Neutral Citation No. [2009] NICC 67

Ref:	**McCL7620**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**15/09/09**

IN THE CROWN COURT IN NORTHERN IRELAND

LONDONDERRY DIVISION SITTING IN COLERAINE

THE QUEEN
–v-
SEAN CRUICKSHANK and EDWARD McELENEY

RULING NO. 2: APPLICATION TO DISCHARGE JURY
(FIRST DAY OF TRIAL)

McCLOSKEY J

[1] For the record, this ruling was given *ex tempore* following the swearing of the jury on the first day of trial, 15th September 2009.

[2] This ruling determines an application by both Defendants to discharge the jury, following completion of the opening summation of the prosecution case. The essence of the submission of Mr. Mallon (appearing with Miss McDermott QC) for the Defendant Edward McEleney and Mr. McAteer (appearing with Mr. McCartney QC) for the Defendant Sean Cruickshank is that a misleading and prejudicial picture of the evidence to be adduced by the prosecution has been outlined to the jury, giving rise to unfairness to the Defendants to such an extent that the jury should be discharged at this embryonic stage of the trial.

[3] The submission on behalf of the Defendants focuses on two aspects of the evidence, which were outlined to the jury by Mr. Mateer QC (appearing with Mr. Connell) on behalf of the prosecution, by reference to the committal bundle and certain additional evidence served subsequently. These are:

(a) The witness statement and interview responses of one Declan Gillespie, who claims to have witnessed the attack upon and the killing of the deceased.

(b) The witness statement of a forensic scientist, Mr. Harvey.

I juxtapose these two pieces of written evidence with the terminology employed in the opening summary of senior counsel which, in its material respects, was as follows (as paraphrased by me):

(i) The post mortem examination of the deceased revealed patterned bruising in two areas of the head, consistent with the application of force by the soles of footwear and deliberate stamping on his head. Forensic examination of Mr. Cruickshank's footwear established that this was consistent with the patterned bruising below the right eye of the deceased. Forensic examination of Mr. McEleney's footwear established that this was consistent with patterned bruising above the left ear of the deceased.

(ii) Evidence will be adduced from various eyewitnesses – Declan Gillespie, Neil Gillespie, Conor Porter and Stephen Hutton. All were in the Gillespie's house, with the victim, beforehand. There followed an encounter with the Defendants in the street, about 100 yards away. All four of these witnesses will testify that the deceased was attacked by both Defendants, who knocked him to the ground where, defenceless, he was kicked by both Defendants repeatedly, including kicks to the head. Throughout the events, the Defendants acted together, with a common purpose, intending to support each other and intending to at least cause serious bodily harm to the deceased. At one point, the deceased got to his feet, shaking and staggering about and said he wanted no more fighting. Mr. Cruickshank then ran at him, punched him in the face and knocked him to the ground. McEleney shouted "*Jump on his face*" twice. Both Defendants then kicked the deceased, as he lay on the ground.

[4] In order to rule on the merits of this application, I have reviewed the terms of Declan Gillespie's witness statement, his interview responses and the witness statement of Mr. Harvey. The first question to be addressed is whether there is any foundation for the discrepancies asserted on behalf of the Defendants. In my view, upon a careful study, there is no material discrepancy between the prosecution opening statement and the documentary materials in question. Clearly, no one can forecast unerringly whether the two witnesses concerned (Mr. Gillespie and Mr. Harvey) will testify fully and precisely in accordance with these documentary sources. However, having said that, in my view, reasonably and realistically, there are grounds for expecting that the evidence under consideration, when adduced, will match the outline given to the jury.

[5] Alternatively, if there is any imbalance, any mismatch, I am satisfied that the jury will be perfectly capable of appreciating and evaluating this. Further, it is inevitable that any asserted mismatch will be fully ventilated and magnified in the course of the examination and cross-examination of witnesses and in closing

addresses. It is equally inevitable that all aspects of the evidence of these two witnesses will be probed exhaustively during the trial, in the presence of the jury.

[6] Furthermore, the importance of the fundamental rule whereby the jury are enjoined to decide the case *according to the evidence* has already been ventilated , in their presence. Out of an abundance of caution, I propose to remind the jury of this again, at this stage of the trial, before *any* evidence is adduced. Moreover, the jury will be fully reminded of this again, upon the conclusion of the evidence on each day of the trial and at the summing up stage.

[7] I would add that the present scenario is clearly distinguishable from one where evidence of an arguably prejudicial nature has been heard by the jury. The contrast between the two scenarios is, in my view, notable. In the present scenario, the quest to establish the necessary degree of prejudice, to the extent that the jury must be discharged, is self-evidently more onerous than in the alternative scenario postulated.

[8] The tests formulated by Auld LJ in ***The Queen –v- Lawson and Others*** [2007] 1 Cr. App. R 20, with appropriate modification, provide suitable guidance on the approach to be adopted in the present application. Firstly, I refer to paragraph [64], where His Lordship formulated the test of –

> "*… whether a fair-minded and informed observer would conclude that there was a real possibility, or a real danger, that the jury would be prejudiced against a Defendant by wrongly admitted prejudicial information*".

In paragraph [65] the touchstones highlighted by Auld LJ included the extent to and manner in which the alleged prejudice is remediable by judicial direction or otherwise. The overarching test applied was that of "*… whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction*". I refer also to Blackstone's Criminal Practice 2009, paragraph D13/49, where the test propounded is whether there is "*a high degree of need*" to discharge the jury.

[9] For the reasons elaborated above, I conclude that the application of these tests to the present context impels firmly to the conclusion that this application is without merit. The necessary threshold has, plainly, not been surpassed. Accordingly, I dismiss the application.

[**Addendum:** When the jury returned to court, a suitable reminder about the importance of deciding the case according to the evidence only and not otherwise, including counsels' depiction or résumé of the evidence, at this or at any stage of the trial, was duly given].