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*(subject to editorial corrections)**

IN THE CROWN COURT FOR THE DIVISION OF LONDONDERRY

THE QUEEN

–v-

R M

McCLOSKEY J

[1] The subject matter of this ruling is an application on behalf of the Defendant to stay his prosecution on the ground that it constitutes an abuse of the process of the court.

[2] The prosecution of the Defendant has evolved, in certain respects, at a comparatively late stage. This evolution has included the service of additional evidence, in particular a witness statement of CM. In consequence, the originally scheduled trial commencement date of 21st April 2009 has been vacated. At this stage, a jury had been sworn and the trial was projected to begin on 27th April 2009. When the court reviewed this prosecution on 3rd April 2009, a draft amended indictment, accompanied by a helpful *aide-mémoire* (prepared by Mr. Hunter QC, who appears with Miss McGuigan on behalf of the prosecution) was produced. At a further review hearing, held on 21st April 2009, two further versions of the same document were produced to the court.

[3] This stimulated a formal application to amend the Bill of Indictment, in the exercise of the court's power under Section 5 of the Indictments Act (Northern Ireland) 1945. The thrust of this application was that the proposed amendments of the Bill of Indictment were designed (a) to set out in clear and appropriate terms the dates material to each count, in a manner which will enable the jury to relate each count to the evidence to be adduced in support thereof and (b) to distinguish clearly and intelligibly between specific counts and specimen counts. The court duly acceded to this application. I was satisfied that the amendments did not entail any fundamental alteration in or reorientation of the Crown case. In particular, the supporting evidence remains unchanged and the Defendant did not claim either to be taken by surprise or, in the language of the statute, to be the victim of resulting "*injustice*". In the exercise of what is an evidently broad statutory power, I duly acceded to the Crown application. The final amended indictment has now been served and filed.

[4] In consequence, the present Bill of Indictment, not unlike its predecessor, contains 18 counts. Each of these alleges the offence of cruelty to a person aged under sixteen years, contrary to Section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968, which provides:

> "*(1) If any person who has attained the age of sixteen and has responsibility for any child or young person under that age wilfully assaults, ill treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill treated, neglected, abandoned or exposed* ***in a manner likely to cause him unnecessary suffering or injury to health*** *(including injury to or loss of sight, or hearing, or limb, or organ of the body and any mental derangement) that person shall be guilty of an offence …* ".

[My emphasis].

Section 20(3) provides:

> "*A person may be convicted of an offence under this Section –*
>
> *(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person …*
>
> *(6) Nothing in this section shall be construed as affecting the right of any parent, teacher or other person having the lawful control or charge of a child or young person to administer punishment to him*".

The words highlighted above formed the basis of an application on behalf of the Defendant for an order of "no bill" in relation to the third, ninth and fourteenth counts on the amended indictment, pursuant to Section 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969. I refused this application, on the ground that I was satisfied that the papers disclose sufficient evidence upon which a reasonable jury, properly directed, could convict the Defendant as regards these counts.

[5] The breakdown of the amended Bill of Indictment is as follows:

(a) Counts 1 to 4 concern the offences of cruelty allegedly perpetrated by the Defendant against R, spanning the period July 1993 to July 2005. The first three counts are specific, whereas the fourth is specimen.

(b) Counts 5 to 11 concern the seven offences of cruelty allegedly perpetrated by the Defendant against P, beginning in December 1994 and ending in March 2006. Nos. 5 – 10 are specific, whereas No. 11 is specimen.

(c) Counts 12 to 17 concern the six offences of cruelty allegedly perpetrated by the Defendant against J, during the period December 1994 to March 2006. The first five are specific, whereas the sixth is specimen.

(d) Count 18 is a specimen count relating to A, in respect of the period 17th February 2002 to 1st March 2006.

[6] The Defendant is a married man and the father of four children of the marriage. In very brief compass, it is the Crown case that the Defendant perpetrated a series of offences of cruelty against his children spanning a protracted period. Based on the amended Bill of Indictment, the earliest date is July 1993 and the most recent is March 2006. The children who are alleged to be the victims of this offending are:

(a) R, now aged nineteen years.

(b) P, now aged eighteen years.

(c) J, now aged thirteen years.

(d) A,, now aged ten years.

The protagonists in this affair include (inexhaustively) C M, spouse of the Defendant and mother of the children of the family and W M, C M's mother (and, hence, grandmother of the children). The court has been informed, helpfully and candidly, by Mr. Hunter QC that the prosecution will not seek to lead evidence from any of the following persons:

(i) J

(ii) A

(iii) W M (at present).

I add the rider that, per Mr. Hunter QC, there was never any intention to adduce evidence from A, the youngest child of the family.

[7] It follows that the prosecution will seek to establish the guilt of the Defendant in respect of counts 12 to 18 inclusive (viz. those involving J and A) by reference to the testimony of C M (the mother) and the two older children, both

alleged victims, R and P. In brief, it is proposed that these three witnesses will attest to what they saw and heard as regards these final seven counts. There will be no direct evidence from either of the victims, nor will there be any evidence in written form on their behalf. For completeness, I should record the Crown's intention to adduce evidence also from A H, who is the author of one of the witness statements in the committal papers. He describes himself as the cousin of the four boys and his statement contains a series of allegations to the effect that the Defendant assaulted the boys, in a variety of ways – hitting, using a belt, punching, grabbing and striking with a rolled up newspaper. The evidence of the four witnesses identified in this paragraph will also, in principle, sound on the first eleven counts of the indictment, where the alleged injured parties are R and P.

[8] It is submitted by Mr. McCrudden QC (appearing with Mr. Cairns) on behalf of the Defendant as follows:

(a) The court has a power to require the attendance of witnesses at any criminal trial.

(b) Such power should be exercised by the court, in this instance, in respect of J.

(c) J is an unquestionably material witness.

(d) If the court declines to exercise this power, unfairness to the Defendant will ensue. This unfairness will consist of the lack of opportunity for defence counsel to expose before the jury and to test asserted inconsistencies, differences and contradictions in the accounts provided by the various protagonists. Equally, there will be no opportunity to cross-examine J about possible collusion, malevolent influence and manipulation – in short, to employ a convenient generic word in its non-technical sense, contamination.

Given this asserted unfairness to the Defendant, and on the premise that the court will decline to exercise the aforementioned power, Mr. McCrudden QC submits that the court should stay the prosecution on the ground that it is an abuse of process.

[9] Responding on behalf of the Crown, Mr. Hunter QC submitted that if J was to testify at the trial, his evidence would be inimical to the defence case. Had he been a willing witness, the prosecution would undoubtedly have wished to call him. His evidence would strengthen the prosecution case, he argued. It is accepted that his absence will, in consequence, significantly weaken the prosecution case. Mr. Hunter further submitted that the Defendant will be at liberty to explore and expose and explore any suggestion of "contamination" in the cross-examination of three significant actors (C M, R and P). The defence will also be able to exploit to their advantage the absence of J and the trial judge will be

obliged to highlight this fact to the jury. Finally, Mr. Hunter informed the court that based on his consultations with the individual concerned, J is a wholly unwilling witness, very uncommunicative and under severe stress, who simply refuses to testify.

[10] In support of the contention that the court is empowered to require J to attend, Mr. McCrudden cited the decision of the English Divisional Court in ***Regina –v-Haringey Justices, ex parte DPP*** [1996] 2 Cr. App. R119, where Stuart-Smith LJ suggested, in the context of a challenge by the DPP to a decision of the Justices to dismiss a summary prosecution as an abuse of process:

> "*Was there any alternative in this case? In my view there was. The justices could have called the witnesses themselves. It is clearly established in the Crown Court that the judge has such a power …* ".

[At pp. 126g-127a].

His Lordship noted that in ***Regina –v- Cleghorn*** [1967] 2 QB 584, Lord Parker CJ had stated, at p. 587:

> "*It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have a right to call a witness who has not been called by either party*".

Stuart-Smith LJ characterised this power as one "*to be exercised rarely*", observing further [at p. 127d]:

> "*There has hitherto been no reported case confirming their power to do so or in what circumstances it should be exercised*".

There is a further passage in the judgment which should properly he highlighted:

> "*Where the witness is a police officer it is in my view unrealistic to require a defence to call him and I do not think it is in the interests of justice that they should be required to do so. The situation with other witnesses may well be different and each case will have to be considered in the light of its own facts*".

[See p. 124g-125a].

The Divisional Court concluded that this was one such case and made an order quashing the decision of the Justices.

[11] The existence of the power which the court is urged to exercise in the present case was recognised also by the English Court of Appeal in ***Regina –v- Bradish and Others*** [2004] EWCA. Crim 1340, per Kay LJ at paragraphs 35-41 especially. The court scrutinised in particular the real reason why the defence sought to have the "missing" witness (in that case, one Mr. Roberts) to testify before the jury. Kay LJ stated:

> "*[38] They did not in any way intend to invite the jury to act upon the evidence of the witness, which they wanted the jury to conclude was untrue, but rather they wanted the questions asked in cross-examination to have an impact upon the jury. That was, we conclude, an improper device and it is not the purpose of cross-examination to act as a substitute for evidence. Cross-examination is to establish the evidence of a witness and it is on the evidence that the jury are obliged to consider the case.*"

This issue was also addressed by the Divisional Court in ***Haringey Justices***, at p. 124e/f:

> "*Where, in the exercise of their unfettered discretion, the prosecution choose not to call a witness, such witnesses will fall into one of two categories. First, there are those whose evidence is helpful to the defence and tends to contradict the Crown's case. On being notified of the existence of such a witness, the defence can make arrangements to call him. Secondly, there are those whose evidence supports the Crown's case but, for whatever reason, it is decided not to call him or her.* ***In the ordinary way the defence will obviously not wish such a witness to be called. But there may be exceptional cases where the defence do wish such a witness to be called.***"

[My emphasis].

In concluding that this was such a case, the court acceded to the defence contention that they would have a better prospect of establishing their defence (which was intentional/collusive harassment and assault by the two police officers concerned against the Defendants) by cross-examination of the missing officer designed to exploit alleged discrepancies and to expose alleged fabrication. It is trite to observe that this was the judgment formed by the court on the particular facts of that case.

[12] This interesting, and rarely visited, line of authority also contains a decision of some vintage, ***Coulson –v- Disborough*** [1894] 2 QB 316, which was a civil action for false imprisonment and malicious prosecution against the police, brought in the wake of an unsuccessful prosecution of the Plaintiff for theft. The trial judge, in response to a request by the jury, called a particular witness who had not previously testified at the behest of either party. The Court of Appeal reviewed the propriety of this course. Lord Esher MR stated, at p. 318:

> "*If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is entitled to call him …*".

The Master of the Rolls also addressed the practical consequences of this course:

> "*When a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers.* ***A general fishing cross-examination ought not to be permitted***".

[Emphasis added].

While this was a decision in a civil action, it has been quoted without qualification in later decisions in criminal cases.

[13] The power under consideration was also explicitly acknowledged by the English Court of Criminal Appeal in ***Regina –v- Wallwork*** [1958] 42 Cr. App. R 153, where the Lord Chief Justice stated, at p. 159:

> "*This court takes the view that in a criminal trial – and I emphasize a criminal trial because it is different in civil proceedings – if the presiding judge, whether he is a judge of assize or chairman of quarter sessions, is of opinion that some person ought to be called who can throw material light on the subject, in his discretion* ***he may call him and examine him himself***".

[Emphasis added].

The words highlighted confirm my own view that, in such unusual circumstances, the witness thus summoned would be the court's witness and his or her evidence would not be adduced in the conventional manner of examination-in-chief by the

party calling the witness and cross-examination by the opposing party. Rather, the witness would be questioned by the court, in the first place, and events thereafter would depend upon the course and outcome of this initial exercise.

[14] In ***Regina –v- Cleghorn*** [1967] 2 QB 584, Lord Parker CJ entertained no doubt whatever about the existence of the power and the circumstances in which the court should consider exercising it (at p. 588):

> "*It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have a right to call a witness who has not been called by either party.* ***It is clear, of course, that the discretion to call such a witness should be carefully exercised*** ***...*** ".

[Emphasis added].

Unsurprisingly, this theme of rarity features in the relatively few reported decisions in this sphere. This is consonant with the role of the presiding judge in a criminal trial, in particular the long recognised principle that the trial judge should not descend into the arena. In ***Regina –v- Roberts*** [1985] 80 Cr. App. R 89, the Court of Appeal reiterated that the power invested in the trial judge to call a witness on his own motion is one which "*… should be carefully and sparingly exercised*" (per May LJ), p. 96.

[15] The principles to be applied by the court in its determination of this application are well established. They are summarised, for example, in the recent decision of the Court of Appeal in ***Regina –v- McNally and McManus*** [2009] NICA 3, paragraphs [14] – [18]. I refer also to ***Regina –v- Murray and Others*** [2006] NICA 33, paragraphs [20] – [29] especially; ***Re Molloy's Application*** [1998] NI 78, per Carswell LCJ, p. 84f – 85f; and ***Re DPP's Application*** [1999] NI 106, per Carswell LCJ, paragraphs [31] – [33] especially. The decisions in this series of cases are binding on me.

[16] I would highlight in particular what Carswell LCJ stated in ***Re Molloy*** at p. 85e/f:

> "*In our opinion these authorities lead to the conclusion that the resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory jurisdiction may nevertheless be regarded as an abuse of the process of the court* ***if, but only if, it operates to affect adversely the fairness of the trial****. It is necessary in every case to look at the circumstances of the case and it lies within the discretion of the court to decide whether the*

> *procedure operates against the interests of the Defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in* ***Ex Parte Bennett*** *(at p. 63) that it is to be 'most sparingly exercised' and that of Viscount Dilhorne … that it should be exercised only 'in the most exceptional circumstances'".*

[Emphasis added].

In ***Re DPP's Application,*** Carswell LCJ formulated three basic propositions, at paragraph [33]:

> *"1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …*
>
> *2. 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.*
>
> *3. The element of possible prejudice may depend on the nature of the issues and the evidence against the Defendant. If it is a strong case and* ***a fortiori*** *if he has admitted the offences, there may be little or no prejudice …".*

[17] Most recently, in ***Regina –v- McNally and McManus,*** the Court of Appeal stated:

> "[17] *… 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***".

[Emphasis added].

[18] The concept of fairness in the context of the modern criminal trial has been explained by Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584, in a celebrated passage which bears repetition:

> "*The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests.* ***It involves taking into account the position of the accused, the victim and his or her family and the public.***"

[Emphasis added].

Moreover, fairness will always entail a contextualised evaluation, tailored to the specific features and circumstances of the individual trial. Equally, an evaluative judgment on the part of the trial judge is required. This judgment must be formed at the stage when a complaint of abuse of process is canvassed. Furthermore, given these considerations, there is obvious scope for differing opinions. This truism is noted in the commentary in the Criminal Law Review, following the digest of the decision in ***Regina –v- JAK*** [1992] CLR 30, at p. 31:

> "*Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form different opinions*".

[19] Finally, I take into account a passage from the judgment in ***Regina (Ebrahim) –v- Feltham Magistrates Court*** [2001] EWHC (Admin) 130, paragraph [25]:

> "*(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***".

[Emphasis added].

This passage was cited with approval by the Court of Appeal in ***McNally and McManus*** [*supra*], at paragraph [15], where it was described by the Lord Chief Justice as containing "*two important principles*".

Conclusions

[20] In determining this application, I consider it appropriate to take into account certain features of this prosecution. Each of the alleged injured parties is a son of the Defendant. They allege that their father was guilty of cruelty to them from an early age. There appears to have been a rift in the family, in recent times. It is clear from the third party materials which the court was invited to read that there have been family strains and stresses, the Defendant is now separated from his family, the mother has reverted to using her maiden name and at least one of the sons has changed his surname by deed poll. Emotive feelings, sensitivities and acrimony are typical features of this kind of case. Vintage and longevity are other familiar hallmarks. Moreover, the court is alert to the possibility that collusion, malevolent influence and manipulation can also feature, either individually or collectively, consciously or subconsciously. In this kind of context, there is nothing unique about late developments regarding who and who will not testify at the trial.

[21] Where an abuse of process application is brought at this stage, the court is required to engage in an exercise of making predictions. This is never a simple matter in the context of a criminal trial, particularly a case of this kind. The court is invited to conclude, in terms, that the trial is likely to take a certain course and that this will result in unfairness to the Defendant. The burden of the defence argument effectively invites the court to conclude that if J was to testify at the Defendant's trial the Defendant would have a fair trial, whereas his absence is likely to render his trial unfair, for the reasons elaborated by Mr. McCrudden QC, summarised in paragraph [8] above. The onus rests on the Defendant in this respect and the standard to be applied is the balance of probabilities.

[22] I consider that, in the particular circumstances, the contentions advanced on behalf of the Defendant, unavoidably and unsurprisingly, entail certain elements of assertion and conjecture. In essence, I find the arguments advanced on behalf of the prosecution the more compelling. I am not persuaded, at this stage, conducting the exercise mooted above, that, on the balance of probabilities, the fairness of the Defendant's trial will be adversely impaired by the absence of J. It seems to me that

his absence is more likely to dilute the potency of the Crown case than to inflict any unfairness on the Defendant. I further take into account that his absence is a factor which will inevitably be highlighted to the jury, probably with some emphasis, on behalf of the Defendant. Moreover, the court will be alert to the need to ensure that appropriate directions and warnings are given to the jury. Beyond this it is inappropriate to venture at present, as the trial has not yet unfolded and its likely course is nothing if not unpredictable. Furthermore, it would be improper to attempt any prediction at this stage of the shape, orientation or emphasis of the cross-examination of the witnesses who will testify on behalf of the prosecution.

[23] I would also highlight the circumstance that, in the present case, it is not contended that the missing witness, J, is likely to give evidence (in the language of Stuart-Smith LJ in ***Haringey Justices***) that "*… is helpful to the defence and tends to contradict the Crown's case*". It seems to me that, as a general rule, where this is the case the absence of the witness in question is unlikely to give rise to a finding by the court, at the predictive stage, that the Defendant's trial will be infected by unfairness. The arguments advanced to the court in the present case are based on the premise that, through the medium of cross-examination of J, the Crown case *might* be undermined and, simultaneously, the defence case *might* be enhanced. This, in my view, falls short of the threshold which must be traversed in order to establish likely unfairness to the accused. It is common case that if J was to testify at the trial, his examination-in -chief would elicit evidence adverse to the Defendant: this was accepted, realistically, by Mr. McCrudden QC. The cross-examination of any witness can have a range of possible outcomes and impacts, including consequences detrimental to the Defendant's prospects of acquittal. As the Divisional Court noted in ***Haringey Justices***, the evidence of witnesses supportive of the Crown case will, at the predictive stage, be of no assistance to the defence. While I acknowledge that this proposition *could* be confounded if cross-examination materialises and has a certain outcome, I consider that there is no basis for making this prediction in the present case. In the language of Stuart-Smith LJ, I conclude that cross-examination of J in the present case is unlikely to provide the Defendant with *a better prospect of establishing his defence*. I further take into account the observations of Kay LJ in ***Bradish,*** at paragraph [38]: see paragraph [11], *supra*.

[24] Given the findings and conclusions rehearsed above, I decline the invitation extended to the court on behalf of the Defendant to require J to attend to testify. Exceptionality is the hallmark of this power. I consider that there is nothing so exceptional about the present case as to warrant its exercise. I accept that the achievement of a fair trial should, in this respect, be the overarching criterion. However, I have already concluded that the absence of J is, in my view, more likely to dilute the strength of the Crown's case than to impair the fairness of the Defendant's trial. Moreover, I consider that the Defendant's application did not really engage with either the practical implications of the course urged upon the court (see ***Coulson –v- Disborough***) or the considerations – prosaic, tactical and otherwise – bearing on the Defendant's evident unwillingness to take steps to have J attend the trial (see ***Haringey Justices***, p. 124g-125a). Finally, while I recognise the

caveat entered by Mr. McCrudden QC, I consider that if the court were to summon J to attend the trial, the most likely outcome is that he would be either mute or would provide unclear and incomplete testimony. Neither of these eventualities would advance the interests of justice or have any bearing on the fairness of the Defendant's trial. For this combination of reasons, it follows that the exercise of this exceptional power would be inappropriate in the circumstances.

[25] Thus I conclude:

(a) It would be inappropriate for the court to have resort to its exceptional power to require J to attend the trial as a witness.

(b) J's absence is more likely to dilute the strength of the prosecution case than to undermine the fairness of the Defendant's trial, from which it follows that there are no grounds for staying this prosecution as an abuse of process.

[26] Finally, it will be necessary to maintain under review the various considerations and features highlighted in the body of this ruling as the trial unfolds. This flows inexorably from my observations at the beginning of paragraph [21] above.