Criminal procedure – identification evidence – breaches of relevant codes of practice – whether trial judge should rule out evidence – whether appropriate for a voir dire – appropriate timing for ruling in Diplock trial

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(subject to editorial corrections)

IN HER MAJESTY'S CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

v

CRAIG and SPEERS

_____

RULING

_____

GIRVAN J

[1] In the course of the trial the Crown adduced evidence relating to the identification of the accused Speers by three witnesses namely Mr Bellew and Police Constable White and a witness known as witness H. They are alleged to have seen the defendant at three separate locations on the night early morning of 31 March–1 April 2001 close in time to the murder of Mr Lowry. In the case of Bellew's evidence the identification is central to the case against Speers in respect of count 2. In the case of PC White and witness H the evidence is material on count 1 and is also of relevance in relation to count 2.

[2] Mr McCrudden QC relatively early on in the trial indicated that the defence would be challenging the admissibility of the identification evidence. There was some discussion as to whether this challenge should be treated as raising matters for a voire dire or trial within a trial. Since this trial is a Diplock trial without a jury the approach adopted by the parties in the court was that the evidence relating to the identification of the accused would be adduced on the basis that when all the identification evidence was concluded the court would be asked to rule on the admissibility of the evidence. The trial proceeded in this way and the Crown without apparent objection from the defence led evidence both in relation to the identification of the accused

during the identification parades in question and in relation to other matters relating to the counts. The Crown evidence remains incomplete and the Crown proposed to adduce further evidence in respect of the scene of the crime, in relation to forensic investigations and matters arising out of the scene and in relation to the interviews of the defendant Speers. Accordingly the stage has not yet been reached for the determination of any application for a direction by the defence.

[3] Mr McCrudden in his lengthy written and oral submissions has argued that the court should hold at this stage that the identification evidence is so flawed and the provisions of code D broken to such an extent that the court should rule that the evidence is inadmissible. Further or in the alternative he contends that the quality of the evidence is such that the court should at this stage conclude that it is of so little weight that the court should rule it out. He relies on the provisions of Article 76 of PACE (NI) Order 1989 to exclude the evidence. The Crown has resisted this argument and contends that the evidence is admissible and that ultimately it will be for the court to consider the weight of the evidence.

[4] There are two statutory provisions of importance in the present context, Article 76 of PACE and Article 66 of the same Order. Article 76 provides that in any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that having regard to all the circumstances including the circumstances in which the evidence was attained the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Under Article 66(10) in all criminal proceedings relevant codes of practice shall be admissible in evidence and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining the question.

[5] The question arises as to whether it is appropriate for the court to rule on the application made by the defence at this stage of the trial. In a jury trial if an issue arises as to the admissibility of evidence of identification effected at identification parades the question would arise as to whether there should be a voire dire proper in the absence of the jury. At the conclusion of the voire dire the court would rule on whether the evidence should be admitted or excluded. If there is a voire dire it is a self-contained trial by the judge in the absence of the jury and the issue before the court would be limited to the discreet topic of the identification evidence and its admissibility. If the judge rules out the evidence it would never go before the jury who would never hear the evidence.

[6] The authorities tend to show that the courts are reluctant to determine the admissibility of identification parade evidence on a voire dire. There are a

number of cases on this point to none of which counsel in their submissions refer the court. It is stated in Blackstone at paragraph F.126:

> "A hearing on the voire dire is not normally required to determine the admissibility of evidence relating to an identification parade."

In Walshe [1980] 74 Cr App R 85 Boreham J giving the judgment of the Court of Appeal said at 87:

> "Those representing the applicant drew some close analogy between the admissibility of evidence of an identification parade and the admissibility of a voluntary statement. But those are very different matters. As soon as a statement is challenged the law places on the Crown the burden of showing that it is admissible by proving that it was voluntarily made (see now PACE) Section 76(2) – in Northern Ireland Article 74(2)). That is a separate and different matter. Here there was no burden on the Crown to prove the admissibility of the evidence relating to the identification parade and what flowed from it. It was clearly admissible evidence and should have been admitted. Its quality is of course another matter to be considered by the jury."

In Beveridge [1987] 85 Cr App R 255 it was argued on appeal that in the light of PACE Section 78 (our Article 76) Walshe could no longer stand. It was held dismissing the appeal that where a question arises under Section 78 as to the admissibility of identification parade evidence although there may be rare occasions when it would be desirable to hold a trial within a trial in general the judge should decide on the basis of the depositions, statements and submissions of counsel.

In Flemming [1987] 86 Cr App R 32 a decision under the law prior to the 1984 Act the appellant argued that identification evidence was inadmissible on the grounds inter alia that the identification at the police station was carried out in circumstances which contravened Home Office Circular No 109 of 1978. It was submitted that the result was that the probative value of the evidence was minimal compared to its prejudicial effect so that it would be unfair for the evidence to be admitted. The Court of Appeal held that it was quite unnecessary to hold a trial within the trial for this purpose. Woolf LJ referring to one of the guidelines laid down by Lord Widgery LCJ in Turnbull [1977] QB 224 at 229 namely that when in the opinion of the judge the quality of the identifying evidence is poor, the judge should withdraw the case from

the jury unless there is other evidence which goes to support its correctness. In the normal way the trial judge will make his assessment whether he needs to take the action referred to by the Lord Chief Justice either at the end of the case for the prosecution or after all the evidence in the case has been called. There may be exceptional cases where the position is so clear on the depositions that he can give a ruling at an earlier stage. However the trial judge should not decide the matter by holding a preliminary trial before the evidence for the prosecution has been placed before the jury. It is of course true that the trial judge has a residual discretion to exclude evidence which is strictly admissible if he comes to the conclusion that its probative value is outweighed by its prejudicial effect so that its admission would be unfair to the defendant. However, this residual discretion cannot justify the holding of trials within a trial. Issues of this sort can be satisfactorily dealt with by the judge perusing the depositions together with any facts that are common ground between the prosecution and the defence.

Archibald at paragraph 14.35 points out that these authorities have been frequently overlooked in cases such as R v Ryan [1992] CLR 187 and R v Penney. In R v Martin & Nicholls [1994] Crim LR 218 the court restated the former position as stated in Beveridge and Flemming saying that occasions for conducting a trial within a trial would be rare. In general the judge should make his decision upon the depositions, statements and submissions of counsel.

[7] The context of Diplock non jury trials is of course different from jury trials. The function of a voire dire is to allow the tribunal of law to decide a point of law in the absence of a tribunal of fact. Magistrates and Diplock judges are both judges of fact and law. In F v Chief Constable of Kent [1982] CLR 682 it was stated that it is impossible to lay down a general rule as to when the question of admissibility should be determined by magistrates or as to when the decision should be announced every case being different. Issues relating to the admissibility of confessions raise a distinct issue under Article 74(2). However subject to that there is no general rule as to when admissibility shall be determined and the decision on it announced. Blackstone points out that where the defence makes a submission that magistrates should exercise a discretion to exclude evidence under Section 78 (Article 76) they are not entitled to have that issue settled as a preliminary issue in a trial within a trial (Vell v Chief Constable of North Wales [1987] 151 JP 510). In Halawa v Federation Against Copyright Theft [1995] Crim App R 21 it was held that the duty of a magistrate on an application under Section 78 (Article 76) was either to deal with the issue when it arises or to leave the decision until the end of the hearing the objective being to secure a trial that is fair and just to both parties. In some cases the accused will be given the opportunity to exclude the evidence before giving evidence in the main issues because if denied that opportunity his right to remain silent on the main issues will be impaired but in most cases it is better for the whole of the

prosecution case including the disputed evidence to be heard first because under Article 76 regard should be had to all the circumstances and fairness to the prosecution requires that the whole of its case in this regard be before the court. In deciding the court may take account of the extent of the issues to be raised by the evidence of the accused in the trial within a trial. A trial within a trial may be appropriate if the issues are limited but not if it is likely to be protracted and to raise issues which will need to be re-examined in the trial itself.

[8] Mr McCrudden points to what he alleges represents significant and substantial breaches of the code relating to the identification parades. His factual and legal arguments are helpfully and exhaustively set out in his very detailed written submissions. Archibald at paragraph 14.40 sets out the approach to the effect of breaches of Code D relating to identifications thus:

> "a. The fundamental issue whether the code applies or not is whether the identification would have such an adverse effect on the fairness of the proceedings that it should be excluded. … Where insufficient regard has been had to fair identification practices and adducing reliable identification evidence the discretion to exclude evidence under Section 78 (Article 76) is likely to be exercised and convictions will be liable to be treated as unsafe. Although every case has to be determined on its own facts it is submitted that whenever Code D is breached the resolution of two preliminary issues should be of considerable assistance in determining the fundamental issue as to the fairness of the proceedings. First did the breach occasion the mischief which the code was designed to prevent? If so the identification may be flawed. Secondly, was the breach caused by a flagrant disregard of the Code or was the breach or the cumulative effect of more than one breach capable of engendering considerable suspicion that the identification procedure was unfair? If so even if the breach of a particular provision did not lead to the mischief intended to be prevented the evidence of an indication might be so tainted with unfairness that it should not be admitted as in R v Gall and R v Finley."

[9] The procedures set out in Code D are designed to ensure fairness in identification procedures and to minimise the risk of fallacious identifications. The more significant the breach of the Code the more questionable will be the

fairness of the procedures and the greater the risk of fallacious identification. If the breaches are deliberate attempts to pervert the identification procedure a court will be quick to hold that the evidence should be excluded. I am satisfied that none of the suggested breaches of the Code were the result of deliberate acts with the intent of perverting the identification procedure so as to secure identifications of the suspect the police considered to be the guilty party. Once flagrancy is rejected it becomes a question of fact and degree whether the identification procedures were so flawed or potentially flawed that the evidence should be excluded. At the direction stage the court will be able to consider the evidence and its weight and carefully analyse it to determine whether it has any probative value and if so what probative value. To exclude the evidence completely at this stage means that the evidence such as it is would go out of the case completely. Leaving the assessment of its weight, if any to be determined at the stage of an application for a direction means that the interests of the defence are fully protected. Furthermore even if the court at the direction stage were to hold that the evidence has some probative value and that that evidence with other evidence is sufficient to give rise to prima facie case fairness is still achieved because at the conclusion of the trial the court must give its fully analysed decision if the defendant is convicted and the defendant has an untrammelled right of appeal. In this respect a Diplock case is significantly different from a jury trial where there is an unreasoned jury verdict and in a jury trial the court will be astute to ensure that the jury hears no evidence that is more prejudicial than probative. I consider in the context of the present case that the admission of the evidence as such would not have such an adverse effect on the fairness of the proceedings that the court should not admit the evidence. At the direction stage t remains open to the court to come to the conclusion that the procedural errors (if any) in relation to the Code and the circumstances taken together render the evidence valueless or of so little evidential value that it should be excluded.

[10] Counsel's submissions in relation to the admissibility of the identification evidence appear to have covered exhaustively the issues which will have to be addressed at the direction stage on the topic of identification evidence. Accordingly it should not be necessary for counsel to repeat contentions already made on the issue of the identification evidence. Obviously they will be entitled to pursue any new point in relation to the question of identification evidence in the light of further evidence in the course of the trial.