Neutral Citation No. [2012] NICC 25 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **04/05/12**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

CROOKS, BAXTER, McCORD, GREEN, McKENZIE and CAMPBELL

HIS HONOUR JUDGE LYNCH

[1] In this case the defence have submitted that the Court should enter an order of No Bill under the provisions of section 2(3) of the Grand Jury (Abolition) Act (NI) 1969 (the 1969 Act) in respect of all counts on the present bill of indictment. The accused Crooks, Baxter, McCord and Green are charged on count one with Conspiracy to Defraud Nintendo (Germany) in November 2010. On the second count Crooks, McKenzie and Campbell are charged with Conspiracy to Defraud Centreprise International (Wales), again in November 2010. Crooks appears on his own on count three with receiving stolen goods the property of Centreprise International (Wales).

[2] Section 2(3) of the 1969 Act reads:

> *"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 subsection (2)(i), do not disclose a case sufficient to justify*

putting upon trial for an indictable offence the person against whom the indictment is presented."

[3] A judge should enter a No Bill only if he is satisfied that the evidence does not disclose a sufficient case to have the accused put on trial, the test being whether a reasonable jury properly directed could find him guilty on the evidence presented. The Court must take the Crown case at its height see McCartan and Skinner NICC 20 [2005] (Hart J).

[4] The defence submitted that there was no admissible evidence before the Court that could establish proofs that are fundamental to the present charges. That the only evidence the Crown could rely upon, relating to the ownership of the goods in question and purported method of effecting the fraud, constituted hearsay evidence as defined by the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). Since (as has been accepted by the Crown) there were no written or oral applications to admit such evidence before the District Judge, who returned the case for trial, I should not therefore take it into account. They relied upon the judgments of Hart J in the cases of R v Porter and Regan (2009) NICC 77 and R v Black (2010) NICC 18 , to which I refer to below.

[5] At an earlier hearing Mr Peter Magill BL, who appears for the Crown, made submissions that there was sufficient evidence to have the accused put on trial without any reliance upon hearsay evidence. I heard full submissions on the issue and determined that without such evidence there was not a case to put before the jury and accordingly I would have acceded to the defence submissions that I should enter a No Bill in respect of all charges against the accused.

[6] Mr Magill has further submitted that the Court in considering whether or not a No Bill should be entered is, in any event, entitled to take into account hearsay evidence, despite the fact that no notices were served at the Magistrates' Court under the Magistrates' Court Rules (NI) 1984 as amended.

[7] I shall return to Mr Magill's arguments but firstly I refer to the case of R v Black where Hart J set out the principles which he applied in coming to his determination on this issue:

"[15] It is clear that both bad character and hearsay applications are now admissible in committal proceedings. …..In 2008 by SR 2008/361 the Magistrates' Courts Rules (Northern

Ireland) 1984 were amended to provide that bad character and hearsay evidence could be adduced at committal proceedings. Rule 149AR (4) now provides that:

"Subject to paragraph (5A), a prosecutor who wants to adduce evidence of a defendant's bad character or to cross-examine a witness with a view to eliciting such evidence, under Article 6 of the 2004 Order, shall give notice in Form 88C."

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

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

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

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

[17] Whilst on one view the contents of the bad character notices, and any witness statements attached to the hearsay application to prove the contents of the bad character evidence, could be argued not to constitute "depositions", I consider

that this would be an artificial and unduly narrow construction of the term, and it is not one that has been advanced by either party in the present case. If the district judge makes an order admitting the bad character evidence then that evidence is before the court and forms part of the material considered by the district judge before he or she decides whether to commit the accused for trial. That being the case, I conclude that it must inevitably follow that it is part of the depositions (that is either the record of any oral evidence given or the written statements) which the Crown Court judge must consider when deciding whether or not to enter a No Bill.

[18] Such an order was made in the present case, and was also made in R v Porter and Regan. In Porter and Regan I was under the misapprehension that the application to admit bad character evidence was being made for the first time at the Crown Court, whereas, as counsel informed me in the present case and my own enquiries have confirmed, orders were made at the committal hearing that the bad character evidence should be admitted. I therefore accept that insofar as my decision in Porter and Regan applies to cases where bad character and hearsay evidence has been admitted at the committal proceedings the decision was wrong, and that because such evidence has already been admitted at the committal stage it forms part of the evidence which has to be taken into account when deciding whether or not to grant a No Bill….."

[8] The Magistrates' Courts (Amendment No. 2) Rules (Northern Ireland) 2008 (promulgated 01 October 2008) amended the Rule to add the word "oral" so that it now reads:

"Procedure for the admission of hearsay evidence
149AS. - (1) This Rule shall apply where a party wishes to adduce oral evidence on one or more of the grounds set out in Article 18(1)(a) to (d) of the 2004 Order and in this Rule, such evidence is referred to as "hearsay evidence"."

[9] Mr Magill submits that the clear intention of the amendment is that in the event that no oral evidence was to be called at the committal proceedings, with a determination based upon the papers only, there should be no requirement for a notice to be given under the rules. The rulings of Hart J in Black and Porter and Regan were delivered before the amendment was made.

[10] Alternatively he submits that since it is clear that the District Judge must have relied upon the hearsay evidence, otherwise the accused would not have been returned for trial in the first place, I should assume that the District Judge did admit the evidence despite the lack of any application under the Rules. He submits that the defence, not having made any objection at first instance to such reliance, should not now be permitted to raise the point in their favour. He relies upon the decision of the Divisional Court in England and Wales in the case of Williams v Vehicle and Operators Service Agency (2008) EWHC 849 (Admin).

[11] Mr John McCrudden QC, who appears for Crooks with Mr Campbell BL, submitted that the proper interpretation of the Rule, as amended, is that where the prosecution wish to introduce hearsay it should be through the medium of oral evidence, for which the appropriate notices should be served. So that if, for instance, business documents, as in this case, are proposed to be used the witness adducing them would have to be called by the Crown at the committal proceedings and appropriate notices served so the District Judge can determine their admissibility. In other words the amendment was introduced, not to relax the duties upon the prosecution as contended for by the Crown, but as an additional safeguard for the defendant. In most cases the Crown will not, he suggests, for the purposes of committal proceedings, be reliant upon hearsay evidence, but where they do specifically rely upon it this procedure should be complied with.

[12] Mr McCrudden referred the Court to the case of Shoukri and others (2007) NICC 22 where the defendants were charged with membership of the UDA under section 11 of the Terrorism Act 2000 which contained the provision:

> *"S108(2) Subsection (3) applies where a police officer of at least the rank of superintendent states in oral evidence that in his opinion the accused –*
> *Belongs to an organisation which is specified……"*

[13] Hart J in his ruling in Shoukri considered the effect of the requirement that oral evidence be given:

> *"(9) It is a striking aspect of section 108(2) that it provides that subsection 3 applies where a person of at least the rank of superintendent "states in oral evidence that in his opinion the accused" belongs to a specified organisation. Why is it that in order to be admissible the opinion has to be given "in oral evidence"? I believe that there are two reasons why Parliament took this course. The first is that making opinion evidence of this sort admissible was a major change in the criminal law of the United Kingdom. It would have been open to Parliament to provide that the evidence was admissible; that it was evidence of the matter stated; that other evidence was required, but not to require the evidence to be given in oral form. Parliament has chosen not to take that route and has expressly provided that in order to be admissible it must be given in oral form. The second is that otherwise section 108(2) and its predecessor may be held to be incompatible with the provisions of Article 6(3)(d) of the European Convention on Human Rights which has been incorporated into the domestic law of the United Kingdom by the Human Rights Act 1998. Article 6(3)(d) of the ECHR provides that:*
>
> *Everyone charged with a criminal offence has the following minimum rights:*
>
> *(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *As Lord Phillips CJ pointed out in R v Xhabri [2006] 1 Cr. App. R. at p. 425:*
>
> *Article 6(3)(d) does not give a defendant an absolute right to examine every witness whose testimony is adduced against him. The touchtone is whether fairness of the trial requires this.*

Nevertheless, were it the case that a person could, as in the present instance, be sent for trial on the basis of a witness statement which had not been tested because the witness had not been called, then there would be a possibility that this would be held to be incompatible with Article 6(3)(d) of the Convention.

(10) The wording of section 108(2) expressly requires the police officer concerned to give oral evidence of his opinion before the court can treat it as admissible. Section 108(3)(b) provides that, inter alia, "the accused shall not be committed for trial" … "solely on the basis of the statement", the "statement" being the oral evidence of the witness. Mr Kerr QC on behalf of the prosecution argued that section 108(2) does not require the witness to be called at the committal proceedings, but I consider that that is not the case. In Northern Ireland, even where the committal proceedings take the form of a preliminary inquiry where the witness statements are served upon the defence in written form, under article 34(2) of the Magistrates' Courts Order (NI) 1981 (the 1981 Order) the Court, the prosecution and the defence may each require the witness to attend. Whilst the defence do not appear to have required Mr Wright to attend at the committal proceedings in this case, nevertheless the prosecution did not do so either, and therefore the evidence before the Resident Magistrate was not given in oral form. It therefore did not comply with s. 108(2) and in my opinion was inadmissible. Had Mr Wright been called as a witness in accordance with s. 108(2) then it would have been recorded in the form of a deposition and, in accordance with section 2(3) of the 1969 Act, would properly be before the Crown Court upon a No Bill application."

[14] Mr McCrudden submits that the amendment to the Rule is analogous to the provision in the Terrorism Act. In Shoukri since the Crown did not call Superintendent Wright to give evidence at the committal they could not rely upon his opinion evidence as appeared in his witness statement at the "No

Bill" stage. Similarly in the instant case the rule now requires oral evidence to be given with notice, before hearsay evidence can be relied upon by the District Judge and in turn by a Crown Court Judge considering a No Bill. He further submits that since these are Rules promulgated under a Criminal Statute they should be interpreted strictly.

[15] However a distinction may be drawn in that in Shoukri the statute required the prosecution, who were relying on the opinion, to prove it by oral evidence. The wording of section 108(2) is clear and unambiguous in this respect. It was a substantive evidential statutory requirement not a procedural one.

[16] The Rule itself, on the construction contended for by the defence, requires either the Crown, or defence, to call a witness in every instance where they desire to rely upon hearsay evidence. The logic of Mr McCrudden's position is that his present objection would still apply even if the Crown HAD served notices since they would have no validity unless oral evidence was also called relating to that evidence.

[17] Mr O'Rourke QC, who appears for Campbell, submitted that, in any event, it is the statutory scheme that renders the hearsay evidence admissible not the rules. He submits that a Judge is not be in a position to evaluate the admissibility of hearsay evidence where it is unclear as to what, if any, evidence was considered by the District Judge in returning the accused for trial. In the case of R v Porter and Regan (2009) NICC 77 Hart J at paragraph 17 stated:

> *"I consider that the effect of both sets of provisions is to defer the decision of the court as to whether, and if so to what extent, bad character and hearsay evidence should be admitted, because whilst bad character and hearsay evidence is admissible under the 2004 Order, it is not admissible until and unless a party applies to have such evidence admitted, and the court has decided to admit the evidence. Were bad character and hearsay evidence to be considered at the No Bill stage the court would be required to determine whether or not this evidence should be admitted in order to decide whether or not there is a sufficient case to put the accused upon trial, evidence which in all probability would be the subject of defence counter notices and objections.*

This would require the court to embark upon satellite litigation when a No Bill application should be determined purely upon the basis of the material contained in the committal papers."

[18] The defence submit, therefore, that the Court should not embark on an exercise of assessing whether or not the hearsay evidence should be admitted. However there are, as set out in the 2004 Order principal categories of admissibility from Article 18 onwards. The hearsay evidence would still have to be established to be within an appropriate category before a Court could take it into account as being prima facie admissible.

[19] If we return to the wording of the Rule it starts by saying "This Rule shall apply where a party wishes to adduce oral evidence on one or more of the grounds set out in Article 18(1)(a) to (d) of the 2004 Order….". The natural construction of the sentence is that a condition precedent, the condition that impels the requirement is the wish by one of the parties' to adduce oral evidence. That oral evidence then must relate to one of the grounds under the 2004 Order, namely the hearsay provisions. Once those conditions apply then the Rule kicks in, so to speak, and the relevant notices must be served as set out in the Rule.

[20] I have come to the view that the logical and natural wording of the Rule, as amended, means that if the Crown propose to call a witness, because they have been required to do so by the defence (or by their own volition) then if that witness intends to rely upon hearsay evidence the relevant notices should be served. The effect of the Rule, therefore, is to concentrate upon those cases where there are evidential issues to be considered in a detailed and structured way by the District Judge.

[21] Accordingly I hold that the amendment to the rules means that unless oral evidence has been called by a party to the proceedings the party relying upon hearsay evidence does not need to comply with the notices as set out in the Rules.

[22] I therefore determine that the hearsay evidence formed part of the body of evidence that the District Judge was entitled to rely upon in determining whether there was a sufficient case to return the accused for trial. In his ruling in Black Hart J determined that where the District Judge had the power to admit such evidence, in that case bad character and hearsay evidence, the

Crown Court Judge could have regard to such evidence in considering his powers under the 1969 Act.

[23] In those circumstances I hold that I am entitled to consider the hearsay evidence in considering whether I should enter a finding of "No Bill" in respect of each of the charges against the accused.

[24] In the light of this finding I do not regard it as necessary to place any reliance upon the Emlyn Williams case (supra).