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IN THE CROWN COURT FOR NORTHERN IRELAND SITTING AT LONDONDERRY

THE QUEEN

–v-

JAMES OLIVER MEEHAN, BRENDA DOLORES MEEHAN and SEAN ANTHONY DEVENNEY

RULING: APPLICATION TO DISCHARGE JURY

McCLOSKEY J

Introduction

[1] The subject matter of this ruling is an application on behalf of the accused Sean Anthony Devenney to have the present jury discharged, on the ground that certain prejudicial evidence has improperly (though inadvertently) been adduced by the prosecution.

The Indictment

[2] The indictment comprises three counts. The first alleges that all three Defendants murdered James McFadden ("*the deceased*") on 5th May 2007, in the County Court Division of Londonderry. The second alleges that, on the same date, all Defendants assaulted one Jason Graham, thereby occasioning him actual bodily harm, contrary to Section 47 of the Offences Against the Person Act 1861. The third count asserts a freestanding charge of common assault, to the effect that the second-named Defendant, Brenda Dolores Meehan, assaulted Ashling McFadden on the same date.

The Prosecution Case

[3] Clearly, this application must be determined by reference to the prosecution case, as this has been outlined to the jury. The résumé provided by Mr. Orr QC at the outset of the trial identified two separate, though inter-related, phases of events. During the first phase, certain events unfolded at the Carlton Redcastle Hotel in County Donegal, a short distance from Londonderry. The second phase concerns the events which occurred at and in proximity to the address of the deceased in the Shantallow Estate of the city, both immediately prior to and at the time of his death. Certain evidence will also be adduced relating to what might be described as an intermediate phase, concerning (a) the taxi journey undertaken by all three Defendants from the hotel to their home in the Galliagh Estate in the city, (b) what transpired at this address and (c) their transit between this address and the locus where the second phase of events unfolded.

[4] In summary, the prosecution will seek to establish that all three Defendants instigated the critical events during the final phase of the sequence which culminated in the death of the deceased and the commission of the other two alleged offences. Based on my understanding and interpretation of Mr. Orr's opening address, the jury will be invited to infer that there were elements of motive, incentive, planning, revenge and the determined prolongation of hostilities in the Defendants' actions, in a context of very recent aggression in a social setting. The prosecution case is that there were very recent hostilities, at the Redcastle Hotel, between the two groups in question viz. the Defendants (on the one hand) and the injured parties and McFadden Family members (on the other). The thrust of the case against the Defendants is that almost immediately after this aggression they determined to prolong these hostilities, in a calculated manner. It is alleged that upon returning home from the wedding reception, the Defendants changed their clothing and, effectively, hatched a plan to attack the deceased and others, which they duly implemented. This entailed, firstly, driving from their home to the vicinity of the home of the deceased. The prosecution contends that such explanation as has been proffered by the Defendants for their movements, direction of travel and, ultimately, presence at the scene of the crimes is utterly implausible. It is alleged that the Defendants were waiting for their victims at a location adjacent to the victim's home, where they instigated a violent confrontation when the McFaddens and others returned home from the wedding. It is contended that the cause of death was a laceration of the heart, giving rise to a rupture. This, the prosecution say, was almost certainly caused by blows to the chest of the deceased – a forceful kick to the chest or stamping. In summary, it is contended that the deceased was the victim of a brutal, savage and unprovoked attack.

[5] As will be apparent from the above summary, the outline of the prosecution case to the jury at the beginning of the trial did not delve into the details of the *inter-partes* hostilities at the Redcastle Hotel. Consistent with this, nothing was said about matters such as perpetrators, ringleaders or aggressors. The prosecution do not make the case that any of the Defendants had the role of culpable aggressor at the

hotel. The prosecution case does not entail any dimension of allocation of blame or responsibility for those hostilities or any resulting injuries. Rather, the prosecution relies on events during this (the first) phase in order to establish the background to the second-crucial phase and with a view to inviting the jury to infer that the Defendants were ill disposed towards the victims and harboured significant ill feelings, to the extent that they had the requisite state of mind, that is to say an intention to kill, or to cause grievous bodily harm to, the deceased. The prosecution case does not invite the jury to adjudicate on events during the first phase. Rather, it presents those events in a relatively neutral, anodyne fashion. The court was informed that this presentation of the prosecution case followed discussions between prosecuting and defence counsel, in which the latter highlighted certain concerns about exposure of the details of the aggressions at the hotel, based not least on the consideration that much of the evidence contained in the depositions bearing on this topic is contentious. Reduced to its essential core, this entails a claim by the Defendants that they were not the instigators or aggressors vis-à-vis these events.

[6] The evidence to be adduced will include forensic evidence linking both the trousers and the boots worn by James Meehan to the deceased. Evidence will also be led in an attempt to establish a deliberate scheme by the Defendants to dispose of contaminated clothing worn by them, in the aftermath of the alleged murder. Further, evidence will be adduced about statements made by two of the Defendants during a taxi transit from the wedding reception to their home, which are said to be indicative of a planned and determined attack. It is also intended to adduce evidence of the movements of the Defendants `vehicle in the aftermath of the alleged offences.

The Application

[7] The application to discharge the jury is founded on certain evidence given by one Gerard Storey, who was the fifth of seven prosecution witnesses who have attested to events during the first phase, at the hotel. In broad terms, these witnesses have recounted certain events both inside and outside the hotel, at different stages of the evening in question. The evidence about events outside the hotel belongs to the later stages of the night and concerns the hostilities between the two groups involved. In this context, Mr. Storey testified that, in the hotel car park, he saw the Defendants, in the company of another person (Michael Dobbins). The witness walked over to this group, whereupon James Meehan said:

> "*… Go away … nothing will happen … it's Liam's wedding*".

In his evidence, Mr. Storey continued:

> "*Sean Devenney made a run, back towards the hotel …*

He started a fight, he hit a boy, a boyfriend of a McFadden girl …

James Meehan then ran and assisted Sean Devenney …

Mickey and I ran down and broke the fight up …

I grabbed James Meehan, while Mickey grabbed Sean Devenney. We calmed them down, then let them go. James Meehan said nothing was going to happen at Liam's wedding adding 'Sorry about this' …

As I re-entered the hotel Jim McFadden [the deceased] *apologised to me for 'this here'* [i.e. the aggression]".

The person described in this passage of evidence as "*a boy, a boyfriend of a McFadden girl*" is clearly Jason Graham. This will be readily apparent to the jury, having regard to all the evidence adduced to date.

[8] In her submission on behalf of the accused Sean Devenney, Miss McDermott QC acknowledges that there was agreement between prosecuting and defence counsel that "*the fact of bad feeling and an altercation between the relevant parties should be adduced in evidence*". I would interpose that in his opening summary, Mr. Orr QC described "*some friction*" between the families inside the hotel, followed by a "*barney*" in the car park later. Continuing, Miss McDermott submits that Mr. Storey's evidence about the alleged actions of Mr. Devenney is inadmissible because it relates to a collateral issue. It is contended that the evidence is prejudicial, to such an extent as to be incapable of remedy by a suitably formulated direction to the jury. This Defendant having pleaded guilty to manslaughter, it is argued that the only issue for the jury to decide is whether he possessed the requisite intention to kill or to cause grievous bodily harm. It is submitted that the offending evidence sounds on this important issue. The impact of the evidence, it is argued, portrays Mr. Devenney as the aggressor and, by necessary inference, the author of Jason Graham's facial injuries. It is submitted that this evidence further conveys the impression that Mr. Devenney's conduct was the cause of certain other phenomena already described in the evidence – the significant distress of Mrs. McFadden and the atmosphere of fear and foreboding which prevailed both at the hotel and in the bus in transit to the McFadden's home. Miss McDermott argues that this creates an extremely high degree of prejudice against her client, such as to give rise to a real risk of an unsafe conviction, thereby impelling to the discharge of the jury at this stage.

The Prosecution Response

[9] Mr. Orr QC, while acknowledging that there must be limitations on the evidence to be adduced regarding events during the first phase, submits that, subject to this qualification, the evidence presented to the jury should be as complete as

possible. Thus they should not be left to speculate about how Jason Graham sustained his injuries at the hotel. Evidence about Mr. Devenney's conduct, in this respect, is indicative of his state of mind and, it is submitted, the jury should be directed in due course to consider the offending evidence from this perspective only and not to engage in any exercise entailing the identification of aggressors or the apportionment of culpability for the first phase events. Mr. Orr also highlights that the prosecution will be adducing in evidence, *inter alia*, this Defendant's written statement, which was submitted by his solicitors to the police, while interviews were continuing. In this statement (duly edited), Mr. Devenney describes the physical aggressions outside the hotel in fairly brief terms. The defence application is opposed accordingly.

Consideration and Conclusions

[10] The approach which the court should adopt in determining an application of this kind was considered by the English Court of Appeal in ***The Queen –v- Lawson and Others*** [2007] 1 Cr. App. R 20, where the judge, in summing up to the jury, inadvertently disclosed evidence prejudicial to the Defendants. Having done so, he attempted to mitigate the damage by directing the jury to disregard the offending material. The question for the Court of Appeal was whether the convictions were safe in the circumstances. Auld LJ stated:

> "[64] … *And, in determining that question in a case such as this of wrongfully admitted prejudicial material, the appropriate test for the trial judge is 'the most prejudicial interpretation' and its possible effect on the jury. Perhaps, more useful is the simpler and more broadly expressed formulation … 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*".

Auld LJ continues:

> "[65] *Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and the circumstances of the case and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including (1) the important issue or issues in the case; (2) the nature and impact of improperly admitted material on that issue or issues, having regard, inter alia, to the respective strengths of the prosecution and defence cases; (3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a Defendant; (4) the extent to and manner in which it is remediable by*

> *judicial direction or otherwise, so as to permit the trial to proceed*".

In the same passage, his Lordship emphasized that the overarching test is invariably the same, that is to say "*… whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction*".

[11] Bearing in mind that every case of this kind is unavoidably fact-sensitive, I consider that some assistance may be obtained by reflecting on the related scenario of an accused person's bad character being improperly disclosed to a jury. In such a case, as was highlighted by the English Court of Appeal in ***The Queen –v- Dubarry*** [1977] 64 Cr. App. R7 (at p. 10):

> "*It is well settled that in the event of a prisoner's previous conviction being improperly or accidentally revealed in the course of a trial, the judge has a discretion whether or not to discharge the jury*".

In other words, there is no suggestion that, in such a case, discharge of the jury follows as a matter of course. This was the scenario which occurred in ***The Queen –v- Doherty*** [1999] 1 Cr. App. R 274, a rape case, where the complainant testified that the Defendant had previously been in prison. An application to discharge the jury was refused. In his ruling, the trial judge highlighted, *inter alia,* that "*… the skilful way in which the matter was quickly passed over is likely to have lessened the impact the revelation may have had on the minds of the jury*" (at p. 277). Delivering the judgment of the court, Roch LJ formulated the following proposition (at pp. 278/279):

> "*…If a jury hears evidence which they should not have heard and that evidence is such that the jury may no longer be able to give an impartial verdict based on the admissible evidence in the case which they are trying, then the judge has a discretionary power to discharge the jury …*
>
> *It is not in every case where some matter prejudicial to the Defendant has inadvertently been admitted in evidence that the jury is to be discharged …*
>
> [This] *is for the discretion of the trial judge on the particular facts*".

Having quoted from ***The Queen –v- Gough*** [1993] 97 Cr. App. R 188, his Lordship continued (at p. 279):

> "*We would add that for a judge having to decide whether or not to discharge a jury* ***the question is whether there is a***

> ***real danger of injustice occurring because the jury, having heard the prejudicial matter, may be biased***".

[My emphasis].

Roch LJ also highlighted two particular factors. The first was that prosecuting counsel "*… had skilfully passed straight on to another matter with the witness*" [at p. 280]. The second was the concession by defence counsel that the trial judge had correctly declined to advert to the offending evidence in the presence of the jury. Ultimately, laying some emphasis on the strength of the scientific evidence and the jury's acquittal of the Appellant in respect of two of the six counts, the court dismissed the appeal.

[12] In determining this application, I consider that bias, in this context, connotes an unfair predisposition or prejudice on the part of the jury, an inclination to be influenced by something other than properly admitted evidence and the merits of the prosecution case. Further, I am required to attribute to the offending evidence the meaning and import that are most prejudicial to Mr. Devenney. For the avoidance of doubt, the defence case is that the offending portion of the somewhat fuller passage from Mr. Storey's evidence that I have set out in paragraph [7] above (based on my note,which is uncontentious) consists of the words to the effect that Mr. Devenney went running and then started a fight in which he struck Jason Graham. I accept Miss McDermott's submission that I should interpret this evidence as conveying that Mr. Devenney was the aggressor, who instigated the fight and inflicted injuries on the victim, thereby creating an atmosphere of general fear and foreboding amongst various protagonists. I then take into account the following factors:

(a) *The stage of the trial at which this evidence was adduced*: it occurred at a relatively early stage (the first week) of a trial which the parties estimate will have a duration of a couple of months or longer.

(b) *The time when the offending evidence was adduced:* this occurred during the afternoon, relatively close to the time when the jury would have expected to be discharged for the day in any event.

(c) *The manner in which the offending evidence was given*: it emerged quickly, largely in a single answer provided by the witness concerned, Mr. Storey, and without any discernible consternation in the courtroom

(d) *The speed and timing of the defence objection*: this occurred swiftly and unexcitedly, with the result that no further evidence of this kind was elicited from the witness.

(e) *Whether any other contentious evidence of this character has been adduced*: the answer is negative.

(f) *Whether other evidence suggesting that a person or persons other than Mr. Devenney may have been the aggressor, or an aggressor, has been adduced:* the answer is yes. I am satisfied that the clear import of the evidence of certain other witnesses – Miss McConnell, Mr. Dobbins, Miss Holmes and, in other respects, Mr. Storey – is that the "candidates", in this respect, include each of the other Defendants (on whose behalf there is no application to discharge the jury) and the deceased, Mr. McFadden. This, in my view, has a diluting and balancing effect, as regards the offending evidence.

(g) *Whether there has been any objection to other evidence depicting this Defendant as aggressive and belligerent:* there has been other evidence of this kind, relating to both alleged utterances and conduct of this Defendant, particularly at the time of departing the hotel by taxi, without objection.

[13] Next, I turn to consider the question of whether the mischief of which complaint is made is capable of remedy by an appropriate direction to the jury. In what terms would it be appropriate to couch such a direction, dealing with this discrete issue? If this application is rejected, the jury shall be firmly directed to the effect that they are to try this case on its merits, on the basis of the admissible evidence only. The evidence in question being inadmissible, they are to disregard it. It will form no part of their function to adjudicate on the rights and wrongs of events during the first phase. The attribution of culpability for those events, which would include issues such as who was the instigator/aggressor, is remote from the issues which they should properly consider. They should take into account that there were hostilities between the two groups at the hotel – but nothing else. The detail of such hostilities is not a matter to concern them. Insofar as there has been some evidence about injury to Jason Graham, the question of how or why such injury was sustained during this phase is immaterial, except insofar it impinges directly on any of the counts alleged in the indictment. I consider that a direction to this effect can be framed in relatively compact terms, which will minimise any undue emphasis on the improperly admitted evidence. In my view, such a direction will be adequate and efficacious in the circumstances now prevailing.

[14] While it is regrettable that the "battle lines" between admissible and inadmissible (i.e. prejudicial) evidence had not been clearly drawn between the parties until the trial was several days old, despite pre-trial reviews and directions by Hart J , the boundaries are now clear. As a result, the court will not permit the prosecution to knowingly adduce any further evidence of the impugned variety Nor will there be any cross-examination of prosecution witnesses about these matters, subject to further argument and the outcome of any further editing, as this would be alien to the considerations highlighted in paragraphs [12] and [13] above and would, *inter alia*, merely serve to give inappropriate exposure to the offending evidence, with the attendant risks. Further, with a view to avoiding this risk, I shall decline to

give the jury a suitable direction at this stage of the trial. This particular matter the court shall keep under review. For example, if an opportune moment arises to highlight the matter, in an unplanned way, it might be appropriate to capitalise on this. Beyond this it would be inappropriate to venture at present.

[15] For the reasons elaborated, I conclude that to continue with the trial before the presently sworn jury would not create a real risk of an unsafe conviction. To the extent that the improperly adduced evidence could generate such a risk, I am satisfied that, taking into account the various factors highlighted above, this can be satisfactorily addressed by a suitably tailored direction to the jury at the conclusion of the trial (and further, if deemed necessary or desirable, in the course thereof), in the terms indicated broadly in paragraph [13] above. The application is, accordingly, refused.