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Judgment: approved by the Court for handing down | *Delivered:* **28/01/09**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

_____

THE QUEEN

-v-

STEVEN LESLIE BROWN

_____

GILLEN J

[1] There is before the court an application by the Crown for the admission of hearsay evidence in this trial under the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order") and the Crown Court Amendment Rules (NI) 2005 ("the 2005 Rules"). On the day that this application was made before me, I gave an ex tempore judgment in order to ensure that the case could continue in an expeditious manner. I undertook to give a fuller written judgment accordingly and I now do so.

[2] In this matter the accused is charged with the murder of Andrew Robb and David McIlwaine on 19 February 2000. He was committed for trial in March 2007.

[3] In November 2007, Constable Colin McMullan made a statement dealing with, inter alia, the continuity of exhibit movements relevant to this case. In particular he dealt with the transfer of an item of clothing, namely a beige jacket of David McIlwaine to the Forensic Science Northern Ireland (FSNI) Buildings and then to the police at Armagh. The evidence contained an FSNI reference number 974/00 which identified the documentation as submission and return forms. The submission forms are the documents which arise when the material is first submitted to the FSNI by police. The return forms are those filled out by members of the FSNI when it is returned to the police. Mr McMullan noted in his statement that the last recorded movement of the beige jacket of Mr McIlwaine was on 21 February 2000 when Constable Johnston submitted it to FSNI. An FSNI reference number namely 974/00 lab. Serial No. 1 also identified the item. The witness relied upon copies of the FSNI submission and return forms.

[4] I pause to observe at this stage that the statement made by Mr McMullan, although obtained in November 2007, had not been served on the defendants until 11 December 2008.

[5] Mr McCrudden QC, who appeared on behalf of the defendant with Mr King objected to the admission of the FSNI's submission and return forms relied on by Constable McMullan, Ms McColgan, who appeared on behalf of the Public Prosecution Service with Mr Kerr QC, made an application to admit these documents under the provisions of Rule 440(8) of the 2005 Rules. She accepted that the prosecution had not complied with the requirements under the Rules to serve notice of intention to adduce hearsay evidence.

The statutory and regulatory framework this application

[6] Where relevant, the Criminal Justice (Evidence) (NI) Order 2004 provides as follows:

> "**Hearsay evidence**
>
> Admissibility of hearsay evidence
>
> 18-(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any manner stated if, but only if –
>
> (a) any provision of this Part or any other statutory provision makes it admissible;
>
> ….
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);

(c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

[7] In this instance the provision of Part III upon which the prosecution relied to make this evidence admissible is Article 21 which provides as follows:

"**Business and other documents**

21-(1) In criminal proceedings a statement contained in a document is admissible as evidence of any manner stated if –

(a) oral evidence given in the proceedings would be admissible as evidence of that matter;

(b) the requirements of paragraph (2) are satisfied, and

(c) the requirements of paragraph (5) are satisfied, in a case where paragraph (4) requires them to be.

(2) The requirements of this paragraph are satisfied if –

(a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office,

(b) the person who supplied the information contained in the statement ('the relevant person') had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

(c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in sub-paragraph (a) received the information in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office.

(3) The persons mentioned in sub-paragraphs (a) and (b) of paragraph (2) may be the same person.

….

(6) A statement is not admissible under this Article if the court makes a direction to that effect under paragraph (7).

(7) The court may make a direction under this paragraph if satisfied that the statement's reliability as evidence for the purpose for which it is tendered is doubtful in view of –

(a) its contents;

(b) the source of the information contained in it,

(c) the way in which or the circumstances in which the information was supplied or received, or

(d) the way in which or the circumstances in which the document concerned was created or received."

[8] The court has a general discretion to exclude evidence under Article 30 of the Order which is couched in the following terms:

> "30-(1) In the criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if –
>
> (a) the statement was made otherwise than in oral evidence in the proceedings, and
>
> (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.
>
> (2) Nothing in this Part prejudices –
>
> (a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (exclusion of unfair evidence), or
>
> (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

[9] Article 35 of the 2004 Order when dealing with Rules of court provides as follows:

> "(5) If a party proposing to tender evidence fails to comply with the prescribed requirement applicable to it –
>
> (a) the evidence is not admissible except with the court's leave;
>
> (b) where leave is given the court or jury may draw such inferences from the failure as appear proper ….

> (6) In considering whether or how to exercise any of its powers under paragraph (5) the court shall have regard to whether there is any justification for the failure to comply with the requirements."

[10] Under the terms of Rule 440 of the 2005 Rules, a prosecutor who wants to adduce such evidence shall give notice in writing in Form 7H of the Schedule and that notice shall be served on the Chief Clerk and every other party to the proceedings within 14 days from the date of the committal of the defendant.

[11] Under Rule 440(a)(c) of the 2005 Rules:

> "The Court may, if it considers that it is in the interests of justice to do so –
>
> (a) dispense with the requirement to give notice of intention to adduce hearsay evidence;
>
> (b) allow notice required under this rule to be given in a different form, or orally; or
>
> (c) abridge or extend the time for service of a notice required under this rule, either before or after that period expires."

[12] The issue of compliance with time limits under the 2005 Rules has generated some case law in this jurisdiction especially under the legislation governing Special Measures terminations. I referred to a culture of non-compliance with the rules by the Public Prosecution Service in R v King (unreported) GILC5826. In R v Black (2007) NICC4, in the context of an application for Special Measures, I expressed the view that the exercise of the unfettered discretion to ignore a breach of time limits must be tempered by the recognition of the failure of the applicant to comply with the rules.

[13] In R v Grew (2008) NICC 6 Hart J, again in the context of the need to observe the appropriate time limits in Special Measures applications, listed factors which he felt were relevant to late applications at paragraph 15 of the judgment as follows:

> "(a) The reasons for late application.
>
> (b) Whether the accused had an opportunity to make any investigations into the matters which are the subject of the late application.

(c) Whether the late application requires the defendant to seek an adjournment in order to conduct further investigations.

(d) Whether the lateness of the application puts undue pressure on the court or the defendant to deal with the application at short notice in order to avoid disruption to the trial timetable, and possibly interfere with other court business, if the application is brought shortly before trial.

(5) While the court must be alert to ensure that the timetable prescribed by the rules of court is observed, nevertheless in the exercise of its discretion the court must pay proper regard to the overriding objective of the legislation, which was that Parliament intended to make it less stressful for various categories of witnesses to give evidence for whom experience has shown that giving evidence may be particularly stressful."

[14] These strictures about the need to comply with the time limits set out in the Rules have to be considered in the context of two recent authorities. In Re Liam Tierney (2008) NIQB 55, a case of judicial review in relation to a warrant issued by a Magistrates' Court, Kerr LCJ said at paragraph 15:

> "The modern approach to the consequences of procedural failures is no longer pre-occupied with the question whether the provision is directory or mandatory. It is now well settled that one should seek to ascertain what the legislature intended should be the effect of a failure to comply with a procedural requirement – see, for instance, R v Immigration Appeal Tribunal, ex parte Jeyeanthan (1999) 3 All ER 231 and, in this jurisdiction, Re Misbehavin' Limited (2005) NICA."

In Tierney's case, Kerr LCJ referred to R v Clarke, R v McDaid (2008) UKHL 8 where Lord Bingham approved a statement of a similar principle set out by Fulford J in R v Ashton, R v Daraz and R v O'Reilly (2007) 1 WLR 181 when he said:

> "In our judgment it is now wholly clear that whenever a court is confronted by failure to take a

> required step, properly or at all before a power is exercised ('a procedural failure'), the court should first ask whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue."

The Crown Application

[15] In the instant case, Ms McColgan submits that it was a matter of simple oversight on the part of the Public Prosecution Service that the statement made by Mr McMullan in November 2007 had not been served until December 2008 (after the trial had commenced) and that there was a further oversight in failing to serve notice to rely on the hearsay evidence under the relevant legislation. In this context I must bear in mind the provisions of Article 35(5)(a) of the 2004 Order which declares that the evidence is not admissible except with the court's leave and Article 35(6) which declares that in considering whether to grant leave, I should have regard to whether there is any justification for the failure to comply with the requirement.

Conclusions

[16] I have come to the conclusion in the exercise of my discretion that it is in the interests of justice that I should accede to the application by the prosecution notwithstanding its failure to comply with the Rules of court and thus dispense with the requirement to give notice, to allow the notice to be given in the form of the current application and to abridge the time for service of such notice to today. I have also come to the conclusion that this evidence should be admitted as hearsay evidence.

[17] My reasons for so concluding are as follows:

(i) As Mr McCrudden has fairly accepted, nothing will be gained by adjourning this case for an hour or more to assist on a written as opposed to an oral application.

(ii) The defence have had the opportunity to examine this document.

(iii) I have offered the defence the opportunity to adjourn the case to deal with the advent of this document and it has been deemed unnecessary.

(iv) This is continuity evidence. There has been careful scrutiny of all the committal papers in this case before I was permitted to see them. For example, I note that I was only afforded the interview notes between the accused and the police in this case five weeks into the trial after they had been appropriately edited by prosecution and defence counsel. The defence has had this statement since 11 December 2008, no editing of its contents was ever suggested and there has been no cross-examination of any witness to date which has sought to challenge the authenticity of this document or to impugn its author. I do not believe, and I have not heard any evidence or submission to the effect, that the admission of this document has prejudiced the accused, or interfered with the ability of the defendant's advisors to investigate it. Its submission does not prevent the defence attacking the document or making submissions as to its weight in the context of the case overall.

[18] I do not believe that it was the intention of the legislature that failure to comply with the requirements of the time limits under the Rules of court was meant to invalidate any step taken in breach thereof. The spirit and intention of the legislation and the Rules thereunder is carefully punctuated with a discretion vested in the court to waive any such breach together with references to the need to observe the interests of justice throughout. The purpose of the legislation is to admit such evidence if it is a fair, efficient and expeditious manner in which to conduct the trial. Whilst I am bound to consider the reasons for non compliance –which in this case was simple oversight - I do not believe that Parliament intended such oversight to invalidate the subsequent step in all cases. To say so would fail to meet the mischief that the legislation was meant to address.

[19] Having decided that it was not the intention of Parliament to invalidate steps to admit such documents if there has been a breach of the court Rules, I have then considered the interests of justice generally (including the wording of Article 35 of the 2004 Order) and in particular whether there is a real possibility that the defence may suffer prejudice on account of the prosecution failure to comply with the terms of the Rules. I do not consider the defendant has suffered any prejudice by this.

[20] I therefore respectfully adopt the view of Kerr LCJ in Tierney's case that preoccupation with whether provisions are directory or mandatory is no longer the modern approach to the consequences of procedural failure. It is in the public interest that the task of the court to determine whether or not the accused is guilty of these two murders should not be impeded by the consequences of technical or procedural failure where the interests of justice requires the evidence to be given.

[21] Having said that, this is yet another troubling instance where the Public Prosecution Service has failed to comply with the Rules of court in

terms of time limits. I direct that my judgment be brought to the attention of the Public Prosecution Service. To have potentially imperilled the admission of evidence in a trial of charges as serious as these is something that requires urgent inquiry.

[22] Having waived, in my discretion, the breach of the Rules of court, I have concluded that provisions of Article 21 of the 2004 legislation have been complied with. The document clearly falls within the provisions and requirements and I note that no submission to the contrary was made on those grounds. Hence whist I have considered each such provision in turn it is unnecessary for me to recite them.

[23] I find no basis to exercise my power to exclude the evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 or the provisions of Article 30 of the 2004 legislation. In coming to this conclusion, although I am not obliged to do so, I have considered the criteria set out in Article 18(2) of the 2004 legislation which only applies when an application is made on the pure basis that it is in the interests of justice under Article 18(1)(d). That is not the burden of the Crown submission in this case. However it seems to me that any consideration of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 will in most cases involve consideration of issues similar to those set out in 18(2). See also R v Cole and Keet (2007) 1 WLR 2716 per Lord Phillips CJ. Whilst this decision dealt with the wholly different issue of the automatic admissibility of evidence in the case of absent witnesses, I believe it has a helpful resonance for any case invoking discretion under Article 30 of the 2004 Order notwithstanding the commentary to the contrary in Blackstone 2009 Edition at paragraph F 16.18.
[24I therefore admit the document.