Neutral Citation No. [2010] NICC 33 | *Ref:* **COG7937**

Judgment: approved by the Court for handing down | *Delivered:* **13/09/10**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND
BELFAST CROWN COURT

THE QUEEN

V

TERENCE GEORGE McGEOUGH

COGHLIN LJ

[1] The accused in this case, Terence George McGeough, together with his co-accused, Vincent McAnespie, is charged with a number of offences arising out of and in connection with the attempted murder of Samuel John Brush on 13 June 1981. The offences with which Mr McGeough has been indicted are: attempted murder, possession of firearms and ammunition with intent, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981, and membership of a proscribed organisation, contrary to section 19(1) of the Northern Ireland (Emergency Provisions) Act 1973 and section 21(1) of the Northern Ireland (Emergency Provisions) Act 1978. The accused has applied to stay these proceedings as an abuse of the process of the court. Mr McGeough was represented by Mr McDonald QC and Mr Vaughan, while Mr Gordon Kerr QC, together with David McDowell, appeared on behalf of the Director of Public Prosecutions. I am grateful to all counsel for their carefully prepared and succinct skeleton arguments and submissions.

Background facts

[2] There was no real dispute between the parties as to the relevant background facts which appear to be as follows:

> (i) On 13 June 1981, the injured party, Samuel John Brush, was shot in the course of an ambush near Ballygawley. During this incident Mr Brush managed to shoot one of his attackers. On the same date a male person giving his name and address as Gerard McGeough of Clones Road, Monaghan, was admitted to Monaghan County Hospital at about 3.45pm suffering from a bullet wound to his chest.

(ii) The individual who had given his name as McGeough was transferred to St Vincent's Hospital, Dublin for treatment and later returned to Monaghan County Hospital to complete his recovery. Whilst under guard at Monaghan County Hospital the individual who had given his name as McGeough escaped on 27 June 1981.

(iii) On 30 August 1988 the accused, Terence Gerard McGeough, was arrested as he crossed the Dutch/German border in a motor vehicle.

(iv) On 27 October 1988 during the search of a flat in Sweden, documentation prepared for an application for asylum was recovered. The prosecution maintains that such documentation was prepared by or on behalf of the accused McGeough and constitutes admissions to the offences charged.

(v) On 4 September 1991 District Inspector Cowan of the RUC visited the accused McGeough in prison in Germany and informed him that he was being investigated in relation to his alleged participation in the attempted murder of Samuel John Brush.

(vi) The documentation referred to at (iv) above was received from the Swedish authorities on foot of a Commission Rogatoire and examined by Mr Maxwell, a forensic expert in handwriting. On 4 February 1992 Mr Maxwell concluded that the handwriting in the documentation could be attributed to the accused McGeough.

(vii) Between 9 March and 1 May 1992, the Director of Public Prosecutions in Northern Ireland considered applying for the extradition of the accused McGeough but no application was ultimately made.

(viii) On 28 May 1992, the accused McGeough was extradited from Germany to the United States of America.

(ix) In May of 1996, the police in Northern Ireland became aware that the accused McGeough had returned to and was resident in the Republic of Ireland.

(x) On 14 February 2007 the current investigation was re-opened.

(xi) On 8 March 2007 both accused were arrested and charged with a number of offences arising out of the attempted murder 1981.

The legal framework

[3] In R v. S [2006] EWCA Crim 756 the Vice President, Rose LJ, confirmed that the discretionary decision whether or not to grant a stay of proceedings as an abuse of process because of delay was an exercise in judicial assessment dependent on

judgment rather than any conclusion as to fact based on evidence and noted that, in such circumstances, it was potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof. At paragraph 21 of his Judgment he made the following observations:

> "21. In the light of the authorities the correct approach for a judge to whom an application for a stay for an abuse of process on the ground of delay is made is to bear in mind the following principles:
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> *(i)* even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
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> *(ii)* where there is no fault on the part of the complainant or the prosecution it will be very rare for a stay to be granted;
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> *(iii)* No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
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> *(iv)* When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate directions from the judge;
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> *(v)* If having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

[4] A similar approach to a stay based on the consequences of delay has been taken by the Court of Appeal in Northern Ireland and in R v. PMH [2006] NICA 9 Kerr LCJ said at paragraph 7:

> "[7] As this court has held in R v. B [2005] NICA 29 the ultimate objective of the power to stay proceedings is to ensure that there should be a fair trial according to law which involves fairness both to the defendant and the prosecution. Expressed slightly differently, the task for the courts in the words of Lord Mustill in Tan v. Cameron [1992] 2 AC 205 is to decide ' . . . whether, in all the circumstances, the situation created by the delay is such as to make it an

> unfair employment of the powers of the court any longer to hold the defendant to account.'"

The learned Lord Chief Justice, after referring to the judgment of Carswell LCJ in Re DPP's application [1999] NI 106, went on to make the following remarks with regard to the nature and extent of the degree of prejudice to be established:

> "[9] The task for the court in the present case, therefore, is whether it should conclude that because of the delay the fairness of the trial would be adversely affected. In this context we should point out that the possibility of prejudice is not sufficient. As this court said in *Re DPP's application*, prejudice to the fairness of the trial arising from shadowy possibilities of mounting a defence will not be a basis for granting a stay of proceedings. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: see the Ex parte Bennett case [1994] 1 AC 42 at 74, per Lord Lowry."

[5] The principles relevant to a stay of proceedings consequent upon a breach of a defendant's right to a fair trial within a reasonable time in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") have been set out by Lord Bingham at paragraph 24 of his judgment in Attorney General's Reference No 2 of 2001 [2004] 1 All England Reports 1049 in the following terms:

> "[24] If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under Article 6(1). For such breach there must be afforded such remedy as may be just and appropriate (Section 8(1) of the Human Rights Act 1998) or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgment of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless
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> *(a)* there can no longer be a fair hearing, or

(b) it would otherwise be unfair to try the defendant.

> The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions *(a)* or *(b)* is met, since the breach consists in the delay which it has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgment of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless *(a)* the hearing was unfair or *(b)* it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions *(a)* or *(b)* applies the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."

[6] In Dyer (Procurator Fiscal, Linlithgow) v. Watson and Another [2004] 1 AC 379 Lord Bingham said, at paragraph 52:

> "In any case in which it is said that the reasonable time requirement . . . has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive."

Lord Bingham went on to identify three areas as calling for particular enquiry in such circumstances. The first of these was the complexity of the case, the second the conduct of the defendant and the third was the manner in which the case has been dealt with by the administrative and/or judicial authorities.

[7] In criminal cases the reasonable time guarantee in accordance with Article 6 normally runs from the time of charge. A person is subject to a charge within the meaning of Article 6(1) when he is "substantially affected" by the proceedings taken against him (see Eckle v. Federal Republic of Germany (1982) 5 EHRR 1). This will usually be "the earliest time in which a person is officially alerted to the likelihood of criminal proceedings against him . . . that period will ordinarily begin when a defendant is formally charged or served with a summons" (see Attorney General's Reference No 2 of 2001 paragraph 27).

[8] Finally, as always, it is worth noting the words of Lord Lowry in R v. Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42 when he said, at page 74:

> "I agree that prima facia it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely 'pour encourager les autres'."

In Re Director of Public Prosecutions for Northern Ireland's application [1999] NI 106 Carswell LCJ, as he then was, adopted Lord Lowry's observations in the course of a judgment refusing a stay in a case in which the DPP accepted without reservation, that the delay had been excessive, unacceptable and unjustifiable.

Submissions

Delay

[9] Mr McDonald advanced two main propositions in relation to delay:

(i) Mr McDonald distinguished the application brought by the accused McGeough from the similar application advanced by his co-accused, Mr McAnespie, on the basis that Mr McAnespie had only become aware of the criminal proceedings at the time of his arrest, whereas Mr McGeough had been interviewed by the police in 1991 whilst on remand in Germany. In such circumstances, Mr McDonald contended that the period of "uncertainty" was much greater for Mr McGeough than it had been for Mr McAnespie.

(ii) Mr McDonald also relied on the very substantial period of time that has elapsed and laid particular emphasis upon the absence of any attempt on behalf of the authorities to extradite Mr McGeough from Germany, the United States of America or the Republic of Ireland despite being aware of his presence in those locations.

[10] Mr McGeough gave sworn evidence before me and, in doing so, he confirmed that prior to 2000 he had been living in the Republic of Ireland but had returned to Northern Ireland upon at least twelve occasions. He said that he had been stopped by the authorities on several occasions but had never been arrested. He gave evidence that he had inherited property near Dungannon and, thereafter, started to spend more time in Northern Ireland looking after that property and acting as the executor of his late uncle's will. In 2003 he made a planning application and entered into discussions with the local Housing Executive about the erection of a building. He renewed his Northern Ireland driving licence recording thereon his address near Dungannon. He told the court that he had been summoned to serve on a jury on two occasions but had been exempted by virtue of his profession as a teacher. His eldest daughter entered school in Northern Ireland in 2006 and, during term time, he stayed with his family in that jurisdiction.

[11] As in the case of Mr McAnespie I accept that the period of time which has elapsed in this case is one which, on its face, appears to be excessive and gives ground for concern. Apart from the period between 9 March and 1 May 1992, no explanation from the prosecution has been forthcoming as to why an application for extradition was not pursued or further considered and/or revived at a later stage. There is also no explanation as to why the accused was not apprehended and interviewed between 2000 and 2007 despite his fairly regular physical presence in Northern Ireland and the existence of documentary records indicating his location. However, I am quite satisfied, on the basis of the evidence given by this accused, that Mr McGeough himself has substantially contributed to the delay by leaving the jurisdiction almost immediately after the attack upon Mr Brush and remaining outside the jurisdiction until the late 1990s. In the course of giving his evidence Mr McGeough said that, subsequent to his release from custody in the USA in March 1996, he had returned to the Republic of Ireland and the primary reason for not visiting Northern Ireland at that time was his concern for his personal safety in the context of a number of his neighbours and relatives having been killed. However, he also conceded that, at that time, it was clear that he was wanted for questioning by the Royal Ulster Constabulary. In *Dyer v Watson* Lord Bingham, giving the opinion

of the Privy Council, said that the court should pay regard to the conduct of the defendant including absenting himself from the jurisdiction and in *Gomes v Trinidad & Tobago [2009] 1 W.L.R. 1038* Lord Brown delivering the considered opinion of the Privy Council said at paragraph 26 of the judgment:

> "26 True it is that Laws LJ then added 'an overall judgment on the merits is required, unshackled by rules with too sharp edges.' If, however, this was intended to dilute the clear effect of Diplock para 1, we cannot agree with it. This is an area of the law where a substantial measure of clarity and certainty is required. If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting State should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting State communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him properly to assert that the effects of further delay were not 'of his own choice and making'."

[12] I also take into account the fact that the accused has not identified any specific element of prejudice said to result from the delay. He told the court that he had read the file and was familiar with the evidence. In cross-examination he confirmed that at the trial he would be able to deal with each of the pieces of evidence put to him by Mr Kerr.

Assurances

[13] Mr McGeough also relies upon an assurance that he was free to return to Northern Ireland without fear of being arrested said to have been received by him from Mr Gerry Kelly of Sinn Fein in or about July 2000. He explained that, at that time, he had been encouraged to take part in a competition to select a Sinn Fein election candidate. He said that he was aware that "on the runs" (OTRs) were a factor in the ongoing negotiations then taking place in the course of the Peace Process. He met Mr Kelly who suggested that he provide him with his name and address to be included in a list of OTRs to be submitted on behalf of Sinn Fein. Mr McGeough said that, as a consequence of his conversation with Mr Kelly, he understood that he would not be arrested or charged when taking part in the selection competition.

[14] Mr McGeough also relied upon the evidence of Mr William Smith, an experienced community worker, who was the chairman of the Progressive Unionist Party and Prisoners' Spokesman during the negotiations leading to the Belfast Agreement of 1998. Mr Smith gave evidence that in March/April of 1998 he had attended a meeting at Castle Buildings, Stormont when the then Secretary of State, Ms Mowlam, confirmed that those who had been involved in carrying out criminal offences during the terrorist campaign but had not been convicted would not be subjected to any further legal process. Mr Smith named a number of senior NIO officials who he said were also present at that meeting and he maintained that the Secretary of State had repeated the assurance in a number of private meetings. He said that loyalist and republicans were both asked to provide lists of OTRs and that he believed the question of the OTRs was "done and dusted".

[15] During his cross-examination, Mr McGeough was shown and asked to comment upon a letter from the Northern Ireland Office to Mr Gerry Kelly dated 22nd January 2003. That letter referred to correspondence between NIO officials and Mr Kelly about "a number of individuals who are currently on the run but want to return to Northern Ireland and wish to be informed of their status if they were to do so." The letter confirmed that following investigations by the relevant authorities, which apparently included the Office of the Attorney General, the "necessary checks" had now been completed on six individuals who, in the then current circumstances of their cases, would face arrest and questioning if they returned to Northern Ireland. One of those six individuals was the accused, Terence Gerard McGeough. Mr McGeough stated that he had no knowledge of that letter and maintained that, subsequent to the conversation in July 2000, he had never, at any stage, been told by Mr Kelly that he would face arrest and questioning if he returned to Northern Ireland. When asked to comment upon why he thought Mr Kelly would not have drawn his attention to this apparently serious and radical change of attitude on the part of the authorities, Mr McGeough said that, by January 2003, he had left Sinn Fein as a consequence of "animosity" and was not on speaking terms at all with Mr Kelly.

Discussion

[16] I have carefully considered the evidence and the submissions of counsel in relation to this application. With regard to the passage of time I take into account the responsibility of the accused for a very substantial portion of the delay together with the absence of any evidence of any specific prejudice. It would appear that, at some stage during the negotiations leading up to the Belfast Agreement, republican and loyalist representatives were asked to provide lists of OTRs in respect of which checks were to be made by the authorities for the purpose of determining whether persons named in such lists would be subject to arrest and questioning should they wish to return to Northern Ireland. It is quite clear from the evidence given both by Mr McGeough and Mr Smith taken together with the letter of 22 January 2003 that this was a continuing process which was still proceeding some 3 years after Mr McGeough's conversation with Mr Kelly. In such circumstances it is very difficult to

accept as a matter of fact Mr Smith's assertion that the question of OTRs was "done and dusted" on the completion of the Belfast Agreement. I am satisfied that, at the material time Mr Gerry Kelly was the Sinn Fein party member entrusted with producing such a list in the course of conducting negotiations with the NIO and that he was not acting as a representative of the police, the prosecution or the Executive. In *R v Abu Hamza [2007] QB 659* Lord Phillips emphasised that it is only in rare circumstances that it would be offensive to justice to give effect to the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. After a review of the relevant authorities he went on to say, at paragraph 54:

> "54 These authorities suggest that it is not likely to constitute a abusive of process to proceed with a prosecution unless; (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Event then, if facts come to light which were not known when the representation was made, these may justify proceedings with the prosecution despite the representation."

In my view the evidence in this case falls very short of establishing such an unequivocal representation.

[17] For the reasons set out above I propose to dismiss the application.