances to require a defendant to be notified and to consider any representations which a defendant may wish to make but this case is certainly far from being a case where such action was necessary or even desirable. The judge in order to come to his decision could do no more than study the depositions of the proceedings before the Resident Magistrate."

[9] However, the point does not arise in the present case and I need not refer to it further, other than to observe that the preservation by the legislature of the power of the Attorney General to return an accused for trial without any form of judicial determination of the strength of the case against the accused is a reminder that, exceptional though it may be to permit a course which deprives the defendant of a committal hearing in the conventional way, such a deprivation has been sanctioned by the legislature.

[10] The reported cases refer to different circumstances where the voluntary bill procedure has been used, and illustrate the exceptional nature of such an application. In R v Rothfield 26 Cr. App. R. 103 the committal proceedings could not be completed because the examining magistrate had been taken ill after some 30 witnesses had given evidence, several of whom came from Scotland or from remote parts of England. More recently in this jurisdiction in R v Stewart and Others [2009] NICC 19 a no bill was granted against one defendant on a murder charge. It was not possible to substitute an amended indictment at that stage and the accused in whose favour a No Bill had been granted on the murder charge was later returned for trial by voluntary bill without objection on his behalf in order to avoid further delay by essentially repeating the procedure which had already resulted in a lengthy examination of the evidence at committal proceedings. In R v Raymond [1981] QB 910 a voluntary bill was granted because it was clear that the defendant had already made clear his intention to seriously disrupt the committal proceedings, see pages 913 and 914. Indeed Watkins LJ at page 922 referred to an earlier and unrelated case against the same defendant where a voluntary bill had been granted because the defendant had abused the process of committal proceedings. Watkins LJ stated at page 917 that to seek a voluntary bill "is undoubtedly to take a very exceptional step".

[11] It is therefore clear that it is still appropriate for a judge of the Crown Court in Northern Ireland to permit the prosecution to apply to return an accused for trial without there having being a conventional committal hearing, although such a course should always be regarded as exceptional. It is unwise, if not impossible, to seek to define the circumstances in which a voluntary bill should be granted other than by requiring them to be exceptional.

[12] Are the circumstances of the present case exceptional, and is it in the interests of justice to proceed in this fashion? At this point it is appropriate to refer to the question of the admission of bad character and hearsay evidence in the course of a voluntary bill application. In R v Black I have explained why I am satisfied that I was wrong to hold in R v Porter and Regan that when considering a No Bill the court should not take into account matters of bad character and hearsay where orders have been made by the district judge to admit such material at the committal proceedings. As I explained in R v Black, since 1969 witnesses are not called at the No Bill stage and the Crown Court judge determines the case solely on the basis of the committal papers.

[13] Although in Ireland between 1816 and 1969 there was a statutory requirement that the Grand Jury hear a least one witness, that requirement was repealed by the 1969 Act. Section 2(3) of the 1969 Act provides that:

> "(3) The Judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry of '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, or, as the case may be, the statements mentioned in sub-section 2(1), do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented."

[14] The reference to "the statements mentioned in sub-section (2)(i)" is to the statements of witnesses intended to be examined on behalf of the prosecution as defined in Section 2(2)(i), that is the statements to be lodged in court by the prosecution where the application is for a bill to be presented with the leave of a judge under Section 2(2)(e) (as in the present case), or under Section 2(2)(f) where the indictment is presented by, or upon the direction of, the Attorney General. On one construction it might be argued that the reference to "statements" that are lodged in court is apt to include not just any statements made by witnesses who will be relied upon by the prosecution, but the statements by witnesses whom the prosecution anticipate may not attend to give voluntarily. However, if that were the case the prosecution will have to apply to have their evidence admitted under one or more of the provisions of Part II of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). That could well result in additional procedural steps raising issues of considerable difficulty and complexity. The prosecution will have to serve an application under Order 44N and Order 44O of the Crown Court Rules. If these notices are to be opposed then the defendant has to serve a notice of objection.

[15] Although the Crown Court Rules do not provide that there should be a hearing before the judge rules on these applications if they are to be decided before the trial, in practice a hearing will invariably take place at which the judge will hear witnesses if necessary, before hearing submissions. For example it is common for witnesses to be called to formally prove the death of a witness whose evidence is to be admitted under s. 20(2)(a) of the 2004 Order, or in the case of a witness who is outside the United Kingdom where it is not reasonably practicable to secure the attendance of the witness under s. 20(2)(c). Applications of this nature not infrequently result in the cross-examination of the witnesses concerned and close scrutiny of their evidence, questioning whether other methods of the witness giving evidence have been considered, such as the witness giving evidence by live link.

[16] A further issue which may well arise in the present case where the prosecution application says that some of the witnesses live in the Republic of Ireland and are unwilling to attend is whether a summons will have to be issued to be served out of the jurisdiction under s. 3 of the Crime (International Co-Operation) Act 2003.

[17] Pre-trial issues of this sort have not infrequently arisen in the past in bad character and hearsay applications, and experience suggests that they could well result in complex contested hearings. I am quite satisfied that hearings of that sort should be avoided if at all possible at this stage of the pre-trial process, and not dealt with as a form of satellite litigation to be embarked upon before a decision is made whether a defendant has a case to answer or not. In any event, no such notices have been lodged in the present case.

[18] It has to be remembered that the voluntary bill procedure has never permitted such contested satellite litigation. First of all, the defendant had no right to appear before the judge, or to be heard by the judge before the judge ruled on whether a voluntary bill should be granted or not. See R v Raymond at page 915. This was confirmed by the original Crown Court Rules in Northern Ireland as Rules 34, 35 and 36 did not require notice to be given to the defendant, nor was the defendant entitled to appear or make submissions. See SR 1979/8. The Rules were amended in 2003 to require the defendant to be put on notice and to permit him to make representations. However, Rule 36(4)(b) contemplates that prosecution witnesses may be called by the judge, presumably to enable the judge to probe any part of the evidence that he or she considers requires further elucidation. I very much doubt it was ever intended that this could mean that the prosecution should be entitled to call witnesses and the defendant should be permitted to cross examine.

[19] Mr Kerr QC argued that the interests of justice require that the prosecution should be able to adduce evidence of bad character, and by inference evidence of hearsay evidence, as otherwise the prosecution would

be prevented from bringing a prosecution in certain types of cases. This submission was advanced by him in R v Black as well as can be seen from the more detailed submissions contained in paragraphs 29, 30 and 31 of the written submissions in Black, which are set out below.

> "29. A rule that bad character evidence cannot be considered at the No Bill stage would prevent the prosecution from bringing such cases to trial. It would mean that the enactment of the 2004 Order has created a category of cases in which the prosecution could not rely on bad character evidence that did not exist under the common law. This consequence would certainly seem unintended in light of the extracts from Archbold above and the comment of the English Court of Appeal in *R v Edwards and Rowlands'4[2006]* 2 Cr.App.R 4 (at para 1 iii)) that: "Under the new regime it is apparent that Parliament intended that evidence of bad character would be put before juries *more frequently than in the past."* (Emphasis added).
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> 30. It is further submitted that a rule that precludes the prosecution from bringing cases reliant upon bad character evidence, regardless of how probative such evidence might be, would not afford proper recognition of the triangulation of interests referred to in the following celebrated passage of Lord Steyn in Attorney General's Reference No.3 of 1999 [2001] 1 All ER 577:
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> > '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."
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> 31 . The effect of a ruling that hearsay evidence cannot be considered at the No Bill stage would be equally dramatic. The House of Lords has

> recently decided that a fair trial can take place even in circumstances where the sole or decisive evidence relied upon by the prosecution is hearsay: see R v Horncastle & Ors [2009) UKSC 1416. There is therefore no absolute rule precluding prosecutions in such circumstances. However, the application in Northern Ireland of a rule that hearsay evidence cannot be considered at the No Bill stage renders the judgment of the House of Lords irrelevant in this jurisdiction. The prosecution will be prevented from ever pulling an accused on trial where the sole or decisive evidence is hearsay because it will not be able to resist a No Bill application. This will be the case no matter how reliable the particular hearsay evidence is."

[20] Mr McCrudden responded to this by relying upon my ruling in R v Porter and Regan, submitting that in any event bad character and hearsay applications have to be made within 14 days from which date leave is given, see Rule 44N(5)(c), and therefore an application cannot be made until leave has been given. Whilst I can see no reason why an application cannot be lodged earlier, it can have no effect in a voluntary bill application because the rule is predicated upon the presumption that the defendant has been sent for trial in one of the four ways permitted by Rule 44N(5). It therefore appears illogical for the prosecution to seek to invoke at this stage a procedure which the Rules provide can only be instituted after leave has been given.

[20] I accept that when considering whether or not to grant a voluntary bill it is appropriate to have regard to the public interest. In Barton v The Queen at page 101 the court observed that in deciding whether the trial

> "…should proceed in the absence of the preliminary examination, we have to determine where on balance the interests of justice lie. We must have regard to the interests of the Crown acting on behalf of the community as well as to the interests of the accused. The nature of the charge (as in Mylius) or in some other exceptional circumstance may justify the suggested departure from the ordinary course of criminal justice."

[21] I do not consider that means the court can create a procedure where neither statute nor statutory rules permit such a procedure, indeed where the suggested procedure is plainly at variance with the statutory framework and the entire law and practice which the statute preserves. To adopt the words of Lord Cooke of Thorndon in R v Bedwellty Justices, ex parte Williams [1997] AC at page 236, the court is "not entitled to prefer a changed

conception of the public interest to the clear statutory law". If the law is to be changed that is for the legislature, and/or the Crown Court Rules Committee to change the necessary rules. If it is thought that this is an unduly restrictive approach to this question it has to be borne in mind that it is always open to the prosecution to apply for committal proceedings to be held in the normal way when, as I have held in Black, if the prosecution puts bad character and hearsay before the Magistrates' Court and if it is admitted then that evidence becomes part of the evidence before the Crown Court judge. The voluntary bill procedure is limited in its scope, and if the prosecution seek to avail of that procedure then they must accept its limitations.

[22] For these reasons I am of the opinion that where the prosecution seek leave to present a voluntary bill under s. 2(2)(e) of the 1969 Act they cannot seek to rely on any evidence of bad character or hearsay that depends upon a prior application being made to the court under the 2004 Order.

[23] A related question that I can briefly touch upon is whether the court should apply the No Bill test, namely is there a sufficient case that justifies the defendant being put on trial, when deciding whether to grant leave under Section 2(2)(e)? In R v Riley and Hogg [2003] NICC 15 McCollum LJ said that even though leave had been granted for a voluntary bill a defendant could still apply for a No Bill. On one reading of the 1969 Act there is no reason why that should not be the case, but it has to be borne in mind that the amendments to the Crown Court Rules in 2003 giving a defendant the right under Rule 36 to make representations to the court against granting a voluntary bill remove the rationale for preserving a further power to grant a No Bill. As the parties agreed in the present case, there is much to be said for determining whether or not there is a prima facie case against the defendant in the course of considering the application whether or not to grant a voluntary bill, thereby avoiding the need to have a further hearing traversing much if not all of the same ground. I respectfully consider that it is preferable, and should be the normal practice, that where a voluntary bill is sought the judge should apply the No Bill test contained in s. 2(3) of the 1969 Act because the defendant now has the opportunity to make representations to the court at that stage.

[24] I now turn to consider whether the prosecution should be permitted to apply for a voluntary bill in the present case. The explanation why this course is being taken is set out at paragraph 3 of the application by the Director of Public Prosecutions lodged under Rules 34-36 of the Crown Court Rules:.

> "(3) No committal proceedings have been commenced in this case.
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> It is desired to present an indictment without committal proceedings for the following reasons:

(i) The offences alleged were committed in May 1977, some 32 years ago. Many of the necessary witness statements are defective in terms of the provisions of Article 33 of the Magistrates' Courts (Northern Ireland) Order 1981. Such defects are not now capable of being corrected as, given the passage of time since the commission of the offences, many of the witnesses, including witnesses crucial to the case to be put forward by the prosecution, are now deceased.

It will be necessary for the prosecution to make application to the court of trial to have the evidence of these witnesses admitted under the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. In this regard reference is made to, for example, the section of this application headed 'Other Evidence' and to paragraphs (xii) and (xiii).

(ii) It is the intention of the prosecution to rely on 'out of court' confessions of accomplices. While it will be the intention of the prosecution to take all reasonable steps to secure the attendance at trial of Kevin Crilly of those persons convicted in connection with the murder of Robert Laurence Nairac it is entirely probable that, given the indication by these persons that they will decline to attend court and give evidence, it will be necessary for the prosecution to make application to the court to have the evidence of these persons admitted under the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

(iii) The nature of these applications and the issues involved are such that it is submitted that they are best dealt with now, at this stage, by a judge of the High Court, Court of Appeal or Crown Court when considering the application for leave to present the Bill of Indictment. There is not, nor will there by any, prejudice to Kevin Crilly in proceeding in this manner."

[25] The first reason advanced as to why this course should be taken is said to be that there are some 13 witness statements which cannot be relied upon before the Magistrates' Court in a conventional committal because they do not comply with the endorsement provisions of Article 32(f) of the Magistrates' Court (Northern Ireland) Order 1981 (the 1981 Order). This is because they were either not endorsed by the officer who received them or recorded as being recorded or received by a police officer. It is quite clear that the effect of the absence of this endorsement is that such statements are inadmissible before the Magistrates' Court, see R v Campbell [1985] NI 354.

[26] On the face of it this is a sound objection, but on reflection I am not persuaded that these statements cannot be relied upon before the district judge. It is true that they cannot be placed before the court in the same way as conventional witness statements, but it is stated that several of these witnesses are dead and others have not co-operated by making fresh statements. In either event, as the application makes clear, the prosecution will have to apply at the trial under the provisions of the 2004 Order to admit these statements. Whether the court will do so will ultimately be a matter for the trial court if this application is granted. But I can see no reason why application could not be made before the Magistrates' Court to admit these statements under the provisions of the 2004 Order just as the applications will ultimately have to be made before the Crown Court.

[27] In any event there is a further difficulty in respect of those witnesses who are alive but who will not co-operate. This is because Rule 35(1)(b) of the Crown Court Rules refers to the statements of witnesses who it is "intended to be examined on behalf of the prosecution". I have grave doubts whether it is appropriate at this stage for the court to have regard to statements of witnesses whom the prosecution accept cannot be put forward as willing prosecution witnesses. It may be of course that if the voluntary bill is granted the prosecution will be able to satisfy the trial judge that such statements can be admitted, but I have considerable doubt as to whether this court should anticipate such a decision, at least in those cases where there will clearly be a real issue about the admissibility of such statements. It may be that so far as dead witnesses are concerned, those difficulties may be more readily surmounted, but again one cannot assume that they will be for present purposes.

[28] A second reason advanced is that the prosecution will seek to rely upon out-of-court confessions. Again these raise difficult matters of admissibility and are matters that are more properly considered by the trial judge, although I can see no reason why they cannot be considered by the Magistrates' Court in the course of committal proceedings now that it is established for the reasons set out in Black that hearsay and bad character evidence is admissible at committal proceedings. However, I accept that the

complexities of these applications are such that they are more appropriately dealt with at the Crown Court.

[29] The passage of time has undoubtedly created many difficulties for the prosecution, difficulties which are not of the prosecution's making and stem from the defendant leaving, and remaining out of, the jurisdiction for many years. The complexities which this has created are such that I consider that this is an exceptional case and one in which any further delay should be avoided. Were the prosecution to proceed in the conventional way I am satisfied that there would inevitably be substantial delay in completing what would clearly be complex and protracted committal proceedings. I should make it clear that in referring to delay I am not criticising anyone for the passage of time that has elapsed since the accused was questioned in circumstances that I shall refer to shortly. The case raises complex issues and undoubtedly time had to be taken to consider them, to prepare the necessary papers and then to arrange for a hearing at which these issues could be explored. Mr McCrudden referred to the passage of time as amounting to an abuse of process in itself, and in granting this application I wish to make clear that I am not pre-determining the merits of any application for an abuse of process due to the passage of time that may be brought in future.

[30] I now turn to consider under s. 2(3) of the 1969 Act whether there is sufficient evidence to justify Kevin Crilly being put on trial on any of the proposed charges. Leaving out of account the allegations in relation to hearsay, bad character and out of court confessions, the prosecution case depends upon the inferences that could be drawn from an interview of the accused carried out by two BBC reporters. In the course of this the defendant made a number of statements which are of significance.

(i) He admitted being on the run for some 30 years because of Captain Nairac's murder (page 36).

(ii) He regretted being involved in what happened that night (page 38).

(iii) He went to fetch Townsen whom he referred to as "OC" (page 39).

(iv) He was in the bar that night.

(v) "It was just a bit of a battle outside that's the first I knew of it".

(vi) He went and got a man (page 41).

(vii) He dropped Townsen off (page 41).

(viii) He said "I wasn't involved with the IRA. I was just in the wrong place at the wrong time".

[31] I consider that a tribunal of fact could conclude from these remarks that Crilly admitted that he went and brought a man who he knew was "the OC", that this meant that he knew that the man was the commander of a local terrorist group, that he was in the bar and that there was a scuffle outside. The tribunal of fact could properly infer that Crilly brought the leader of an IRA unit to where Captain Nairac was being held, and that when doing so he must have known that Captain Nairac was going to be murdered, and that by driving Townsen to where Captain Nairac was being held in those circumstances he was aiding and abetting Townsen to commit murder.

[32] For these reasons I am satisfied that this is an exceptional case and that it is appropriate that the accused should be returned for trial by way of a voluntary bill, and that there is sufficient evidence to justify him being placed on trial on these charges. I therefore grant leave to the prosecution to prefer this bill of indictment.