Neutral Citation No: [2022] NICC 18 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO11838** **ICOS No: 21/064777** *Delivered:* **09/05/2022**

IN THE CROWN COURT OF NORTHERN IRELAND
SITTING IN BELFAST

THE QUEEN

v

GERARD CHRISTOPHER McDONAGH AND OTHERS

RULING ON SEVERANCE APPLICATION ON BEHALF OF GERARD CHRISTOPHER McDONAGH

Mr Barra McGrory QC and Ms Pinkerton (instructed by the Public Prosecution Service) for the Crown
Des Fahy QC and Stephen Toal (instructed by Sheridan Leonard, Solicitors) for Joseph Joyce
Martin O'Rourke QC and Sean Mullan (instructed by Sheridan Leonard, Solicitors) for Ellen Joyce
John Kearney QC and J P Shields (instructed by HHD Solicitors) for Gerard McDonagh
Seamus McNeill QC and Steffan Rafferty (instructed by TT Montague, Solicitors) for Jimmy McDonagh

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ROONEY J

Background circumstances

[1] The five defendants in this case face various charges arising from a street brawl that occurred at Coolcullen Meadows, Enniskillen, on Saturday, 11 April 2020. The charges emanate from a verbal confrontation between members of the Joyce and McDonagh families which then escalated into a serious physical confrontation between Joseph Joyce and Ellen Joyce on the one hand and Gerard McDonagh, Jimmy McDonagh, John Paul McDonagh and Caroline McDonagh together with other members of the McDonagh family more peripherally involved in a non-criminal manner. Tragically, what has been described by the prosecution as a "full scale street battle," resulted in the death of John Paul McDonagh ("the deceased").

[2] Significantly, the main body of evidence upon which the prosecution seeks to rely is captured on CCTV footage taken from a camera in a house overlooking the

locus of the confrontation in Coolcullen Meadows. There is also evidence from video footage taken from a phone, described as You Tube footage.

[3] The prosecution case is that Joseph Joyce, Gerard McDonagh and Jimmy McDonagh together with the deceased were participants in a physical confrontation and that they were armed with weapons. It is alleged that Joseph Joyce was armed with an offensive weapon, namely, a Darby wooden shaft with a curved blade. It is also alleged that the deceased, was armed with a garden hoe. Gerard McDonagh was armed initially with a glass bottle and, thereafter, an offensive weapon, namely, a spade. Jimmy McDonagh was allegedly armed with a knife.

[4] Tragically, the deceased, during a physical confrontation with Joseph Joyce sustained a serious injury caused by the scythe held by James Joyce, which severed the deceased's popliteal artery resulting in considerable blood loss. He died two days later in hospital.

The charges

[5] Joseph Joyce is charged with the murder of the deceased. He is also charged with unlawfully and maliciously wounding Gerard McDonagh and possessing an offensive weapon, namely, a Darby wooden shaft with a curved blade, in a public place. Joseph Joyce is also charged with affray and possessing an offensive weapon in a public place, namely, a bottle containing ammonia.

[6] Ellen Joyce is charged with possessing an offensive weapon, namely, a bottle of ammonia, with intent to commit an assault and two separate counts of assaulting Caroline McDonagh. Ellen Joyce is also charged with affray.

[7] Gerard Christopher McDonagh is a brother of the deceased. He is charged with unlawfully and maliciously attempting to cause grievous bodily harm to Joseph Joyce. He is further charged with possessing offensive weapons in a public place, namely, a spade and a glass bottle. Gerard McDonagh is further charged with affray.

[8] Jimmy McDonagh is charged with attempting to unlawfully and maliciously wound Joseph Joyce. He is further charged with possessing an offensive weapon in a public place, namely, a knife. Jimmy McDonagh is further charged with intentionally encouraging or assisting attempted grievous bodily with intent, in that it is alleged that he handed a spade to Gerard McDonagh for use as a weapon with intent to encourage or assist the commission of the offence. Jimmy McDonagh is further charged with affray.

[9] Caroline McDonagh is charged with two counts of assault on Ellen Joyce.

History of the case

[10] The prosecution states that the accused were all initially charged and appeared as co-defendants on a single bill of indictment. The prosecution further states that, due to logistical concerns, including safety issues, a decision was made to separate the indictment to facilitate the committal. The prosecution submits that it was known to all the parties that the purpose of splitting the committal was due to the said concerns and that no objection was raised on behalf of any accused.

[11] Prior to the arraignment, the prosecution put all parties on notice of its intention to "join" the two indictments (ie the "Joyce indictment" and the "McDonagh indictment"). It is common cause that no party objected. There has been no change in the evidence or the wider factual matrix since the said consensual position was adopted by the parties.

Matter for determination

[12] The defendant, Gerard McDonagh, brings an application to sever the indictment and asks the court, in the exercise of its discretion, to direct a separate trial of this accused.

[13] The prosecution and the legal team on behalf of Joseph Joyce oppose any severance of the indictment. For the reasons considered in detail below, the prosecution argues that the charges faced by all accused are founded on the same facts and consequently the defendants and respective counts are correctly joined on the single bill of indictment.

The law on severance

[14] Severance is legislatively governed by section 5(3) and (4) of the Indictments (Northern Ireland) Act 1945 ("the 1945 Act") which provides:

> "(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.
>
> (4) Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a

> count, the court shall make such order as to the postponement of the trial as appears necessary."

[15] The court was referred to paras 1-280 to 1-300 of *Archbold (2022)* for an exposition of the general principles relating to severance of an indictment. The court has power to order separate trials of accused who are properly and lawfully joined in one indictment whether in relation to the same charge or separate charges. In essence, the court retains a discretion that flows from the court's inherent power to control its own proceedings and/or from the power to sever contained in the 1945 Act

As stated in *Archbold* at para 1-282:

> "The discretion given to the trial judge to order separate trials is a wide one, but like all discretions it must be exercised judicially. The Court of Appeal will not readily interfere with the exercise of that discretion unless it can be shown to have been exercised other than on the basis of the usual and proper principles: *Blackstock (1980) 70 Cr.App.R.34, CA: Wells (1991) 92 Cr. App. R.24, CA: Dixon (1991) 92 Cr.App.R.43 CA: Cannan (1991) 92 Cr.App.R.16, CA.* The application of the general principles will depend to a great extent on the individual facts of particular cases."

[16] In *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, HL in relation to the exercise of the court's discretion, Lord Pearson stated as follows:

> "The judge has no duty to direct separate trials under section 5(3) unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice. In some cases the offences charged may be too numerous and complicated (*R v King* [1897] 1QB 214*; R v Bailey* [1924] 2KB 300, 306*)* or too difficult to disentangle, (*R v Norman* [1915] 1KB 341*)* so that a joint trial of all counts is likely to cause confusion and the defence may be embarrassed or prejudiced. In other cases, objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused."

Legal Arguments on behalf of the prosecution, Gerard McDonagh and Joseph Joyce

[17] I have been provided with succinct and relevant written submissions on behalf of the prosecution and Counsel for Gerard McDonagh and Joseph Joyce.

Based on the said skeleton arguments, I have been helpfully assisted by further oral argument by Mr McGrory QC on behalf of the prosecution; Mr Kearney QC on behalf of Gerard McDonagh and Mr Fahy QC on behalf of Joseph Joyce. The said written and oral submissions are summarised below.

[18] It is noted that experienced senior counsel on behalf of the other defendants have not made similar applications for severance. Mr McNeill QC, Senior Counsel for Jimmy McDonagh, adopts a neutral position. Mr Kearney QC was instructed at a very late stage and, for this reason, I have accepted his reasons for bringing the application to sever close to the commencement of the trial. However, I was advised that experienced senior counsel who had been instructed previously on behalf of Gerard McDonagh had considered but decided against an application to sever the indictment. Clearly, Mr Kearney QC disagreed with this decision.

Submissions on behalf of Gerard McDonagh

[19] Mr Kearney QC, on behalf of Gerard McDonagh, acknowledges that there is no rule of law that separate trials should be ordered where an essential part of one defendant's defence amounts to an attack on a co-defendant. However, he argues that such a matter should be taken into account by the judge when deciding whether or not to order separate trials.

[20] The court was referred specifically to paras 1-298 of *Archbold (2022)* where it is noted that, whilst there is no rule of law that separate trials should be ordered, it will often be appropriate to order separate trials in a scenario based on the present facts. Reference was made to the case of *Johnson* [1995] 2Cr.App.R1 and the following relevant passage from judgment of Gildewell LJ:

> "Thus, severance was a matter for the judge's discretion, a discretion to be exercised under the principles to which we have just referred derived from ***Ludlow***. However, it is, to put it no higher, unusual to try together a count alleging that A assaulted B together with a count alleging that C assaulted A. None of the members of this court can remember such a trial. It has the effect that, if A gives evidence, counsel for the prosecution is able to ask questions of him in cross-examination about C. This is what happened here. This is inevitably prejudicial to C, and especially when the issue is whether C was A's assailant at all. Of course, if A and C are charged jointly with the same offence, and run cut-throat defences, and if A gives evidence, he may then be cross-examined by counsel for the prosecution about C. But that prejudice arises from the nature of the respective defences.
>
> We do not suggest that there should be a firm rule that when this situation arises, the court should invariably

> order separate trials. We are, however, of the opinion that it will often be appropriate for there to be separate trials in such a case, and it would have been preferable to order that Johnson be tried separately in this case. The avoidance of the unusual prejudice to the defendant will normally outweigh the convenience of not having to call the same witnesses at two separate trials. We cannot, however, say that the judge was wholly wrong in his decision not to sever. If this ground of appeal stood alone, it would, therefore, not be a sufficient basis for allowing the appeal."

[21] Mr Kearney QC submits that the facts of this case present an unusual, if not an extraordinary scenario, which engage special prejudicial features to Gerard McDonagh. Mr Kearney emphasises that this is not a case where all the accused stand jointly charged with assaulting a third party, with one accused blaming the other of assault of that third party. Rather, he emphasises that the case involves allegations that Joseph Joyce murdered the deceased and that the Joyces assaulted the McDonaghs and, on the other hand, allegations that the McDonaghs assaulted the Joyces. Mr Kearney states that he cannot think of any case in this jurisdiction where the prosecution has pursued putative injured parties as defendants, arising from the same incident, conjunctively in the same trial with the McDonaghs and Joyces enjoying the simultaneous status of victim and accused in that joint trial.

[22] Mr Kearney argues that if the case goes forward as a joint trial of all counts against all accused, then the jury will potentially, if the Joyces give evidence, hear and be able to rely upon the Joyces evidence against the McDonaghs (and vice versa) even though the prosecution could not and did not seek to rely upon that evidence from one against the other, to the detriment, from his perspective, of this defendant, and indeed all accused. In essence, Mr Kearney QC submits:

> "… that the effect of an ongoing joint trial would be to enable the prosecution to ride both horses and to pick and choose, *a la carte, plum and duff,* which sections of evidence to rely upon, from both camps, one against the other, when closing the case, all of which creates considerable difficulty for the trial judge at charge stage."

[23] Mr Kearney QC further argues that if the Joyces do not give evidence, then there is a further risk of contamination from the jury hearing the pre-prepared Joyce statements, which inculpate the McDonaghs and which, although not evidence against the McDonaghs, would unnecessarily pollute the evidential stream, especially when that danger can be easily avoided by severance.

[24] Furthermore, Mr Kearney QC states that whether or not the Joyces give evidence, the ultimate charge in a multi-barrelled case may have a material and

detrimental impact upon, for example, the issues of Makanjuola and motive and prejudice, with Makanjuola being less deployable against a defendant than a witness, thereby operating to the prejudice of Gerard McDonagh.

[25] Furthermore, it is submitted on behalf of Gerard McDonagh that, in all likelihood he will be cross-examined three times, as opposed to once and that such will operate to Gerard McDonagh's enduring prejudice, particularly in circumstances where he may well be emotionally overwrought.

Submissions on behalf of the prosecution

[26] Mr McGrory QC on behalf of the prosecution, accepts that this is an unusual case. However, he argues that the CCTV footage, which is real, independent and contemporaneous evidence, operates to significantly limit the potential prejudice to the defendants arising from a single trial, notwithstanding that the defendants are accused of offences against each other. As stated by Mr McGrory QC in his written submissions:

> "The jury can view for themselves what occurred on 11 April 2020 in Coolcullen Meadows. The prosecution submits the only additional evidence that any of the accused can in fact give would be limited to an explanation of their actions. The events that were captured on CCTV (and viewed by the jury) will have been played as part of the prosecution case at a point in which any accused might give evidence."

[27] Mr McGrory QC argues that the decision of the Court of Appeal in *Johnson* [1995] 2 Cr App.R1, which Mr Kearney QC cites in favour of severance, can be distinguished from the facts of this case. Firstly, Mr McGrory QC states that it is clear from the facts of *Johnson* that the prosecution case relied in its entirety on the eyewitness testimony of individuals and that Johnson disputed that he was, in fact, present in the nightclub at all. Therefore, one of the key issues in that case related to identification. Johnson did not argue a case of self-defence. Accordingly, it is argued that the potential prejudice that arose in the ***Johnson*** case is not a feature of the circumstances in this case.

[28] Mr McGrory QC also argues that the "interests of justice" as referred to in ***Ludlow***, is not confined to the interests of any accused. Rather, it includes the interests of the prosecution and the public as a whole.

[29] Mr McGrory QC also refers to the decision of the Court of Appeal in ***Sullivan*** [2003] EWCA Crim. 964, a case where an application had been made to sever the indictment. Although he acknowledges that this case involved a cut-throat defence, he states that the dicta of Latham LJ (at para 29) is relevant to the facts of this case:

> "The facts of this case cried out for a joint trial. In the overall interests of justice, it was essential that the jury

> heard the whole story, not a partial story which would have been the result of severing the indictment in the way Mr Sapsford submitted. In our judgement, these considerations fully justified the decision that the judge took to continue with the trial against all three defendants. As we have already explained, we do not consider that the result was an unfair trial."

Decision

[30] I have considered carefully the written and oral submissions made by the parties.

[31] Section 5(3) of the 1945 Act gives the court a power to order a separate trial of any count or counts in an Indictment where, before trial or at any stage of a trial, the court is of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence on the same indictment or where for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment.

[32] As stated by the House of Lords in ***Ludlow***, the judge has no duty to direct separate trials under section 5(3) unless, in his opinion, there is some special feature in the case that would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice.

[33] In *Ludlow*, Lord Pearson further stated at p. 245:

> "In my opinion, this theory – that a joinder of counts relating to different transactions is in itself so prejudicial to the accused that such joinder should never be made – cannot be held to have survived the passing of the Indictments Act 1915 … In my opinion, the manifest intention of the Act is that charges which either are founded on the same facts or relate to a series of offences of the same or a similar character properly can and normally should be joined on one indictment, and a joint trial of the charges will normally follow, although the judge has a discretionary power to direct separate trials under section 5 (3)."

[34] In the exercise of my discretion, I am not prepared to direct a separate trial in respect of Gerard McDonagh or any of the defendants. My reasons are as follows.

[35] Firstly, the charges against all the accused are founded on the same facts and, accordingly, as stated by Lord Pearson in *Ludlow* above, the defendants are correctly joined on one indictment. The main body of evidence upon which the prosecution

seeks to rely is captured on the CCTV footage and You Tube footage. It will be open to the jury, having viewed the CCTV and the You Tube footage and having heard the evidence, to draw its own conclusions as to the alleged factual matrix and all issues that may be introduced by the defence, including self-defence, *mens rea* states of mind (intent to cause GBH as opposed to ABH or otherwise) and the parameters of attempted GBH in the absence of actual GBH.

[36] Secondly, in the interests of justice, the offences should be tried jointly before the same jury so that the same treatment and the same verdict shall be returned against all those concerned in the same offences arising out of the same factual circumstances. There is a real risk that if the offences were tried separately, potential inconsistencies might arise if different juries are asked to decide the said interlinked events. It is my view that the jury should hear and see the whole story, not just a partial story that would inevitably follow in the event of severance of the indictment.

[37] Thirdly, no argument has been advanced that the said bill of indictment which includes all the counts is confusing for the jury and that it will be too difficult for them to disentangle. Rather, it is my view that severing the indictment could lead to confusion as the jury will left to speculate as to the whereabouts or involvement of the parties who have been severed into a separate trial. The said parties are clearly present and can be readily identified on the CCTV and other video evidence and any such speculation will inevitably create unfairness and prejudice for the defendants.

[38] Fourthly, if it appears during the course of the trial that the joinder of the charges against the defendants in a single indictment operates to cause prejudice, the court has power to postpone the trial as necessary and/or discharge the jury pursuant to sections 5(4) and 5(5) of the 1945 Act. Such safeguards will operate in this case.

[39] Finally, it is my opinion that the avoidance of any risk of improper prejudice can be achieved by careful trial management and careful directions to the jury in the court's summing up.