Neutral Citation No. [2010] NICC 49

Ref: **HAR8035**

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

Delivered: **10/12/2010**

IN THE CROWN COURT IN NORTHERN IRELAND

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ANTRIM CROWN COURT

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THE QUEEN

-v-

DARREN IVAN KERNOHAN
and
LAURENCE DESMOND KINCAID

_____

HART J

[1] The above named are two of five defendants now jointly indicted on the same bill of indictment with various offences relating to the death of Geoff Kerr at his home in Templepatrick, County Antrim on 27 April 2009. As Templepatrick is within the Division of Antrim the accused have all been returned to Antrim Crown Court where their is case is listed as a standby trial on 12 January 2011, with a going trial date of 31 January 2011.

[2] Because of what is contended on behalf of the defendants to be adverse newspaper publicity relating to Kincaid and Kernohan that has appeared in the Sunday World newspaper in particular, Mr O'Rourke (who appears with Mr Moriarty on behalf of Kincaid) has applied for an order staying the proceedings on the basis that the publicity has made a fair trial impossible. In the alternative, he submits that the venue of the trial should be changed; or that a temporary stay should be placed on the proceedings to delay the trial to allow further time for memories of the publicity to fade, or that the charge against Kincaid should be severed so that he can have a later trial. On behalf of Kernohan, Mr Barry Macdonald QC (who appears with Mr Tom McCreanor) adopted Mr O'Rourke's submissions.

[3] Mr Neil Connor, who appears on behalf of the prosecution, submitted that whilst it is for the applicants to demonstrate on the balance of probabilities that a fair trial cannot take place, and whilst accepting the general proposition that adverse pre-trial publicity can give rise to ground for staying proceedings (although such instances are likely to be very rare and in

practice limited to cases of adverse publicity in the course of, or at the very least, very proximate to the commencement of the trial), the applicants have failed to demonstrate that a fair trial cannot take place. He argued that the report of 5 May 2010 to which I shall refer later is the only relevant report in the context of this application, and that as a period almost nine months will have elapsed between that publication and the commencement of the trial it is highly unlikely that any juror will have any recall of the article in question. He pointed to the likelihood that the trial would last for several weeks, and therefore that the jury is likely to be subjected to what has been described as the "focusing effect of listening to evidence over a prolonged period".

[4] Laurence Desmond Kincaid (whom I will call Laurence Kincaid senior for the purposes of this application) has a son named Laurence David Kincaid, who it appears is generally referred to as "Duffer" Kincaid. A large number of articles from various publications, but principally from the Sunday World, referring to "Duffer" Kincaid were placed before the court. In some recent instances these reports also contained references to Laurence Kincaid senior.

[5] I have considered these reports which date back to 2002, but it is unnecessary to refer to them individually. The content of these articles may be summarised as alleging that "Duffer" Kincaid:

(1) lived in Ballysillan in North Belfast, and later moved to live in Ballycraigy, County Antrim;

(2) is or was a member of the LVF; and

(3) is a notorious drug dealer who has been convicted of serious drug offences in the past, and as a result has served substantial prison sentences.

[6] It is of particular significance that because of the prejudicial nature of the reporting of "Duffer" Kincaid's activities up to and during 2007, a trial in which he was a co-defendant at that time had to be postponed because the trial judge was satisfied that was necessary to ensure that the defendant received a fair trial. The Attorney General took proceedings against the editor of the Sunday World for contempt, and for the imposition of fines on both the editor and the paper. These reasons for the deferral were described in the judgment of the trial judge, His Honour Judge Marrinan; whilst the subsequent history of the proceedings against the editor and the Sunday World are described in the judgment of Kerr LCJ in An Application by H M Attorney General for Northern Ireland [2008] NIQB 41. It is therefore unnecessary for me to recount those matters in this judgment.

[7] Although Mr O'Rourke referred to a number of press reports relating to the death of Geoff Kerr, his submissions were principally based on two

articles. The first appeared in the Sunday World on 5 May 2010, and the second in the Sunday Life of 12 September. It is necessary to refer to some of the comments that were made in both articles.

[8] The article of 5 May 2010 carries a banner headline:

> "Duffer Dad Up On Murder Rap",

> underneath which appears the legend:

> "'LVF boss's father linked to killing of gun collector'."

[9] In the course of a long article a description of the alleged events of the night of Mr Kerr's death is given, followed by a quote from an unidentified source. There then appears the following passage:

> "Six years ago the PSNI revoked Laurence Kincaid snr's firearm certificate that allowed him to carry a personal protection weapon and a certificate allowing him to carry transport (sic) guns.
>
> The PSNI revoked them on the grounds that he was 'associated with a proscribed organisation' and was also involved in 'criminality'.
>
> The decision was made following a police search of Laurence Kincaid snr's Flush Road home in north Belfast in October 2004.
>
> At Belfast Magistrates' Court, it was claimed his son Laurence 'Duffer' Kincaid was running a loyalist drug dealing operation from his father's home.
>
> The court was told drug squad officers believe that 38 year old 'Duffer' was running a drug dealing operation from the Flush Road address.
>
> Convicted dealer 'Duffer' Kincaid was charged with having £80,000 worth of the Class A Ecstasy tablets with intent to supply.
>
> Police uncovered the 16,000 Ecstasy tablets in a shed."

The remainder of the article contains an extensive reference to the views of a police officer who apparently gave evidence in support of the charge before the Magistrates' Court.

[10] The next relevant article is in the Sunday Life of 12 September 2010. This refers to the activities of various Loyalist terrorists, and in the course of the article refers to the pipe bombing of a Catholic primary school in Antrim the week before. It continues:

> "Paramilitary sources have accused the thug, who is the self-styled Real UFF boss, of being behind the attack."

The article goes on to link the unnamed Real UFF leader to a series of crimes, including

> "The April 2009 murder of businessman Geoff Kerr in Templepatrick."

It later alleges that:

> "The real UFF murdered Martin Morgan because he owed them money for drugs,"

and

> "Last year its members murdered Geoff Kerr in Templepatrick. They broke into his house to steal guns and shot him in a struggle."

[11] The thrust of Mr O'Rourke's submissions on behalf of Laurence Kincaid senior can be seen from the following extract from his skeleton arguments.

> "It is of some significance that in virtually every report concerning the instance case, the Sunday World has deliberately and directly linked the defendant with Laurence 'Duffer' Kincaid whose alleged criminality relates to the Belfast and South Antrim area. As such this directly connects the defendant in the instant case to a catalogue of systemic sensationalist and grossly prejudicial reporting concerning the defendant's immediate family."

[12] I accept that the combined effect of the two articles to which I have referred is to infer that Laurence Kincaid senior may be connected with the LVF because:

(a) his firearms licence was revoked, allegedly on the ground "that he was associated with a proscribed organisation";

(b) he was involved in "criminality";

(c) his son "Duffer" Kincaid is, or has been, prominent in the LVF, a proscribed terrorist organisation;

(d) "Duffer" Kincaid carried on a drug dealing operation from the home of Laurence Kincaid senior in 2004; and

(e) those who entered Geoff Kerr's house were members of a Loyalist "splinter group … called the Real UFF".

[13] Although both Mr O'Rourke and Mr Macdonald referred to a number of authorities in their skeleton arguments, Mr O'Rourke in particular relied upon the observations of Lord Phillips CJ in R v Abu Hamza [2007] 1 Cr App R 27 at [92]. However, in order to place these remarks in context I think it is appropriate to quote more extensively from Lord Phillips' review of the relevant authorities.

> "88. Applications for a stay of proceedings on the ground of abuse of process, founded on prejudicial media publicity, are a growth area in our criminal process. In v McCann (1991) 92 Cr. App. R. 239 the Court of Appeal held that such an application should have succeeded in quite extraordinary circumstances. During closing speeches in a terrorist trial where the defendants had exercised their right to silence the Secretary for Northern Ireland and Lord Denning took part in radio or television broadcasts, which might have been heard by the jury, in which they equated the exercise of the right of silence with guilt. Equally, in R. v Taylor (Michelle) and Taylor (Lisa) (1994) 98 Cr. App. R. 361 this court held that 'unremitting, extensive, sensational, inaccurate and misleading' press coverage of the trial was one reason why the guilty verdict was unsafe.
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> 89. In general, however, the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather

they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity. The position was summarised by Lord Taylor C.J. in R. v West [1996] 2 Cr. App. R. 374. 385-6, as follows:

> 'But, however lurid the reporting, there can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts. The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view, it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In Kray (1969) 53 Cr App R 412 at pp. 414, 415, Lawton J said:
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> > 'The drama ... of a trial almost always has the effect of excluding from recollection that which went before.'

That was reiterated in Young and Coughlan (1976) 63 Cr App R 33 at p. 37. In ex p. The Telegraph Plc (1994) 98 Cr App R 91, 98, [1993] 1 WLR 980 987, I said:

> 'a court should credit the jury with the will and ability to abide by a judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.'

90. Very recently in B, In re [2006] EWCA Crim 2692 the President of the Queen's Bench Division (Sir Igor Judge) made the following statement, which we would endorse:

> '32. There is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. No doubt in this case Butterfield J will give appropriate directions, tailor-made to the individual facts in the light of any trial post the sentencing hearing, after hearing submissions from counsel for the defendants. We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair.'

91. The position is the same in Scotland. In Montgomery v HM Advocate [2003] 1 A.C. 641 the Privy Council had to consider a submission that pre-

trial publicity had rendered impossible a fair trial that would satisfy Art. 6 of the Human Rights Convention. Lord Hope of Craighead remarked at 673 that Art. 6 did not set out to make it impracticable to bring those accused of crime to judgment. The Strasbourg court did not require the issue of objective impartiality to be resolved with mathematical accuracy. Account was taken of the fact that certainty in these matters was not achievable. He went on to observe:

> 'Recent research conducted for the New Zealand Law Commission suggests that the impact of pre-trial publicity and of prejudicial media coverage during the trial, even in high profile cases, is minimal: *Young, Cameron & Tinsley* Juries in Criminal Trials: part Two , vol 1, ch 9, para 287 (New Zealand Law Commission preliminary paper no 37, November 1999). The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard. Nevertheless the risk that the widespread, prolonged and prejudicial publicity that occurred in this case will have a residual effect on the minds of at least some members of the jury cannot be regarded as negligible. The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers

> his charge before they retire to consider their verdicts.
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> The judges in the court below relied on their own experience, both as counsel and as judges, of the way in which juries behave and of the way in which criminal trials are conducted. Mr O'Grady submitted that there was no basis upon which one could assess the likely effect of any directions by the trial judge. He said that this was something that was incapable of being proved. But the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence.'

92. It seems to us that there is a degree of tension between the approach of the House of Lords in Coutts and Lord Hope's observations in respect of the trust that can properly be placed on the jury's ability to perform their duty to reach a decision in accordance with the evidence and the directions of the judge. We suggest that the answer to this tension is as follows. The risk that members of a jury may be affected by prejudice is one that cannot wholly be eliminated. Any member may bring personal prejudices to the jury room and equally there will be a risk that a jury may disregard the directions of the judge when they consider that they are contrary to what justice requires. Our legal principles are designed to reduce such risks to the minimum, but they cannot obviate them altogether if those reasonably suspected of criminal conduct are to be brought to trial. The requirement that a viable alternative verdict be left to the jury is beneficial in reducing the risk that the jury may not decide the case in accordance with the directions of the judge. Prejudicial publicity renders more difficult the task of the court, that is of the judge and jury together, in trying the case fairly. Our laws of contempt of court are designed to prevent the media from interfering with the due process of justice by making it more difficult to conduct a fair trial. The

> fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties."

[14] As Mr O'Rourke recognises, and Mr Connor emphasises, the authorities to which Lord Phillips refers provide ample support for his conclusion at [89] that in general the courts have not been prepared to accede to submissions that prejudicial pre-trial publicity has made a fair trial impossible. This is because the courts are confident that, as experience has shown, jurors follow their oath and observe the trial judge's direction not to be influenced by prejudice in general, or by prejudicial or other material they may have read about before or during the trial. As Lord Taylor of Gosforth CJ put it in Ex parte Telegraph Plc [1993] 2 All ER at 978 in a passage that bears repetition:

> "In determining whether a publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of the trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom."

[15] I am satisfied that the applicants have failed to discharge the burden upon them of showing that a stay is required to ensure that they can have a fair trial, because I am satisfied that when this case comes to trial the trial judge can and will give the jury suitable directions to ignore any prejudicial material published about this trial, and that the jury can be trusted to faithfully observe those directions and decide the case solely on the evidence before them. I am satisfied that the earlier article of 5 May 2010 is the more damaging articles of the two so far as Laurence Kincaid senior is concerned, but that a period of over eight months to the trial date from the publication of that article will be sufficient to allow memories of the article to fade to a very substantial extent. I do not consider that it would be in the interests of justice to sever the charge against Laurence Kincaid senior from the charges against the other defendants because this is a case where the interests of justice point strongly towards a joint trial of all concerned.

[16] The reference in the article in the Sunday Life of 12 September 2010 might have the effect of reviving recollections in the minds of readers of that paper who had also read the earlier article in the Sunday World of the prejudicial content of the article of 5 May 2010 so far as Laurence Kincaid senior is concerned, but I am satisfied that its effect will also have largely dissipated by the time of the trial on 31 January 2011, even though a shorter period of some four and a half months will have elapsed since the publication of that article.

[17] The impact of the article of 12 September 2010 upon Kernohan is clearly more immediate, given the more recent date of that article, but he is only indirectly linked to these offences as he is not mentioned by name in the article. Given that he is only indirectly implicated I am satisfied that in his case also any prejudice to him from the publication of that article, whether viewed in isolation, or in combination with the earlier article from the Sunday World to which I have already referred, can be satisfactorily dealt with by the fading of memories which will have occurred since the publication of the article on 12 September 2010, and by suitable directions of the trial judge.

[18] In addition I consider that the measures to which I am about to refer will assist in dissipating any residual prejudice to either defendant created by this publicity.

(1) The case will be taken out of its standby date of 12 January 2011 and the commencement of the trial will thereby be deferred to 31 January 2010.

(2) I also propose to transfer the case to the Division of Ards from which the jury will be selected at Downpatrick. However, for the convenience of witnesses and for reasons of courtroom availability the trial itself will then take place at Belfast Crown Court before a jury drawn from the Division of Ards, not from the Division of Belfast or the Division of Antrim. This should ensure that the jurors are not drawn from any part of Belfast – where "Duffer" Kincaid lived – or those parts of County Antrim where it seems he now lives.

(3) I have already issued a no publicity order during the hearing of the applications last Friday, and it will be replaced with the following order which I make by virtue of Article 19 of the Criminal Justice (NI) Order 1984, and s. 4(2) of the Contempt of Court Act 1981.

> "There must be no report of this ruling, or of the application made on behalf of the defendants, nor must there be any report of the proceedings against the present defendants which names, or refers to, any of the accused by any form of description whatever, or names, or refers to, any relative of any of the

> accused by any form of description whatever without further order of the Court."

[19] In view of the previous history of the attitude of the Sunday World newspaper towards Laurence "Duffer" Kincaid, the nature of the reporting of the present allegations by that newspaper in particular, and the repeated, and on the face of them quite unnecessary, references to Laurence "Duffer" Kincaid by that newspaper when reporting the allegations against Laurence Kincaid senior, I further direct that a copy of this judgment and of this order be served on the editor of the Sunday World newspaper.

[20] I also direct that a copy of this judgment, together with copies of the press reports placed before the court during this application, be sent to the Attorney General for Northern Ireland so he may consider whether proceedings should be instituted against the Sunday World or any other newspaper for contempt of court in respect of those reports.