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Ref:

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

Delivered: **21/11/11**

IN THE CROWN COURT FOR THE DIVISION OF NEWTOWNARDS

REGINA

-v-

ROBERT McCULLOUGH

Ruling on Fitness to be Tried

His Honour Judge Smyth

[1] The defendant is aged 62 being born on 22nd January 1949. Allegations have been made against him by two men about misbehaviour of a sexual nature that is alleged to have occurred between the years 1970 and 1974. These matters were the subject of police statements taken from the first complainant, Mr B, on 15th August 2008 and from the second complainant, Mr M, on 20th June 2009. The first complainant has made allegations of two specific incidents that are covered by three counts: two of buggery and one of gross indecency. Mr B was, he said, about 9 or 10 years old at the time. The second complainant, Mr M, alleges a serious sexual assault upon him when he was in the first complainant's company. He also alleges he witnessed one of the above incidents when he was with the first complainant. Mr M makes other allegations in his statement about misbehaviour that he said had been perpetrated on him when he was on his own. I do not feel it is required to set out the detailed allegations that ground the further counts in the indictment here. Mr M says he was about 11 to 14 years old at the time. He also described contact with the accused McCullough's family and, in particular, with Cassie, Robert McCullough's mother, and Joe McCullough, his brother.

[2] It is not entirely clear why both these men came forward to make these allegations or exactly what their explanation will be for the delay of over 36 years. There is no other evidence apart from the interviews of Mr McCullough which took place on 27th November 2009. Mr McCullough was accompanied by an appropriate adult from an independent scheme, Mr Nathan Hughes, and also by his solicitor, Gareth Dornan. His interviews lasted over 70

minutes. The allegations were put in some detail to him but these can be correctly described as containing consistently expressed denials of any misbehaviour.

[3] Mr McCullough was arraigned on 16th November 2010 before Judge Miller and pleaded not guilty. Since that date concerns were investigated about his fitness to stand trial though not, on the balance of medical opinion, on grounds of unfitness to plead. The first hearing in relation to this was in May 2011 and it was adjourned, at the defence request, to seek a further opinion by an appropriately appointed medical doctor. The prosecution also sought to have their appropriately qualified doctor examine Mr McCullough. Although the court had access to the doctors' reports it was not until yesterday that it proved possible to receive the doctors' evidence.

[4] The court has, for the defence, received two reports from Dr Harbinson, a psychiatrist, one report from Dr Rauch, a psychologist, and one report from Dr Curran, a psychiatrist. It has also had a report from Dr Browne, a psychiatrist, who examined Mr McCullough for the prosecution.

[5] It is established law that the question of fitness to stand trial should normally be dealt with as soon as it is raised and that, where the issue is raised, as it is here, by the defence the test the court should apply is that of being satisfied upon the balance of probabilities that a determination of unfitness should be made. The onus however is upon the party seeking the court to make such a determination. Here it is upon the defence.

[6] The Doctors, and in a case that is as rare as this it is not a surprise, are not in agreement. Dr Curran and Dr Rauch have given evidence for the defence and Dr Browne for the prosecution. Mr B has also given short evidence for the prosecution about two aspects of the defendant's more recent life: his work as a plasterer's helper and his playing darts on a regular local team basis. I have concluded from all this evidence and from the history of this case: that Mr McCullough was fit to plead. He has pleaded not guilty, he appreciates the difference between right and wrong and he also appreciates also the significance and import of pleading not guilty (or guilty).

[7] The question remains is there evidence on which, on balance, I am satisfied that he is currently unfit to be tried. The leading case is that of R v Pritchard (1836) 7 C & P 303.

[8] None of the doctors, who have either given evidence or who have provided reports to the court, disagree about the nature of the deficits that Mr McCullough suffers from. His IQ has been tested by Dr Rauch and he is found to have an IQ that places him in the category of "mild learning disability". His schooling was incomplete and he is unable to read or write. He is capable of

recall of significant events but frequently is inaccurate in the way he recalls dates for significant events.

[9] He has held down a number of jobs, more particularly as a plasterer's assistant with two successive employers and on a wide variety of sites over a considerable period of time. He has been unemployed for some time but his period of employment in a physically demanding job was lengthy and it has only come to an end some few years before the allegations were first made. He is married, but without children, and his wife gives him assistance in relation to such matters as cooking, shopping, taking journeys by bus (to Belfast from Derry for medicals) and in using a mobile phone. He holds some friendships and is sociable, or was, and played darts with some facility. He suffers a considerable number of physical ailments for which he is on medication. This is supervised by his wife who also is clearly a more dominant person. His social functioning is therefore not great but not completely unreasonable.

[10] He tends to minimise his problems and also minimises the disadvantages of being unable to read or write. This is not unusual. In relation to whether he is "suggestible" I have the strong impression from the evidence that whilst he may be a quiet person and keen to please that he is not likely to be a person who would make concessions that were against his interest. He strongly denied the allegations that are made against him both to the police and to Dr Curran. He showed to all doctors that he understood the allegations and that he appreciated this type of behaviour was wrong. I also am satisfied that he has a degree of understanding of the function of a court such as this. He appreciates the importance of these matters, the significance of the roles played by those defending him, those prosecuting him and the role of the jury.

[11] The principal concern of the defence was stated by Dr Curran to be that Mr McCullough would be overwhelmed by the trial and therefore become more anxious to please and as a result make concessions. His IQ reading puts him in the lowest 1% of the population though at the upper end of that 1%. Dr Browne referred to a "bell type" curve where there would be less people in the lowest readings and their deficits would be greater. He however felt that the use of simple language, the avoidance of any abstract concepts, the taking of frequent breaks/adjournments and enquiries to ensure understanding would assist to ensure that a trial is fair, that evidence is understood and that adequate instructions are given.

[12] I am satisfied that the test of unfitness is one that has to be applied before the use of any special measures is considered. The test is expressed in the same way whether fitness to be tried or fitness to plead is being considered. Disability also has a wider concept than a mental disability. Unfortunately the leading case of R v Pritchard has not been recently revisited

in a comprehensive way and all the doctors have conceded that there is, perhaps understandably, a lack of definitive guidance in relation to the scope of a disability. In this case however I suggest the primary concerns are: the extent of ability of the accused to understand the allegations against him, his ability to communicate instructions to the defence team throughout the entire process of a trial, his ability to give evidence in court to the jury and finally his ability to appreciate, in broad terms, the nature of a trial and the role of the jury.

[13] I have also assessed any particular added disadvantage that the accused has been put to by the nature of this trial, of its evidence and by the delays involved. In many respects these are separate issues but the ability to read statements, to make points about the topography of locations and to recall dates are all matters that I have given consideration to as I have made my assessment because of the effect of delay.

[14] Having heard the evidence, whilst I can understand the concerns of the doctors, I am not satisfied on the evidence before me that a determination of unfitness should be made and I decline to make one. This is a matter I will keep under review.

[15] I will also adopt the measures suggested and which I have listed above though I will tailor them to my assessment of what is required as the trial proceeds.

[16] I also have to correct one matter that I believe was erroneous. The relevant parts of the Mental Health Order (NI) 1986 as amended provide:

> ***"Procedure in relation to unfitness to be tried***
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> **49.**—(1) The following provisions of this Article apply where, on the trial of a person charged on indictment with the commission of an offence, the question arises (at the instance of the defence or otherwise) whether the accused is unfit to be tried (in this Article referred to as "the question of fitness to be tried").
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> (2) Subject to paragraph (3), the question of fitness to be tried shall be determined as soon as it arises.
>
> (3) If, having regard to the nature of the supposed mental condition of the accused, the court is of opinion that it is expedient so to do and in the interests of the accused, the court may—
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> (a) postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence; and

(b) if, before the said question falls to be determined, the jury returns a verdict of acquittal on the count or each of the counts on which the accused is being tried, that question shall not be determined.

(4) The question of fitness to be tried shall be determined by the court without a jury.

The court **shall not make a determination** under paragraph (4) except ***on*** the oral evidence of a medical practitioner appointed for the purposes of Part II by the Commission and on the written or oral evidence of one other medical practitioner.

(9) In this Article "unfit to be tried" includes unfit to plead."

[17] In my view this means that the Court is not to make a "determination" of unfitness unless that determination is supported by the requisite evidence. The word "on" has to be read with the words "make a determination". If the evidence of the second doctor disagrees with that of the first, or does not support it, it would be difficult to envisage a court being able to make a determination ***on*** such evidence. There must therefore be the requisite evidence in support of a determination. It is not sufficient for the court to receive the oral evidence of two medical practitioners, one of whom is appointed for the purposes of Part II. They must be in agreement with each other and support the determination.

[18] Here the two medical doctors called in aid by the defence support (in broad terms) each other. The opinion and conclusions of the prosecution expert are at variance with them. The decision is however for me and, upon the totality of the evidence, I am not satisfied that I should make a determination of unfitness in the circumstances of this case.