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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MARTIN McNALLY and JOSEPH McMANUS

Before Kerr LCJ, Higgins LJ and Coghlin LJ

KERR LCJ

Introduction

[1] This is a prosecution appeal, taken by leave of Her Honour Judge McReynolds the trial judge, from a ruling made on the application of Martin McNally and Joseph McManus that proceedings against them for armed robbery and going equipped for theft be stayed on the ground that the continuation of the proceedings against them would constitute an abuse of process.

[2] Mr McNally and Mr McManus had been jointly charged with: (a) the armed robbery of a Group 4 Securicor guard as he collected cash from the Northern Bank on Market Street in Downpatrick on 30 January, 2007; and (b) going equipped for theft in that a false number plate was found in the car used in the robbery. Before the trial began, applications were made on behalf of both respondents to stay the proceedings as an abuse of the process. Her Honour Judge McReynolds acceded to these applications on 2 May, 2008.

Factual background

[3] Shortly after 3.25 pm on 30 January, 2007 Robert Skillen, a Group 4 Securicor guard was approached by a man outside the Northern Bank in Market Street Downpatrick. The man threatened Mr Skillen with a large

knife, then took a security box from him and ran off to a waiting car. On the prosecution case against the respondents at least three persons were involved in this robbery. It was alleged that Mr McNally and Mr McManus were among them. It was accepted that Mr McNally was unlikely to be the main robber, given his age – (he is middle-aged). The car into which the robbers escaped was identified by its registration number. It was found at about 3.45 pm in nearby Ballymote Walk. At approximately 4.15 pm, police were informed by a passer-by that two people had run into the back of a house at 9, Ballymote Walk. Police entered that house shortly afterwards. The passer-by was never identified and did not provide a written statement. The security box was recovered in a wheelie bin in the back yard of the property.

[4] The two respondents and the owners, John Gough and Sherry Doran, were found inside the house. Mr Gough and Ms Doran were quickly eliminated from the investigation. Both were found to be drunk. Apart from this, no evidence was found to suggest that they had been connected to the robbery.

[5] When police officers entered the house they found Mr McNally in an upstairs bathroom. Mr McManus was upstairs in bed. He was undressed. Mr McNally gave his name as Hughie McNally, a false date of birth and a partially inaccurate address. Mr McManus gave his name as Kieran Smyth which he continued to use throughout the police inquiry. He also gave a false date of birth. A knife, similar to that used in the robbery, was found in the living room and the key to the getaway car was found under the carpet in an upstairs bedroom. The washing machine in the kitchen had just been turned on as the police arrived. It contained a sweater similar to that worn by the robber. Both respondents were forensically linked to the vehicle: Mr McNally's DNA was on a cigarette butt in the car; fibres from the car matched his sweater; and two of his thumbprints were found on a page of the *Belfast Telegraph* for the day of the robbery. Mr McManus' DNA was found on a Lucozade bottle in the car and his fingerprints were on an Oasis drinks bottle. Two other men were forensically linked to the vehicle but in light of all the evidence no prosecution was directed against them.

[6] Both respondents refused to answer questions at interview. They gave prepared statements at the conclusion of their interviews. In his statement Mr McNally claimed that he had travelled from Belfast the night before and stayed the night at 9, Ballymote Walk. He said that he had slept most of the day on the sofa. Mr McManus claimed that he too had come down the night before and had slept all day apart from a period at about 1 pm when he got up and helped Mr Gough cut the grass at that house. In their statements, Mr Gough and Ms Doran maintained that nobody had stayed the night before at their home and that Mr McManus had not helped to cut the grass.

[7] Both respondents have previous convictions for robbery. Mr McManus had committed robbery on 4 May, 1999 and 1 April, 2003. He had committed a further offence of aggravated burglary on 26 July, 2000. Mr McNally had committed robbery on 11 March, 1987 and on 15 April, 2003. On the latter occasion he had been the getaway driver in the robbery of a Securicor van in Ballycastle. Applications were to be made to admit these convictions in evidence.

[8] A command and control report was disclosed to the defence on 22 February, 2008 following the respondents' arraignment. An audio recording of the police radio communications relating to the incident was disclosed at the beginning of the trial. Contained within these were a number of matters of assistance to the defence. In particular certain flaws were discovered on the disclosure of the audio recording of the police radio communications. These may be summarised as follows: -

1. A Constable Pye was observing the front entrance of 9, Ballymote Walk. Before the police went into the property, a man came out of the house and ran off down the street. He broadly matched the description of the man who had robbed Mr Skillen, in that he wore a jumper with navy and white stripes, although he appeared to be taller. This man was never apprehended.

2. A Constable Wishart had found Mr McManus in bed. He expressed reservations about arresting him when ordered to do so. He gave the opinion that McManus had been asleep and appeared to have been 'on the lash' the previous night.

3. The radio communications log revealed that a Constable Mayne had spoken to a passer-by, described by her as 'a source known to me.' This individual had told the constable that two persons had run from the car into the back of the property, although she did not provide descriptions of the pair. They were never identified and Constable Mayne's notebook was not located. She was abroad at the time of the application to stay the proceedings.

[9] No identification parade of the respondents was held. Two witnesses, Cheryl McCreery and Claire Thompson, declined to attend an identification parade for Mr McManus, claiming that they were in fear. The officer in charge of the case, Detective Sergeant Dunlop, considered it inappropriate to invite the remaining three witnesses to attend the procedure. He had formed the view when taking their statements that they would not be able to identify the robber. It was conceded that he should have (in accordance with Code D: 2.12(ii) under the Police and Criminal Evidence (Northern Ireland) Order 1989) asked two of them, a Mr Skillen and a Mrs Curran to attend such a parade, it being apparent from their statements that there was a reasonable

chance that they would be able to identify the robber. No identification procedure was ever attempted for Mr McNally who was substantially older than the description given of the main robber.

[10] Finally, there was a possibility of other witnesses to the robbery who had not been traced. A Constable Moore had transmitted over the radio a first description of the robber stating his height as 5'3". Later, information came from a Detective Inspector Graham that another witness had come forward and described the robber as 5'8". In the statements of the eye-witnesses the robber was described as between 5'6" and 5'7". No one on the papers described him as 5'3" or 5'8". These two witnesses have never been identified and thus have not been available to the defence. This has grounded the submission that not only were the police in dereliction of their duty to carry out a thorough investigation (as required by the Code of Practice) but the respondents were denied access to witnesses who might have identified others as the likely culprits. This was of especial significance, it was claimed, when viewed in combination with the evidence that persons had been seen running from the property. It was also claimed that the failure to establish a proper cordon and to detain the man whom he had seen run from the property constituted a breach of the Code by Constable Pye.

The trial judge's ruling

[11] The learned trial judge in a detailed, lengthy ruling carefully noted the various discrepancies in the police investigation and the delay in disclosure. She summarised the defence arguments in favour of a stay as follows: -

1. Failure to pursue a reasonable line of inquiry (this is essentially in relation to the man who was observed leaving the house – paragraph 3.4 of the Code)
2. Failure to conduct an identification parade
3. 'Drip feed' disclosure and the lack of appropriate primary disclosure
4. A suggestion of *mala fides* in relation to the observations of Constables Pye and Wishart

[12] The judge singled out the omission from disclosure of the evidence of Constables Wishart and Pye as amounting to 'a considerable shortcoming' since it was 'clearly likely to undermine the prosecution case.' She also considered that the failure to pursue the escapee from the house was a potentially significant flaw. In the view of the judge, these two items taken together were 'of prejudicial potential in terms of evidential value relevant to the settled facts.' In relation to what she described as the more minor points, the failure to pursue lines of inquiry were considered by the judge to indicate a very haphazard investigation lacking in cohesion or continuity.

[13] Significantly, the judge found that neither bad faith nor manipulation on the part of the police had been established. She nevertheless considered that the investigation was very seriously flawed and concluded that 'the identified shortcomings in the investigation and the cumulative effects of those shortcomings undermine[d] the reliability of the investigation as a whole and in the particular circumstances of the settled facts and other evidence in this case ha[d] inevitably caused prejudice to the defendants to the extent that a fair trial could not … take place even bearing in mind that the trial process [was] to an extent equipped to deal with issues of this kind'. She also found that, in light of the unhappy history of disclosure during the pre-trial process, it was unlikely that the PPS was even now aware of the identity of all police officers who were at the scene following the robbery and whose evidence and notebook entries might contribute to circumstances favourable to the defence or undermining of the Crown case.

The principles

[14] The general principles governing the grant of a stay of proceedings on the basis that to continue them would amount to an abuse of process are now well settled. There are two principal grounds on which a stay may be granted. The first is that if the proceedings continue, the accused cannot obtain a friar trial – see, for instance, *R v Sadler* [2002] EWCA Crim 1722 and *R(Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130. The second is that, even if a fair trial is possible, it would be otherwise unfair to the accused to allow the trial to continue – see, *Attorney General's reference (No 2 of 2001)* [2004] 1 All ER 1049 and *R* v. *Murray and others* [2006] NICA 33.

[15] These grounds require to be separately considered. They should not be conflated for the prosaic and obvious reason that considerations that will be relevant to one are not necessarily germane to the other. The first ground requires a careful analysis of the circumstances which are said to give rise to the possibility that a fair trial cannot take place and a close examination of whether the trial process itself can cater for the shortcomings of the prosecution or police investigation. These inquiries should be informed by two important principles. They were set out in paragraph 25 of *Ebrahim* as follows: -

> "(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.

> (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded."

[16] The principles governing the grant of a stay in circumstances where a fair trial is possible but it would be unfair that the defendant should be required to stand trial were summarised by this court in *R* v. *Murray and others*. In that case we referred to the judgment of Lord Bingham of Cornhill in *Attorney General's reference (No 2 of 2001)* and made the following observations on it at paragraph [23] *et seq*: -

> "[23] It is, we believe, important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is possible but some other species of unfairness to the accused makes a stay appropriate. We therefore set out in full paragraph [25] of his opinion: -
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> > 'The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which *Darmalingum v State* (2000) 8 BHRC 662 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga DC* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's convention right.'

> [24] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith, unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's convention right is possible, a stay will *never* be appropriate.
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> [25] We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not."

[17] Although Lord Bingham was discussing the question of when it would be appropriate to grant a stay where a fair trial was possible and in this case, the focus of the debate has been on whether such a fair trial *can in fact* take place, these passages serve to highlight the rule that where an alternative course is available to remedy a breach of a defendant's convention right (in this case the right to a fair trial under article 6 of the European Convention on Human Rights) a stay will never be appropriate. By parity of reasoning, a judge should never grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue. Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the defendant is avoided.

[18] It appears to us that this examination must be conducted at two levels. The first involves an inquiry into the individual defects in the prosecution case or the police investigation and the measures that might be taken to deal with each. The second entails the weighing of the impact of the various factors on a collective basis. It does not necessarily follow that, because some steps to mitigate each item of potential unfairness can be taken, the stay must be refused. A judgment can still be made that the overall level of unfairness that is likely to remain is of such significance that the proceedings should not be allowed to continue. It is to be remembered, of course, that the judge must be persuaded of this proposition by the defence, albeit only on a balance of probabilities.

Discussion

[19] The critical portions of the learned trial judge's ruling appear at pages 28-30 of the transcription. They are as follows: -

> "Taking a [proportionate] account of all that has been said in support of this application, I am … satisfied on the balance of probabilities that the identified shortcomings in the investigation and the accumulative effect of those shortcomings undermines the reliability of the investigation as a whole and in the particular circumstances of the settled facts and other evidence in this case have inevitably caused prejudice to the defendants to the extent that a fair trial could not now take place even bearing in mind that the trial process is to an extent equipped to deal with issues of this kind. I do not reach that final conclusion lightly and in doing so I have taken account of the matters now known to this court but not known to defence representatives before committal or arraignment because of significant omissions from the schedule and the command and control record. I consider that a different approach would have been taken to case preparation had the material been available.
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> …
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> This is a prosecution case which depends on multi-stranded, circumstantial evidence and forensic connection to items in the car, including an item dated 30 January in the case of Mr McNally combined with a number of descriptions of one young man leaving the scene and of the number of young men or

> men generally in the vehicle. I am satisfied that had counsel for the defendants been aware that the first officer to enter Mr McManus's bedroom half an hour after the incident considered he gave an impression of having been asleep following a night 'on the lash'. This no doubt would have impacted considerably on defence preparation and had, more significantly, defence lawyers been aware that someone fitting a description of the robber was seen leaving the house whilst the police were present, they would have expected this line of inquiry to be pursued more rigorously. I am satisfied that had the material been in the possession of the defence prior to committal and arraignment, a different approach would have been taken to those procedures.
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> …
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> I am satisfied that whilst the evidence does not point to bad faith, it does point to a catalogue of serious omissions in respect of failures to retain material in question and to pursue inquiries to which I have already referred. The cumulative effect of the plethora of both major and less major flaws amount[s] to serious fault in respect of this investigation. I am satisfied that the investigation is so lacking in rigour that it cannot now be relied upon and that as a result, prejudice is not only inevitable but irreparable in terms of the defence preparation and presentation. I am further satisfied that the prejudice inevitably resulting is of such a level as to justify the grant of a stay."

[20] It appears to us that in these passages, the judge seems to have allowed considerations of the gravity of the shortcomings of the investigation to influence her view on the question whether a fair trial could take place and, to some extent at least, conflation of those issues (which, as we have said above, should be avoided) has taken place. Of course, it is true that serious defaults can lead to serious prejudice but one must guard against an assumption that because the shortcomings are serious, a fair trial is inevitably rendered impossible.

[21] Of more particular concern, however, is the lack of any analysis by the judge as to how the defects in the police investigation and the failures in relation to disclosure might have been dealt with within the trial process. Thus, for instance, she did not discuss whether the fact that a man or men

were seen to emerge from the house and were not detained might not be examined in the course of the trial so that appropriate weight could have been given by a carefully directed jury to that factor and to the question whether this cast doubt on the guilt of the respondents. Likewise, there was no consideration of whether the fact that an identification parade was not held could have featured in a perfectly fair trial of the respondents. If this was a matter which raised a doubt as to the respondents' guilt, it is difficult to see why it should not be canvassed in the course of the trial. Similarly, Constable Wishart's impression of the demeanour of Mr McManus, the fact that the witness who spoke to Constable Mayne was not available, and, if it was right that there may have been other police officers present, the fact that they were not called to give evidence were all matters that could have been dealt with in the course of a perfectly fair trial. Indeed, one might observe that these are entirely typical of the type of issues that regularly feature in cases such as this, without any suggestion that the trial is unfair.

[22] The judge considered that if the defence had known of certain matters before committal or arraignment, "a different approach would have been taken". In particular, it was suggested that the defence would have modified their preparation for the trial if they had been aware that there were suggestions that others whose appearance might match those involved in the robbery had left the scene and of Constable Wishart's view as to Mr McManus's appearance. The judge did not elaborate on her reasons for concluding that these matters would have led to a different approach by the defence nor on what that approach might have been. More importantly, however, there is no consideration of the question whether, even if a different approach might have been adopted, a fair trial was nonetheless still feasible. All of these matters were known to the defence before the trial of the respondents was due to begin. We cannot see how, even if it is the case that a different defence strategy would have been undertaken had the defence team been aware of them earlier, it made a fair trial impossible because they did not learn of them until just before trial.

[23] Section 26 of the Criminal Justice (Northern Ireland) Order 2004 (which deals with the powers of the Court of Appeal, on an appeal by the prosecution, to reverse rulings made by a trial judge) provides: -

> "**26.** The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied –
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> (a) that the ruling was wrong in law;
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> (b) that the ruling involved an error of law or principle; or

> (c) that the ruling was a ruling that it was not reasonable for the judge to have made."

[24] It was submitted on behalf of the respondents that the only basis on which the trial judge's ruling could be impeached was that it was a ruling that it was not reasonable for her to have made. It was therefore argued that this court should only reverse the ruling if it was satisfied that no court could reasonably have reached the conclusion arrived at by the judge in this case – *R v O* [2007] EWCA Crim 3483. We do not accept these submissions. In our judgment, the trial judge failed to analyse the identified shortcomings and the supposed prejudice that arose from these in a way that properly examined whether they could have been overcome by the trial process itself. If she had done so, we are satisfied that she would have concluded that no irreparable prejudice existed. This, therefore, is an instance of the ruling involving an error of law and principle. We should say, however, that properly analysed, the shortcomings and defects could not be said to support the conclusion that a fair trial was not possible. Had it been necessary to do so, we would have found that the ruling was one which it was not reasonable for the judge to have made.

Conclusions

[25] We have concluded that the trial judge should not have acceded to the application for a stay of proceedings. We therefore allow the prosecution's appeal against her ruling that proceedings against the respondents be stayed. The counts against the respondents that were the subject of the stay will be restored to the indictment and they will stand trial on the offences charged in those counts.