Neutral Citation No. [2010] NICA 34 | *Ref:* **GIR7973**

Judgment: approved by the Court for handing down | *Delivered:* **22/10/10**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

V.

STEPHEN PAUL McSTRAVICK

Before: Morgan LCJ, Higgins LJ and Girvan LJ

Girvan LJ (delivering the judgment of the court)

Introduction

[1] The appellant, Stephen Paul McStravick, was jointly charged with Michael Patrick Clarke on six counts on the bill of indictment.

> (1) Count 1 alleged that both defendants robbed Brinks Ireland Limited of £85,000 in cash on 28 May 2008 at Duncrue Road, Belfast;
> (2) Count 2 alleged that both defendants falsely imprisoned JL on 28 May 2008 at JL's family home in County Down;
> (3) Count 3 alleged that both defendants kidnapped EC on 28 May 2008 at the same location;
> (4) Count 4 alleged that both defendants kidnapped MC on 28 May 2008 at the same location;
> (5) Count 5 alleged that both defendants falsely imprisoned EC on 28 May 2008 at a house on the Ravenhill Road, Belfast; and
> (6) Count 6 alleged that both defendants falsely imprisoned MC on 28 May 2008 at a house on the Ravenhill Road.

[2] Following the commencement of the trial before a jury the trial judge discharged the jury and in exercise of the powers contained in section 46(3) of the Criminal Justice Act 2003 he directed that the trial should continue before him alone. On 12 February 2010 this court dismissed an appeal against the

trial judge's ruling. The trial resumed before the trial judge sitting alone and was eventually completed on 12 March 2010. On 19 March 2010 the trial judge found the appellant guilty on counts 5 and 6 and acquitted him on the other counts.

[3] The appellant who has a right of appeal by virtue of the fact that he was tried by a judge sitting alone challenges his conviction on counts 5 and 6. The thrust of the appellant's appeal is that the trial judge erred fundamentally in convicting the appellant of false imprisonment having concluded that he was not guilty of a joint enterprise to rob and/ or kidnap.

The evidence

[4] The evidence adduced at the trial established the following:-

(a) JL, his partner EC and their son MC resided in County Down on 28 May 2008. In the early hours of the morning at 2.35 am entry was forced to their home by a number of persons who were armed. The family was held captive and EC and MC were removed from the house at about 4.00 am. JL was employed by Brinks Ireland Ltd ("Brinks") and was told to go to work that day and make arrangements for the hand over of cash to the assailants from the Brinks Ireland facility at Duncrue Road, Belfast. He was instructed that his family would be held captive until such time as the hand over had been completed.

(b) On arrival at his place of employment at about 7.00 am JL took steps to inform his employers of what had taken place and the police were informed. An operation was undertaken by Brinks and the police to deposit £85,000 in a yellow salt box at the rear of the Northern Bank close to the Brinks facility. The moneys were removed from that yellow salt box that afternoon at about 5.43 pm by the co-accused Clarke. This event was recorded by police surveillance team. Clarke was driving a red VW Golf. This was a stolen vehicle and was bearing "ringer" plates. It was recovered shortly after 6.00 pm after it was set on fire in Ben Eden Gardens.

(c) Having been removed from their family home EC and MC were taken in a white Renault traffic van to a house situated on the Ravenhill Road, Belfast. That vehicle was recovered also having been set on fire at 5.58 pm at Iris Close, Belfast. EC and MC were held captive in the house on the Ravenhill Road throughout the course of

that day before eventually leaving the house between 6 and 7 pm when they realised that their captives had left. The Renault van which had been stolen in advance was bearing "ringer" plates.

(d) During the course of their captivity EC and MC were given foodstuffs contained within a Spar carrier bag. During the morning of 28 May MC was hungry and would not eat sandwiches which the captives had brought from the family home. EC asked the captors to get him a plain ham sandwich. Following this request a period of time elapsed. EC was then given the bag and foodstuffs. When provided with the foodstuffs contained in the Spar bag she was specifically told that she had to return all the packaging to her captures in the bag. She was provided with a plain ham sandwich, a carton of Suki orange and a tube of Smarties. EC confirmed that the three items on the list contained within the till receipts, exhibit CA1, matched the items given to her in the Spar bag. The evidence established that that the only Spar shop within a two mile radius where that combination of items in that till receipt was purchased at the relevant time was at Anchor Lodge Service Station on the Ravenhill Road, Belfast, a short distance from the house in which EC and MC were held captive..

(e) Investigation of the till role revealed that these three items together with a packet of 10 Regal filter cigarettes and a pack of 24 Pampers baby wipes had been purchased at that store at 11.50 am on 28 May 2008. CCTV footage revealed that a light blue coloured Vauxhall Astra was present on the forecourt when an unknown male got out of the passenger side of the vehicle and made those purchases in the shop before returning to the Astra and getting into the passenger side.

(f) The appellant was arrested at his home in Downpatrick on 31 May 2008. A search conducted of those premises by the police recovered an empty pack of 24 Pamper baby wipes from the top of the wheelie bin located in the back yard of the premises. This was close to a bag which was tied and which when opened and examined contained a number of drinks bottles and five latex gloves. When the contents of the bag were forensically examined a mineral water bottle and a latex glove were

found containing a DNA profile matching that of Clarke and three Coke bottles containing DNA matching a profile of the appellant. The Vauxhall Astra was registered to the name of the appellant's wife and it was recovered at the rear of the premises.

(g) The appellant underwent eight interviews between 1610 pm on 31 May 2008 and 2158 on 1 June 2008. It is clear that he changes his story as the interviews developed. At his first interview he made no mention of being on the Ravenhill Road and claimed to have spent three of four hours in the company of a friend whose nickname was Beano to whom he claimed to have supplied sausages. In his next interview he said he might have been on the Ravenhill Road the other day and he said that he was on his own. He then claimed he was on the Ravenhill Road but then subsequently gave a different account. In his third interview he said that he did not think he had stopped at a shop and he claimed his car had been somewhere and that someone had plated the car. In his fourth interview when he was challenged with a photograph placing his car at the Anchor Lodge Spar shop at 1153 am on 28 May he said he did not know if it was his car and he could not remember shopping at the shop or petrol station. He said he definitely was not there but if he did go there it was to buy cigarettes. In his fifth interview he claimed he did not recognise the man who could be seen getting out of his car. In his seventh interview when challenged about the Pampers packet found in his wheelie bin he said he had probably bought them in Downpatrick. In his eighth interview he changed his story. He recounted that he had collected a passenger who did not say why he was going to Belfast. He conveyed him to Belfast. They drove down the Ravenhill Road. He stopped at the garage at the passenger's request. While driving back along the Ravenhill Road the passenger said he was meeting somebody. The vehicle stopped at traffic lights and the passenger got out. In response to further questions he stated that he drove from Downpatrick to Newcastle and collected his passenger there by prior arrangement. He admitted that the visual evidence showed his vehicle in the garage forecourt. He could not describe his passenger's attire. This passenger he called "Ed". That was all that he knew and he did not know where he lived and he had known him for five or six months. He had

never spoken to him by telephone. He would receive "a bit of a smoke" for driving him to Belfast. The passenger had an English accent. He did not know what the passenger's business was in Belfast. He did not know where the passenger went after dropping him off. He would be wary of the passenger. He was offered £10 for diesel but declined this. He said that the passenger had a distinctive nose and he could not remember him wearing a hat. Although he had not been threatened he said he was afraid and he could not remember whether the passenger was wearing gloves. The appellant claimed that he was telling the truth about everything.

(h) The appellant said that he knew EC and all the members of the C family in County Down all his life. He was aware that he was being questioned by police in relation to suspicion of kidnapping, false imprisonment and robbery connected with EC. He said that he knew of these matters and had seen them on the news. He only made mention of his knowledge of EC at his fifth interview.

(i) The prosecution asserted and the trial judge accepted that the appellant was the driver of the Astra car on the forecourt of Anchor Lodge. He had brought there the man who purchased the foodstuffs for MC who was close by in the house in Ravenhill Road. He was in Belfast during that day. He was connected forensically in timeous proximity to the events of 28 May to the co accused Clarke by virtue of the DNA evidence. The retrieval by Clarke with whom the appellant was linked as aforesaid of the Brinks, money was closely followed by the end of the false imprisonment of EC and MC with which the appellant was linked. The appellant lied consciously and persistently during his interviews, a point which the judge accepted.

(j) The appellant did not give evidence during the course of the trial. The only accounts that he had given for his actions on 28 May 2008 were those given during the course of his interviews.

The judges' findings

[5] The trial judge in his judgment reached the following conclusions to the requisite criminal standard.

(a) The appellant willingly transported a gang member in his vehicle during the relevant morning driving down the Ravenhill Road and stopping at the garage at the passenger's request.

(b) The appellant participated in the purchase of retail goods which were used for the purpose of the operation.

(c) The use of the appellant's vehicle for this purpose was of obvious value and utility to the gang providing assistance and support to other members of the gang and facilitating the overall enterprise.

(d) The appellant had a role in disposing of certain important items of physical evidence in the aftermath of the kidnapping and false imprisonment.

(e) The captors were clearly forensically aware. The Pampers product was purchased to facilitate the conduct of the criminal operation probably to eliminate potentially incriminating traces.

(f) There was a direct correlation between the purchase of these items and the empty packages recovered from the defendant's wheelie bin.

(g) The judge rejected the appellant's explanations in interview.

(h) The scientific evidence concerning the recovered latex glove connected the appellant with the co accused. The judge made a finding of deliberate disposal by the appellant because it constituted potentially incriminating material.

(i) The judge found that the scientific evidence established a previous connection between the appellant and his co accused.

(j) He found a close temporal connection between the compilation of the contents of the plastic bag and its insertion in the receptacle.

(k) The judge found that both defendants were demonstrably involved in the relevant criminal operation. He concluded that the evidence pointed firmly to the association between them and was linked exclusively to the commission of one or more of the principal offences.

(l) Crucially at paragraph [83] the judge states –

> "I am satisfied that (the appellant) had been recruited to act as a member of a criminal gang *for the purpose of the operation in question*. The terms of the recruitment would have been made clear to him the nature and scope of his role. Having regard to the evidence adduced I find that this role was one of providing driver support service on the date in question." (italics added)

(m) In dealing with inferences to be drawn from the fact that the appellant did not give evidence the judge made the inference that he was unable to provide any account, answer or explanation capable of withstanding critical scrutiny in circumstances when the Crown case demanded an answer.

(n) He concluded that having regard to the Lucas principle the appellant's manifestly deliberate and significant lies were not susceptible to an innocent explanation. He had consciously and repeatedly lied in his interviews.

[6] The judge at paragraphs [81] and [82] of his judgment concluded:-

> "With regard to this accused I shall consider initially the first four counts in the indictment. In my view the evidence fails to establish a sufficient nexus between this accused, a secondary party and the commission of these offences by the principal parties. There is no direct evidence establishing a secondary role by this accused in the commission of these offences and insufficient evidence from which inferences adequate to support a finding of guilt to the criminal standard can be made. The prosecution have failed to discharge the burden of establishing an actus reus on the part of this accused vis a vis the first four counts.

> 82. The critical question is whether the prosecution have established beyond reasonable doubt that this defendant had the necessary mens rea in respect of the fifth and sixth counts in the indictment namely the false imprisonment of E[C] and M[C] [at the house on the] Ravenhill Road. I must consider whether, by inference, this accused knew that offences of this kind were being committed and knew the essential elements of the offending in this respect …….”

The appellant's argument

[7] Mr Pownall QC argued that the trial judge's conclusion lacked logic. He argued that the trial judge had correctly identified the law relating to secondary participants. He found that there was insufficient nexus between the applicant as a secondary party and the commission of Counts 1-4 by the principal parties. He found there was insufficient direct or inferential evidence to establish an actus reus on behalf of the appellant in the commission of the robbery and kidnapping offences. This was, it was argued, an inevitable finding as the applicant was with his girlfriend at the time of the kidnapping and had been with his wife in the hospital in the course of the morning. It was submitted that his conclusion that the applicant had sufficient mens rea for guilt to be found in respect of counts five and six was at odds with his earlier findings. The conviction on Counts 5 and 6, accordingly, was inconsistent with the acquittal on Counts 1-4.

Conclusions

[8] The Crown case was that the defendants were joint participants in a joint enterprise. That alleged joint enterprise involved the robbery of Brinks the robbery being executed by means of subjecting an employee in Brinks to such fear caused by the kidnapping of his partner and child that he would be forced to co-operate in the removal of money from Brinks for the benefit of the defendants. In other words the modus operandi of the robbery was by means of what is commonly called a "tiger kidnapping." The first question for determination by the court was whether the appellant was a party to a joint enterprise or plan to commit such an offence.

[9] In a straightforward joint enterprise case the direction which a judge should give his jury in a jury trial or himself in a non jury case is succinctly set out in Crown Bench Book thus:-

> "The prosecution case is that the defendants committed this offence together. Where an offence is

> committed by two or more persons each of them may play a different part but if they are acting together as part of a joint plan to commit the offence they are each guilty of it. The word plan does not mean there has to be a formal agreement about what has to be done. A joint plan to commit an offence may arise on the spur of the moment. It can be made with an nod or a wink or a knowing look (even without such actions you may infer from the behaviour of those involved that they agreed to commit the offences. Put simply the question for you is were they in it together? Your approach to the case should therefore be as follows: if, looking at the case of the defendant you are satisfied beyond reasonable doubt that he committed the offence on his own or that he did an act or acts as part of a joint plan with others he is guilty.

It goes without saying that defendants in a joint enterprise may play different roles. A look-out or a driver may not participate in the actual act of violence, robbery or murder, as the case may be, but if he is a party to a joint plan to bring the relevant result about and by his actions knowingly contributes to that outcome he will be guilty. If not a principal actor in the plan he may be guilty as an accessory if he intentionally aids the principal actors if he at least knows the essential matters which constitute the offence (per Lord Goddard in Johnson v Youden [1950] 1 KB 544.)

[10] The judge's legal analysis unnecessarily complicated what was at the end of the day a straightforward case and it may have diverted the judge from the key question which was whether the Crown had proved beyond reasonable doubt that the appellant was a participant either as a principal actor or as an accessory in a joint plan to carry out a tiger kidnapping in furtherance of a robbery. The dissection of the principles of mens rea and actus reus in the judge's analysis diverted attention from that central and key question. If the appellant had the mens rea sufficient to show a conscious and willing participation in the planned robbery albeit that he merely acted as a driver in the circumstances alleged and he knowingly did an act in furtherance of the joint plan that very act itself would constitute the actus reus. Furthermore the judge misdirected himself in paragraph [81] when he appeared to require "direct" evidence establishing a secondary role by the accused in the commission of the offence. Regard must be had to all the evidence including circumstantial evidence in approaching the question whether the evidence establishes beyond reasonable doubt that the defendant was a knowing participant in the offences charged either as a principal actor or as an accessory.

[11] By his own findings in paragraph [83] the trial judge concluded that the defendant had been recruited to act as a member of a criminal gang for the purpose of the operation and that the terms of his recruitment would have made clear the nature and scope of his role:

> "I am satisfied that (the appellant) had been recruited to act as a member of a criminal gang *for the purpose of the operation in question.* The terms of the recruitment would have been made clear to him the nature and scope of his role."

That finding combined with his other findings against the appellant amply supported by the evidence demonstrates clearly the safety of his conviction on Counts 5 and 6 which were ingredient offences in the overall joint plan. The trial judge's findings, in fact, demonstrated his participation in all the offences and not merely Counts 5 and 6. Counsel's criticism of the lack of logic in the trial judge's conclusions is not unjustified but it was a lack of logic which resulted in an unmerited advantage to the appellant. The appellant cannot rely on it to undermine the conviction on Counts 5 and 6 which was soundly based, albeit that it was an incomplete reflection of his true participation in the crime.