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Judgment: approved by the Court for handing down

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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

STEVEN LESLIE BROWN

GILLEN J

[1] In this matter the accused is charged with the murder of Andrew Robb and David McIlwaine on 19 February 2000.

[2] It is alleged that in the early hours of 19 February 2000 the accused in the company of another man who is now deceased, namely Noel Dillon, murdered the two victims at Druminure Road, Tandragee. The primary witness relied on by the Crown has been Mark Burcombe. This witness alleged that he was at the scene of the murder in the company of the accused and Noel Dillon when the murders took place. He has been cross-examined by Mr McCrudden QC, who appeared on behalf of the accused with Mr Hunter. In the course of his cross-examination, Mr Burcombe denied that he was ever a member of the UVF in mid-Ulster.

The application

[3] It is the submission of the defence that it would be an abuse of process to further try the accused and the court should stay the proceedings or at least not admit the evidence of Mark Burcombe .

[4] Mr McCrudden relied upon disclosed material by the prosecution to the defence of intelligence in the possession of the police in relation to this witness. That intelligence suggested that on 2 May 2001 Mark Burcombe was a member of the UVF in mid-Ulster. Detective Superintendent Hanley in the course of evidence in this trial said that in the year 2001 Mark Burcombe was believed by the police to be was a member of the UVF and that the police had reasonable grounds for arresting him for alleged involvement in the

attempted murder of a Mr Greenaway, a conspiracy to murder him, and robbery.

[5] Mark Burcombe himself accepted in evidence that whilst being investigated from involvement in terrorism the police had put to him in 2001 that his name had appeared with others on a list of persons that the police believed were members of the UVF in the mid-Ulster area. In interviews in 2005 the police also suggested to Burcombe that he was a member of the UVF.

[6] Counsel also asserted that at a High Court bail application on 22 November 2005 before Girvan J – at a time when Burcombe was accused of the murder of the two victims in this case – the court was informed by Crown counsel that police believed that Burcombe was a member of the UVF. Mr McCrudden also asserted that Senior Counsel on behalf of Mr Burcombe denied that he was an "active" member of the UVF.

[7] It was Mr McCrudden's contention that the issue of his truthfulness as to membership was a central issue in the case from 3 perspectives. First on his credibility generally. Secondly on his involvement of Brown. Thirdly on the theory put forward by the defence that the witness Burcombe was involving the accused purely to protect others who had carried out the murders along with Burcombe himself and that he was merely the mouthpiece of a UVF script, as Mr McCrudden coined it, to take the heat of Mr McIwaine senior's inquiries away from the UVF .

[8] It is Mr McCrudden's contention that once Burcombe's status changed from that of defendant to that of Crown witness, the Crown position has altered to one of representing Burcombe, through the medium of his witness statement and evidence not to have been a member of the UVF. Burcombe has now become a witness under the Serious Organised Crime and Police Act 2005 (SOCPA) and has signed an agreement under Section 73 of that Act. Paragraph 3A of that agreement includes an agreement by Burcombe "to fully admit and to give a truthful account of his own involvement in the above matters under investigation and *any other crimes*."

[9] In short it is counsel's submission that there has been a volte face on the part of the Crown which should offend the court's sense of justice and propriety to further try the accused.

The prosecution case

[10] Mr Kerr QC, who appeared on behalf of the Crown with Ms McColgan, asserted that there has been disclosed to the defence an intelligence report which is a basis for suspecting or forming a belief that the witness Burcombe may have been connected to paramilitary activity. A culmination of the intelligence disclosed and his earlier arrest in May 2001 in

relation to the attempted murder of Mr Greenaway was, contended Mr Kerr, sufficient to permit Crown counsel to raise these matters in the bail application as relevant to the application being made. Mr Kerr asserted it was perfectly appropriate for the prosecution at that time to draw to the attention of the court the police belief as a relevant factor when deciding whether or not to grant bail.

[11] However Mr Kerr asserts that it was not suggested and has never been suggested by the Crown that there is evidence to prove that Burcombe was a member of the UVF. He contended that Burcombe had given evidence of his association with loyalist activities and associations that could explain the intelligence without him being a member of the UVF. Counsel submitted that it was a matter for the Court to decide and the prosecution did not have to form a view as to whether his explanation was satisfactory or not.

[12] Counsel submitted that when the witness undertook the procedure under the SOCPA he signed an agreement that he would disclose all his criminal activity which of necessity includes membership of any proscribed organisation. Mr Kerr asserts that it is role of investigators to check the account given by a witness under the scheme and to make an assessment of the truth of the witness's statements. It is then the duty of the police to report the results of the investigation to the Public Prosecution Service who will decide on the evidence whether the witness has honoured his obligations. In this instance, following a full investigation and having regard to all matters known to the prosecution the prosecution have accepted the witness's account of this incident and in these circumstances Mr Kerr asserts it is perfectly proper for the prosecution to put the witness forward and to allow the court to determine the truth and reliability of his evidence. The fact that there may have been intelligence that led to a belief or suspicion that the witness was a member of an organisation is a matter which has been properly disclosed to the defence.

[13] Mr Kerr asserted that whilst the membership of the UVF of this witness is a central part of the defence case it is not a central part of the prosecution case .It is one of those matters where the prosecution does not have to form a determined view.He conceded that if,despite the SOCPA process, it had become apparent that the witness had told blatant lies that might have required more anxious scrutiny of his assessment of him as a witness but such was not the case in this instance .

[14] The prosecution submit that a stay should not be granted in a case such as this where a fair trial is possible absent any highly exceptional circumstances which can properly be described as affronting the principles of justice. The prosecution have carried out the task of assessing witnesses and putting Burcombe forward as a witness of truth on the facts in issue and,

having performed that task, it is for the court to assess him and draw such conclusions as it thinks appropriate in the normal way.

Authorities and principles governing the application

[15] The seminal authority when dealing with the abuse of executive power is Horseferry Road Magistrates' Court, ex parte Bennett (1994) 1 AC 42. In that case an accused had been brought back forcibly to the UK in disregard of extradition procedures that were available. Lord Lowry said at p. 74G:

> "… I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either
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> (i) Because it will be impossible (usually by reason of delay) to give the accused a fair trial; or
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> (ii) Because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.
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> I agree that prima facie 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."

[16] In R v Mullan (2000) 2B 520 the security services and police had procured M's unlawful deportation from Zimbabwe. The Court of Appeal held that unconscionable conduct on the part of the authorities in bringing an accused before a court may amount to an abuse of process. However it is not invariably an abuse of process since every case should be approached on its own facts. Rose LJ said at p. 536H:

> "In arriving at this conclusion we strongly emphasise that nothing in this judgment should be taken to suggest that there may not be cases, such as Reg v Latif (1996) 1 WLR 104, in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed

> or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant's presence within a jurisdiction. In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged."

[17] In R v Latif (1996) 1 WLR 104, an accused was convicted of being knowingly concerned in the importation into the UK of heroin which had been brought into the country by an undercover customs officer. Lord Steyn said at p. 112G:

> "The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed."

[18] In Re Director of Public Prosecutions for Northern Ireland's Application for Judicial Review (1999) NI 106, dealing with an application to stay proceedings in a magistrates' court because of delay, Carswell LCJ set out the principles at p 117B as follows:

> "The courts have constantly been enjoined to bear several factors in mind when considering an application for a stay:
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> (1) The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. …
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> (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."

[19] In a very recent authority in the Court of Appeal in N. Ireland of R v McNally and McManus [2009]NICA 3 at para14 et seq Kerr LCJ set out the general principles governing the grant of a stay of proceedings on the basis that to continue them would amount to an abuse of process as follows ;

> " [14] There are two principal grounds on which a stay may be granted. The first is that if the proceedings continue, the accused cannot obtain a fair trial – see, for instance, *R v Sadler* [2002] EWCA Crim 1722 and *R(Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130. The second is that, even if a fair trial is possible, it would be otherwise unfair to the accused to allow the trial to continue – see, *Attorney General's reference (No 2 of 2001)* [2004] 1 All ER 1049 and *R* v. *Murray and others* [2006] NICA 33.

[20] These grounds require to be separately considered. They should not be conflated for the prosaic and obvious reason that considerations that will be relevant to one are not necessarily germane to the other. The first ground requires a careful analysis of the circumstances which are said to give rise to the possibility that a fair trial cannot take place and a close examination of whether the trial process itself can cater for the shortcomings of the prosecution or police investigation. These inquiries should be informed by two important principles. They were set out in paragraph 25 of *Ebrahim* as follows: -

> "(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.
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> (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded."

[21] The principles governing the grant of a stay in circumstances where a fair trial is possible but it would be unfair that the defendant should be required to stand trial were summarized by this court in *R* v. *Murray and others*. In that case we referred to the judgment of Lord Bingham of Cornhill in *Attorney General's reference (No 2 of 2001)* and made the following observations on it at paragraph [23] *et seq*: -

> "[23] It is, we believe, important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is possible but some other species of unfairness to the accused makes a stay appropriate. We therefore set out in full paragraph [25] of his opinion: -
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> > 'The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which *Darmalingum v State* (2000) 8 BHRC 662 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga DC* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's convention right.'
> >
> > [24] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith,

> unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's convention right is possible, a stay will *never* be appropriate.
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> [25]We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not."

[22] Kerr LCJ went on to say at paragraphs 17 and 18:

> "(17)Although Lord Bingham was discussing the question of when it would be appropriate to grant a stay where a fair trial was possible and in this case, the focus of the debate has been on whether such a fair trial *can in fact* take place, these passages serve to highlight the rule that where an alternative course is available to remedy a breach of a defendant's convention right (in this case the right to a fair trial

under article 6 of the European Convention on Human Rights) a stay will never be appropriate. By parity of reasoning, 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."

Conclusions

[23] Applying these principles to this case, I have come to the conclusion that the defendant's application must be dismissed. I am of this view for the following reasons:

[24**]** I find no basis to conclude that the accused can not receive a fair trial if this evidence on the issue of UVF membership or the evidence of Burcombe overall admitted or the trial continues. This court can make a clear determination as to the relevancy of this issue in the context of both the prosecution and the defence cases. The defence say it is an essential issue. The prosecution say it is an issue peripheral to the core matter for determination. I can make my mind up on that matter at the appropriate time and in doing so I can ensure the accused obtains a fair trial. The trial process can cater adequately for this issue and take into account any shortcomings on the part

to the witness or the presentation of the evidence by the prosecution. Whilst it is not determinative, I consider that there has been no prejudice to the accused in these circumstances where all the material is before the court and I am in a position to determine the truth and reliability of the evidence of Burcombe. Nothing has occurred in my view which should impede or inhibit the fair trial of the accused on these charges.

[25] I do not consider it would be otherwise unfair to the accused to allow the trial to continue. The Prosecution has acted properly in disclosing all the information and intelligence which it had at its disposal to the defence. The Public Prosecution Service is entitled to make a decision on the basis of all the material before it as whether a witness will be put forward. In this instance it has done so without any breach of professional duty or bad faith that I can discern at this stage. I find nothing in the attitude or behaviour of the Public Prosecution Service on this issue which would bring this case within the ambit of the principles which I have earlier set out and which would persuade me to exercise the very sparing jurisdiction to stay the proceedings. The charges in this case are extremely serious and society would expect such a trial to proceed unless there were exceptional circumstances where it should not .This case does not come into the category of cases to which I have referred in paras 15-17 of this judgment.

[26] In all the circumstances I am not persuaded on the balance of probabilities that this is a proper case to grant a stay or disallow Mr Burcombe's evidence and therefore I dismiss the defence application.