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Judgment: approved by the Court for handing down
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IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

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THE QUEEN

v

DESMOND PAUL KEARNS, PAUL ANTHONY JOHN McCAUGHERTY
AND
DERMOT DECLAN GREGORY
(otherwise known as MICHAEL DERMOT GREGORY)

____

HART J

[1] At the conclusion of the prosecution case applications were made on behalf of Kearns and McCaugherty that the court should stop the prosecution of each defendant on the basis that each had been entrapped by the State into performing the actions that the prosecution allege constitute the offence with which each is charged. As these applications have been made at the conclusion of the prosecution case, neither defendant has been called upon to say whether he intends to give evidence, and as neither answered any material question put to them in interview after their arrest neither has advanced any evidence to support this assertion. Both rely on what are alleged to be indications in the prosecution evidence that they were entrapped.

[2] I have had the benefit of detailed and comprehensive written submissions from the defence and the prosecution, and whilst I do not intend to refer to each and every one, I have considered them together with the exhibits and the portions of the transcripts to which they have referred. When a court has to consider allegations by a defendant that he acted as he did because he was entrapped into doing so by an agent of the State acting as an agent provocateur it is common ground that the court must approach this question by applying the principles laid down by the House of Lords in *R-v-Loosely [2002] 1 Cr App R, 29* at p360 in which the leading judgments were given by Lord Nicholls, Lord Hoffman and Lord Hutton.

[3] The fundamental distinction addressed by the principles set out in R-v-Loosely is whether the defendant has been prosecuted for an offence that was artificially created by the misconduct of agents of the State, usually law enforcement officers, or whether their actions did no more than offer the defendant an opportunity to commit that offence and the defendant freely took advantage of that offer. If the court concludes that the conduct of the officers amounted to the first alternative then, depending upon the point the proceedings have reached, it is open to the court to stop the prosecution by staying the proceedings on the grounds of an abuse of process, or by applying the principles applicable to a stay and excluding the incriminating evidence by virtue of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (the 1989 Order). As Lord Scott pointed out at page 401 in R-v-Loosely: "*The Court's decision to allow the accused go free is based upon his disapproval of the behaviour of the police officers, not upon the prosecution's failure to establish those ingredients*" of the offence.

[4] At p391 and 392 Lord Hutton referred to the need for the court to carry out a balancing exercise in each individual case and having agreed with the approach formulated by McHugh J in the Australian case of *Ridgeway -v- The Queen* said:

> "In balancing the relevant factors the English courts have placed particular emphasis on the need to consider whether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity to commit a similar crime, and when he freely took advantage of the opportunity presented to him by the officer."

[5] The distinction between conduct of law enforcement officers that is permissible and that which is not was more pithily stated by Lord Hoffman when he referred at page 381 to –

> "A more general concept of conduct which causes the defendant to commit the offence as opposed to giving him an opportunity to do so."

[6] Their Lordships identified a number of circumstances that are of particular relevance in the present case:

1. The nature of the offence. The use of proactive techniques is more

needed and, hence, more appropriate, in some circumstances than others. As Lord Hoffman pointed out in the context of drug dealers, "*some protective colour in dress or manner as well as a certain degree of persistence may be necessary to achieve the objective.*" I consider this applies with equal force when dealing with suspected or alleged terrorists.

2. The reason for the particular police operation. Had the authorities reasonable grounds for suspecting that the defendant was likely to commit the particular offence committed by the defendant, or were acting in the course of a bona fide investigation into offences of a similar kind with which the defendant has been charged? A bona fide investigation will be properly authorised in the sense that it had been approved by the superiors of the law enforcement officers concerned, and was conducted by virtue of the appropriate statutory authorisations required under the Regulation of Investigatory Powers Act 2000 (RIPA).

3. Whether, prior to any inducement being extended to the defendant, he had the intention of committing the offence, or a similar offence, if the opportunity arose.

4. Whether conduct of the law enforcement officers induced the defendant to commit the offence.

5. The nature of the inducement held out to the defendant.

6. The manner in which the inducement was held out to the defendant.

[7] In the present case this is an issue that has received particular attention, and was referred to on a number of occasions in R-v-Loosely. Lord Nicholls said that –

> " . . . the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary. Their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind."

[8] However, persistence of itself has to be viewed in the context of the circumstances of each case. Lord Hutton commented that in the case of a drug dealer in his opinion –

> "A request for drugs, even if it be persistent, need not be regarded as luring the drugs dealer into committing a crime with the consequence that a prosecution against him should be stayed."

[9] Lord Hoffman also referred to drug dealers when he said at p381 that, amongst other considerations –

> "A certain degree of persistence may be necessary to achieve the objective." He also recognised that "a good deal of active behaviour in the course of an authorised operation may therefore be acceptable without crossing the boundary between causing the offence to be committed and providing an opportunity for the defendant to commit it."

[10] Under this heading also fall the various considerations identified by McHugh J in *Ridgeway -v- The Queen* namely –

> "Whether the offence was induced as the result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence."

[11] Nevertheless, although it is clear that the courts must pay proper regard to the realities of how operations involving those who are suspected of being involved in terrorist activity have to be carried out, the boundary between conduct which causes the defendant to commit the offence, as opposed to giving him an opportunity to do so remains central to the circumstances of each case and must not be crossed. The desirability of the end does not justify the adoption of improper means to achieve it. As McHugh J pointed out –

> "The ultimate question must always be whether the administration of justice will be brought into disrepute because the processes of the court are being used to prosecute an offence that was artificially created by the misconduct of law enforcement authorities."

[12] Before turning to consider the evidence in the light of *R-v-Loosely,* there are some procedural and evidential issues to which I should refer. The first relates to the burden of proof of proving that the proceedings should be stayed on the balance of probabilities. Mr Pownall QC for Kearns accepted that it was for the defendant to show on the balance of probabilities that a stay ought to be granted, and that has traditionally been accepted as being the position since the judgment of Lord Lane, CJ in Attorney General's Reference (No 1 of 1990) (1990) 95 Crim App R 296.

[13] Mr Colton QC for Mr McCaugherty referred me to the following passage

from Andrew Choo – 'Abuse of Process and Judicial Stays of Criminal Proceedings' Second Edition at p166 and 167:

> "Traditionally the defence was generally considered to bear the burden of persuading the court, on the balance of probabilities, that the proceedings ought to be stayed as an abuse of process. In R-v-S, however, the Court of Appeal, speaking in the context of delay, considered the concept of burden and standard of proof to be an unsuitable one to be applied.
>
> In our judgment the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. It is therefore potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof which is more apt to an evidence-based fact-finding process.
>
> It is unclear whether these observations are to be regarded as confined to applications for stays on account of delay, or whether they are to be regarded as relevant to applications for stays generally. Certainly, the observations in R-v-S appear to be consistent with the recent judicial thinking in relation to the discretion to exclude prosecution evidence under Section 78 of The Police and Criminal Evidence Act 1984."

[14] The requirement that "*a stay should not be imposed unless the defendant established, on the balance of probabilities, that the defendant would suffer serious prejudice*" was identified by Lord Lane, CJ, in *The Attorney General's Reference (No 1 of 1990)* at p303, and had been consistently followed and applied in countless cases in succeeding years.

[15] In *R-v-S (SP) [2006] 2 Crim App R at p346,* having considered Lord Lane's statements and a number of later authorities, Rose LJ expressly propounded the Court's view in the context of delay. However, in *R-v-Fulton [2009] NICA 39* at [52] Girvan LJ referred to the reasoning of Rose LJ in the following passage –

> "The normal rule is that he who asserts the abuse of process must prove it and to do so on the balance of probabilities (Telford Justices ex parte Badhan [1991] 2QB 78). This proposition must be read in the light of

> S(SP) [2006] 2 Criminal Appeal Reports 341 in which the Court of Appeal observed that the discretionary decision of whether or not to grant a stay by reason of, for example delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. The judicial balancing of competing interests is at the heart of all abuse claims."

[16] It is clear from the following remarks of Clarke LJ in *R-v-EW [2004] EWCA Crim 2901* at [22] which were approved by Rose LJ in *R-v-S*, that it is still for the defendant who asserts that a stay should be granted to raise the issue; but once he has done so it is for the prosecution to satisfy the court that a stay should not be granted -

> "22. It appears to us that ultimately the question for the judge on any application for a stay in a case of this kind is essentially whether in all the circumstances of the case a fair trial is possible notwithstanding the delay.
>
> 23. We think that there is force in Mr Crozier's point which was not taken in either B or Hooper, that once the issue has been raised it must be for the Crown to satisfy the court that a fair trial is still possible. Nevertheless, it must be for the defendant to raise the issue and to identify those respects in which he says that a fair trial is not possible. We are not persuaded that this approach is in substance different from that adopted in Attorney General's Reference No 1 of 1990. The Recorder himself had this point in mind. He held, in our view correctly, that in this case it made no difference to his decision whether he approached the case on the basis of a legal burden of proof on the balance of probabilities lying on the defendant, or simply as an evidential burden on the defendant."

[17] Whilst these remarks were made in the context of delay it may follow from *R-v-Fulton* that they apply to cases where the stay is sought on the grounds of abuse of process. However, it does not necessarily follow that they mean that a court should be easily persuaded that a stay should be granted. As the Court of Appeal emphasised in *R-v-Murray & Others [2006] NICA 33* at [25], there need to be very compelling reasons to order a stay, a requirement that can be traced through DPP's application for judicial review [1999] NI 106 to ex parte Bennett [1994] 1 AC At p74 per Lord Lowry. It may also be the case that the approach identified by the court in *R-v-EW* and *R-v-S* cannot be applied to cases where a stay is sought on the grounds of entrapment. In entrapment cases the prosecution evidence will establish that the defendant committed the offence in

question, as was pointed out in _R-v-Loosely_. See for example the remarks of Lord Hoffman p381 and Lord Scott at p401 cited earlier in this judgment. In cases where delay has occurred the defendant's ability to dispute the ingredients of the offence will be prejudiced, whereas in entrapment cases a stay will pre-suppose that the ingredients of the offence have been established, at least on a prima facie basis where the stay is applied for at the end of the prosecution case as, in the present case. Lord Lane's principles may be more appropriate and certainly easier to apply, in entrapment cases where the evidence may show the defendant committed the offences, as it will focus attention on why he did so. However, as will become clear it is unnecessary for me to resolve this issue in the present case, as I consider the result would be the same in each application irrespective of whether there is a legal burden on the balance of probabilities lying on the defendant, or simply an evidential burden on the defendant.

[18] A further issue raised by Mr Colton related to the onus of proof in relation to disputed facts, and he referred to the comments of the late Sir John Smith in his commentary in _R-v-Saifi_ at [2001] Crim L R 655-656 quoted in Choo, 'Abuse of Process and Judicial Stays of Criminal Proceedings' Second Edition at p167 -

> "There is no room for the application of rules as to the onus of proof when, in the light of admitted circumstances, the court is considering the possibly adverse effect on the fairness of proceedings of the admission of certain evidence. This is not a question of fact but a matter for the judgment of the court and does not admit of requirement of proof any more than does the question of law. But where the circumstances are not admitted, it may surely be different. There may be two reasonable views as to whether relevant circumstances existed or not. If defendant alleges that there are circumstances, not so far appearing in evidence, which would render the proceedings unfair if certain evidence were admitted, presumably he must introduce some evidence of them. This may raise an issue of fact and, if it does, presumably the general rule in criminal cases applies; the onus would be on the prosecution to prove beyond reasonable doubt that the alleged circumstance did not exist."

[19] I agree that it is for the prosecution to prove beyond reasonable doubt that the alleged circumstance did not exist. As in any criminal case where the prosecution rely on any disputed fact they must prove that fact beyond reasonable doubt and Sir John Smith's comment is in accordance with principle.

[20] In _R-v-Loosely_ at p395 Lord Hutton said that an application for a stay on

the grounds of entrapment should normally be made before the proceedings begin, but he clearly left open that it may be possible to apply during the trial. As will be apparent from this ruling, much of the material relied upon by Mr Pownall was only disclosed by the prosecution during the trial. Although Kearns' defence statement alleged entrapment, I am satisfied that this application can be made at this stage of the trial by both Kearns and McCaugherty.

[21] I now turn to consider the application by Kearns. It is clear that there is no dispute about some of the relevant circumstances in his case, and so I can deal with them briefly. First of all, the authorities were carrying out a bona fide operation that was properly authorised under RIPA, and was supervised and controlled by the superiors of Amir and Ali. So far as Kearns was concerned, he was not himself initially suspected of being involved in terrorist activity, attention was directed at him because he was believed to be associated with those who were suspected of involvement in terrorist activity on the basis of intelligence information in the hands of the Security Service. In other words, this was not a random operation carried out in an unauthorised or unsupervised manner.

[22] Secondly, irrespective of whether the initial operation was always directed at McCaugherty, as Amir accepted, or was directed at gaining intelligence about the activities of the Real IRA in Lurgan by using Kearns as an entry point into the Real IRA, as 3583 suggested (1st of June 2010, page 22) the nature of the operation was such that to be successful Amir and Ali, as well as the other minor role players, had to appear convincing in their respective roles, and this would inevitably require them to behave as cigarette smugglers and arms dealers would be expected to behave.

[23] At this stage it is convenient to refer to a number of matters relied upon by Mr Pownall as indicating entrapment, although I can also deal with them briefly.

1. That Amir was supplying Kearns cigarettes at a very low price. I do not consider that this amounted to inducement to Kearns to become involved as acting as a go between or intermediary between Amir and McCaugherty. Kearns was already smuggling cigarettes into the United Kingdom which he was able to get significantly cheaper elsewhere. That was one of the ways it seems he made a living, although he was prepared to sell anything on which he could make a profit, such as a laptop. His only concern about the provenance of the cigarettes when dealing with Amir appears to have been that they had a Luxembourg stamp on them, presumably to satisfy his customers as to their authenticity. In any event, he got from Amir what he was on the look out for, namely cheap cigarettes. There is nothing to show that cheap cigarettes or laptops may have influenced him to approach McCaugherty. The readiness of Amir to supply them no doubt increased Amir's trustworthiness and bona fides in

Kearns' eyes, but there is no evidence to show that the prospect of cheap cigarettes influenced him into doing anything that may have laid him open to prosecution on these charges.

2. Some play was made of Amir's willingness to provide Kearns with a 'cut' of the price to be paid for the arms. Even in legitimate business transactions a finder's fee or introduction fee for those who bring about meetings between two principals are common. Given the nature of the proposed transaction I consider that Amir's actions in this respect were no more than might have been expected on the part of a genuine facilitator of such an illicit transaction. In any event, Kearns does not seem to have been particularly interested in obtaining a cut for himself to judge by his lukewarm reaction when Amir raised the prospect, to judge by his tepid response on 4th of December 2005 at p941-942 when he said he doesn't mind when Amir said to him: "*We'll see if we can get you a little cut as well*" and "*it might be in the form of cigarettes*".

3. I do not consider that in any of the discussions where recordings are available there is anything to show that Kearns was "*incited, instigated, persuaded, pressurised or wheedled*" in any improper way into committing these offences.

[24] A degree of persistence was justified in view of the objective to buy arms and explosives on the part of those who were fooled into thinking that Amir could be trusted to introduce a genuine arms dealer in the form of Ali. In the recorded transactions I do not consider that there is anything done or said by Amir that could justify a stay of the charges against Kearns.

[25] The defence application for a stay is based upon a close examination of Amir's evidence as to what was said at the meetings at the 24th of May 2005 and the 1st of July 2005;. what are alleged to be serious inconsistencies and contradictions in the contemporaneous records as to what was said and why; his credibility as a truthful and reliable witness because of his evidence about matters such as bonuses, his disputes with the Security Service about giving evidence, and the circumstances surrounding the compilation of his statement he is alleged to have made close to these events and before he signed his witness statement of the 19th of June 2006.

[26] I do not intend to refer to each and every area of factual dispute, only to those which I consider to be the most significant. But before doing so it is necessary to bear in mind aspects of what Kearns did and said at later stages of this operation that were recorded at the time. These recordings had been played and no issue has been taken with the accuracy of the transcript, except for one or two very minor instances, despite the difficulty in making out what was being said at times the following matters have not been disputed –

1. On 27th of September 2005 at p722 and 723 he made it clear to Ali that groups were engaged in "*hit and run*".

2. On 1st of November 2005 at p812 he told Amir that his friend was asking about "*dets*" i.e. detonators.

3. On 16th of August 2005 at p495, he said that someone who is clearly his friend from the context "*is interested*".

4. On 27th of September of 2005 at p574 he said that he's been trying to get "*them*" to try and organise something, and at p578 he made it clear that he was prepared to approach his friend.

5. On 1st of November 2005 at p801 and 802 he described how he managed to contact various people, and in the course of the discussions the following exchange took place:

> *"Amir: Well what is it worth to them if it were, I mean is it worth it?*
> *John: Oh it is, yeah, yeah. Well (inaudible).*
> *Amir: You'd think they'd jump at the chance, there's no risk really, is there?*
> *John: No, no, generally it should be okay, you know, just don't know but it's like to suit themselves, you know.*
> *Amir: Yeah, yeah oh well.*
> *John: No, but I got them organised eventually, so (inaudible)*
> *Amir: Um, excellent.*
> *John: Cos I didn't, I didn't want to happen, what happened the last time, you know, them just pulling out or whatever at the last so. They'd always say, you know, we'll go, we'll go and then say you have to organise it blah blah, it's on the wrong day of the week or whatever it is, you know".*

These comments, individually and cumulatively, give rise to a strong inference that at all times Kearns was well aware that the person or persons he was in contact with at home wanted to acquire arms and explosives, and that he was organising them to make an approach to Amir's contact who could supply arms and explosives.

6. Not only that, but he was doing so as someone who was a party to, and involved in, the planning and activities of this group, as could be seen from remarks he made to Amir on 1st of November 2005 and 21st of December 2005.

1st of November 2005 p802:

"Amir: Um. Have you em, obviously you've got them going back at different times and all that kind of stuff.
John: Yeah (inaudible).
Amir: Yeah. But, em, I mean in a ways, I mean I think that it's better to have them going back at different times, but in a way sometimes if the first ones get through you think I wish we'd all have been on that one. (Laughs)
John: Oh I know. Well it cuts out the hassle for me as well, it just means I don't have to take the whole lot together.
Amir: Yeah.
John: So ...
Amir: Right. So how many of you all together, how many people all together?
John: Well, there's, ehh, five.
Amir: Five other than you?
John: Alison's (inaudible) ourselves. Six all together.
Amir: Six plus you, crikey".

On the 21st of December 2005 p1110:

"*John: Haven't heard a whole lot since from, ehh, I had the guy over, you know, I think he's been in contact with him again and all, okay. So.*
Amir: Oh.
John: I don't know what they're gonna to do next, but I take it they're gonna make arrangements, you know, meet up again or whatever, you know, to discuss the final, finer details of it, you know. Seems to be going okay, you know, but ehh sort of, sort of, ehh. I won't hear a whole lot of it now after that there, you know, so I don't really care, you know. That's the way it sort of operates. We may try and keep it close-knit amongst ourselves, you know. Just to try and keep things tight.
Amir: I suppose the best way I think ...
John: Probably is, yeah.
Amir: To be honest".

[27] The six matters that I have just referred to, and the inferences that can be drawn from them, are relevant when considering whether Kearns was caused to act as he did by the actions of Amir, or whether he was merely given the opportunity to do so and would have acted as he did in any event.

[28] However, it is also necessary to bear in mind that Amir accepts that on many occasions Kearns made it clear that he did not want to become involved in whatever others might do. For example, on 21st of December 2005 immediately after the exchange quoted above the following exchange took place:

> *"John:* *Um.*
> *Amir:* *Yeah well, ehh, I mean to be fair you, you know, you and I have always said that we didn't really want to have anything to do with it, let them get on with it.*
> *John:* *Yeah.*
> *Amir:* *And I think probably ...*
> *John:* *Um.*
> *Amir:* *That's probably the best way to ...*
> *John:* *Yeah, yeah.*
> *Amir:* *To, ehh, to do it. So. You, you. I mean em, I'm similar to you in so much as em, I haven't really seen the guy, you know.*
> *John:* *Um.*
> *Amir:* *Your man.*
> *John:* *Yeah".*

[29] An earlier example of Kearns' anxiety to avoid becoming too closely involved is to be found on 4th of December 2005 at p936 –

> *"Amir:* *See I need to, I need to look at it.*
> *John:* *Uhm.*
> *Amir:* *With a view to em, working out what my cut's going to be. Em, I mean you're definitely not getting anything at all.*
> *John:* *No, no, no, no. (Laughs). No.*
> *Amir:* *Well why, well why does it, would they expect you to run all the way, come all the way here, spend your money?*
> *John:* *Uhm..*
> *Amir:* *On flights.*
> *John:* *Yeah.*
> *Amir:* *Hotels.*
> *John:* *Uhm.*
> *Amir:* *Running up and down here, not getting anything at all for it.*
> *John:* *Yeah. Well, maybe, maybe he'll (inaudible).*

But I couldn't see it. I just couldn't see it really, you know. You know they'll expect me just to take it out of my own expenses or whatever.

Amir: Yeah, but your own expenses as in from your pocket?

John: Oh yeah, or, or whatever cigarettes I'll bring back, you know, just to cover myself, you know.

Amir: Oh dear me. (Laughs) That's a strange old ehh..

John: Ehm, no well, then I'm not caring really, you know, I just want to get it over and done with.

Amir: Yeah.

John: Really, you know, because I don't wanany. I don't want to be under any spotlight then, you know, when I do get home, you know".

[30] A notable feature of Amir's account of the meeting in O'Reilly's Bar in Brussels on 24th of May 2005 when Alison Kearns was also present is that it was Alison, and not her husband, who did most of the talking. Indeed Kearns said very little, and this pattern was repeated on later occasions when both were present, as for example on 16th of August 2005 when there is a transcript of what was said. Looking at the various accounts of these meetings as a whole, it is the case that it is largely Alison, and not the defendant who is making the running when both were present, and the defendant appears to be a passive observer. This does not mean that Kearns was not interested in what was being said. As Mr Pownall conceded, arms were undoubtedly discussed on 24th of May 2005 and 1st of July 2005, because the later references by Kearns to arms and explosives during the meetings that had been recorded, some of which I have quoted, clearly have their origin in what was said in those two meetings. This brings me to Amir's evidence in relation to those meetings. and whether that evidence can be relied upon. Amir is undoubtedly a capable role player, and so by definition capable of dissimulation and deceit when necessary, qualities that are obviously essential in successfully performing that role. I am satisfied that his evidence was deliberately untruthful in the following respects –

1. He was emphatic that he had "*received no bonus for this operation whatever*". It emerged that in fact he had received three payments each of £1,000 in respect of his part in this operation. These payments were made on 26th of April 2005, 27th of June 2005, and 29th of September 2005. I found his explanation when challenged to explain these by Mr Pownall lacking in candour and credibility.

2. When he denied that he made, or authorised, the demand conveyed by

his solicitor for £30,000 in return for giving evidence in this case, see Defence Exhibit 1, page 3. On 11th of May 2010 at page 56 he stated unequivocally and emphatically that neither he nor his solicitor "*said if you give me money I'll give evidence*". His denial and the terms of his solicitor's letter of 24th of October 2007 are irreconcilable, and throughout the cross-examination on 11th of May 2010 between pages 56 and 67 his attempts to explain this away were convincingly exposed as untrue.

3. Amir denied ever having seen the Operation Nare statement to be found in Defence Exhibit 3 at pages 20 and 21. The evidence of 3583 was that he showed it to Amir after he had prepared it for Amir on his laptop to make sure it was accurate. 3583 said on 1st of June 2010 at page 48 that there was no doubt in his mind that Amir had seen this. Both accounts cannot be true. I believe 3583 and am satisfied that Amir tried to disavow this statement because a number of details in it that must, on the face of it, have come from him, are at variance with parts of his evidence.

[31] In these respects at least Amir's attitude bore out 3522's assessment of Amir given on 9th of June 2010 at page 83 when he said that: "*He becomes less reliable when there is some element of personal agenda in relation to his life and some distance between events around his life that made him a difficult role player for us to deal with*". There are several references in the contact notes that suggest that Amir was prepared to follow his own agenda once he was actually deployed and playing his role, and this was a concern to his superiors. For example, on 4th of August 2005 3590 commented upon his "*wrong attitude and wilful disobedience*" as having "*significantly degraded the result*" see Defence Exhibit 3, page 54.

[32] On 11th of July 2005 3590 commented that Amir "*stepped outside the agreed plan -and so altered the script that it is likely that we have lost the ability to bring this to court*". At page 70 in a series of comments created on 4th of August 2005 3522 made a number of highly critical comments, notably that Amir had made it clear "[a] *once deployed we've got no control over what he does,[b] he never had any intention of playing Ejaz into this scenario*". Whether or not each individual criticism is fully justified, the cumulative effect of so many critical comments, and I do not intend to refer to them all, is to create a strong impression that Amir was prepared to act as he thought best. This, coupled with the financial incentive of receiving bonuses, creates an obvious and substantial risk that he was prepared to go beyond what he had been told to do, including stepping across the boundary of entrapment. A matter of particular significance is that there is no independent and verifiable account of everything that was said on 24th of May 2005 and 1st of July 2005. Given the untruths Amir has told, and the risk that Amir was prepared to act as he thought fit on the ground, the absence of an independent and verifiable record, places an additional and significant handicap in the path of the prosecution when Amir's truthfulness and reliability are called into question.

[33] For all of the reasons I have so far stated it is therefore of even greater importance to examine what contemporary accounts there are to see whether there are any material inconsistencies in Amir's description of what was said, and by whom, and whether there are any other matters which directly or indirectly cast significant doubt on the accuracy of his account. There are a number of such inconsistencies –

1. How long the discussion about guns between Alison and Amir lasted on 24th of May 2005. Paragraphs 6 and 10 of the contact note prepared by 3583 imply that Alison asked about guns on several occasions and at some length during the conversation, but Amir said she asked a few times, and agreed that the note was not an accurate reflection of what happened. See 20th of May 2010 page 53.

2. Who first raised the topic of weapons? Amir's evidence was that Alison was interested when he referred in passing to guns in the context of explaining how poor people were in Pakistan, and Alison was interested when he mentioned guns, and asked him what type of guns. See 6th of May 2010 at page 12. However, paragraph 6 of the Operation Nare statement, Defence Exhibit 3, page 20 states quite unequivocally that it was Alison who first raised the topic of weapons when she "*asked about the availability of weapons*".

3. The notes compiled by Detective Sergeant Brown of these lengthy discussions, (Defence Exhibit 5) also contain both versions. The first version appears towards the end of the bundle under the headings "*3rd, 4th, 24th of May 2005*" and "*page 5*" says Amir first mentioned "*cheap Kalashnikovs*" but the second version on page 1 under the heading "*24th of May 2005 - pre-deployment briefing*" it says that it was Amir who first mentioned guns.

4. The notes made during that portion of the meeting was transmitted make no mention of guns. See Exhibit 13, pages 23 to 29. It is only during the subsequent debrief that guns are mentioned, and then only pen guns. See pages 30 to 32. There is no mention in either section to the live feed failing or to Kalashnikovs.

5. Amir asserted without equivocation at the 21st of May 2010, page 20, that concerns were never expressed to him about the agent provocateur boundaries, yet 6503 on 7th of June 2010 at page 7, said that Amir was reminded before 1st of July 2005 "*that he should be responsive and not directive*" but he wasn't given specific legal briefing about these matters. However, 3583 conceded on 1st of June 2010 at page 31 that issues around agent provocateur were discussed as part of pre-deployment briefs with Amir.

6. In the immediate aftermath of 1st of July 2005 meeting there was a good deal of concern about whether Amir had crossed the entrapment boundaries, so much so that when 6503 contacted 3522, 6503 expressed concern about the references "*negotiations*" by Amir. I have considered and accepted 3522's evidence about the manner in which his concerns were dispelled, but that concerns were expressed at all by 6503 suggests that at least one of those who had the advantage of listening to the live conversation at the time was apprehensive that Amir had crossed the entrapment boundary. Because of the failure of the live feed I have to form an independent judgment as to the reliability of the various accounts relating to those concerns. In this context I must have regard to my earlier conclusion that Amir has lied about 6503's entry that Amir admitted that the line he had taken in the meeting of 1st of July 2005 could be construed as agent provocateur.

[34] Finally, I turn to the evidence of Detective Sergeant Brown and Amir about the circumstances in which Brown embarked upon preparing the incomplete handwritten draft of Amir's witness statement. Their evidence was riddled with inconsistencies, confusion and improbabilities and cannot be accepted as reliable in any way. Taking into account the deliberate untruths told by Amir; the obvious risk that he had a financial incentive to earn bonus payments by exaggerating, distorting or inventing what was said during the meetings of 24th of May 2005 and 1st of July 2005; the many contradictions and inconsistencies between his evidence and the contemporary records; and the absence of a recording of much of what was said on 24th of May 2005, and all of what was said on 1st of July 2005, I cannot be satisfied that Amir's account of these meetings is reliable. Notwithstanding that, as I have explained, Kearns' later conduct gives rise to the strong inferences that I have earlier described, the reality is that the edifice of the prosecution case now rests upon an inadequate foundation. and therefore that edifice cannot stand. Considering Amir's evidence about these two meetings as a whole, the defence have satisfied me that Kearns' conduct was brought about by the misconduct of Amir during his meetings; that the offences were artificially created by that misconduct; and that the administration of justice would be brought into disrepute were the prosecution permitted to continue. I therefore stay the prosecution against Kearns on both counts and accordingly he will be discharged at the end of this ruling.

<u>McCaugherty</u>

[35] I now turn to consider the application for stay on behalf of McCaugherty, and it is unnecessary to repeat my conclusions on the relevant law to be applied to the case. It is, however, necessary to address what is a major plank, if not the central plank, in Mr Colton's submissions on behalf of McCaugherty, namely that as it was summarised in paragraph 36 of the written submissions: -

> "It is submitted that, given the entire dependency of the operation that led to the arrest of Mr McCaugherty upon the instigatory role of Amir, the court should grant a stay in respect of the proceedings against him. If the court accepts that Amir's conduct is sufficient to justify a stay, proceedings for all alleged offences that would not and could not have occurred but for his intervention should be halted".

[36] In my judgment it does not follow that because I have found that the case against Kearns should be stayed because of Amir's misconduct, that of itself requires the proceedings to be stayed against McCaugherty. It is necessary to examine all of the circumstances relating to McCaugherty separately whilst giving due weight to any influence upon his conduct that can be properly attributed to Amir's actions. However, so far as McCaugherty is concerned Amir's role, whilst essential to persuade Kearns that Amir was a trustworthy person through whom McCaugherty could be put in touch with an arms dealer, was essentially a preliminary and subsidiary one.

[37] Before I turn to the circumstances that are relevant to the case against McCaugherty I remind myself of his application as being made at the end of the prosecution case, and therefore any conclusion I make at this stage is based solely upon the prosecution evidence which I consider I must take at its reasonable height at this stage, and that if the application for a stay is rejected it is still open to McCaugherty to give and call evidence if he wishes in his defence, and in such circumstances the court will not be able to arrive at a verdict until it has heard all of the evidence that may be adduced, and any submissions that may be made, on behalf of both McCaugherty and Gregory.

[38] So far as McCaugherty is concerned there are a number of matters to consider, and my conclusions on them are as follows –

1. The authorities had reasonable grounds for initiating this operation. If, as Amir stated, McCaugherty was the target; and the prosecution witnesses from the Security Service stated that he was suspected of being involved with the Real IRA in Lurgan; Kearns was chosen as a possible avenue of approach to McCaugherty because Kearns was believed to be an associate of his. The operation was properly authorised by the superiors of Amir and Ali, and conducted by virtue of the appropriate statutory authorisations required under RIPA.

2. Amir was representing himself as someone who could introduce whoever Kearns brought to meet Amir to the supposed arms dealer who turned out to be Ali. It was necessary for Ali behave as if he really was an arms dealer, and the prosecution evidence is that not only did Ali

perform that role, but elaborate steps were taken to ensure Ali's position appeared to be as convincing as possible. To that end arrangements were made to set up what would be presented to McCaugherty as a trip to Georgia where weapons of a suitable type could be demonstrated if necessary, or at least shown, to McCaugherty in circumstances that would suggest that Ali could deliver his side of any bargain. Such steps were entirely appropriate in the context of this case.

3. There is evidence that McCaugherty wanted to purchase arms and explosives before he came into contact with Ali. The recordings of the meetings between Ali and McCaugherty are replete with references by McCaugherty to his desire to purchase various types of munitions, and on some occasions his remarks suggest that this was not the first time he had been involved in such activity. Thus on 28th January 2006 in Istanbul, at page 1195, he is alleged to have said to Ali: "*A few years ago we got armaments from Slovakia.*"

4. Was any inducement held out to McCaugherty to engage in the conduct revealed by the recordings? Reliance is placed on Ali taking it upon himself to make hotel arrangements for McCaugherty in Istanbul, paying for the hotel, paying for meals and giving him some Turkish Lira as spending money. All of this was unauthorised, as 3583 accepted on 2nd June 2010, page 20. However, there are two answers to this. The first is the description of this by 3583 in the same passage as "*theatre, my Lord, to try to make sure that everything looks natural.*" In the context of the evidence, McCaugherty had many thousands of Euros at his disposal, and was able to travel to the Continent and Turkey to negotiate with Ali, for Ali to lay out what were presumably relatively modest amounts; and it has not been suggested that McCaugherty was the recipient of lavish or luxurious spending by Ali; for him to oil the wheels so to speak can properly be described as 'theatre'. Secondly, there is presently no evidence to suggest that any of his expenditure influenced McCaugherty's behaviour or actions in any way.

5. Unlike Amir's case, although Ali was also paid a bonus in February 2006, the crucial difference is that through the recordings, the associated transcripts, and to a limited extent the video footage, the court and the defence are able to form their own view of what Ali and McCaugherty did and said at all material times.

6. At present there is nothing to suggest that Ali did anything more than skilfully and convincingly play the role of an arms dealer responding to the determined efforts of a prospective purchaser to buy a significant quantity of munitions.

[39] I am satisfied that there are no grounds to justify ordering a stay of the proceedings in McCaugherty's case and I refuse the application.