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Judgment: approved by the Court for handing down
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

-v-

BRIAN GRINDY

PROSECUTION APPEAL PURSUANT TO ARTICLE 17
OF THE CRIMINAL JUSTICE (NORTHERN IRELAND) ORDER 2004

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

[1] This is an appeal by the prosecution against a ruling made by His Honour Judge Lockie at Belfast Crown Court on 15 December 2005 that the criminal proceedings against the defendant, Brian Grindy, be stayed because of abuse of process. The defendant was charged with the theft of a pallet of computer equipment while delivering consignments of computers for MMK, Mallusk, a transport company for which he worked as a sub-contractor.

[2] The theft was alleged to have occurred on 20 March 2003. On that date the defendant made a number of deliveries. He was due to deliver the computer equipment that eventually went missing to the Social Security Agency in Corporation Street, Belfast but it did not reach that destination. It was not delivered to any of the other companies to which the defendant made deliveries on that day.

[3] A central issue in the case was whether the defendant would have had the opportunity to remove the equipment from his lorry and, if so, when that removal had occurred. It was the prosecution's contention that this was most likely to have happened between 9.24 and 9.40am. At 9.23 or 9.24am Mr Grindy had been invoiced for a tyre at Magowan's Tyres at an industrial

estate in Mallusk. Tachograph records showed that he had arrived at Magowan's at 9.09am and his vehicle was stationary until 9.30am. It then moved a matter of metres before again coming to a halt at 9.40am.

[4] During interview by police officers on 8 September 2003 the defendant stated that he had been to Magowan's on the date of the alleged theft and he invited police officers to view CCTV footage for that day which, he suggested, would reveal the movements of his vehicle. Police officers visited the premises the following day and spoke to tyre fitters. They took a statement from a Mr William Chambers about the invoice for the tyre that Mr Grindy had purchased and looked at the CCTV cameras. Detective Inspector Thompson gave evidence that if there had been any footage covering 20 March 2003, he would have obtained it but he also said (according to the transcript of the judge's ruling) that he had "no recollection of speaking to anyone about the tapes from that system". He did not give evidence about the location of the cameras and failed to offer an explanation for not making a record of any inquiries made about the footage.

[5] The learned judge concluded that the police had "failed in their duty to the defendant to properly investigate and report on the CCTV coverage at Magowan's premises on 20 March 2003." Inspection of such material was required by paragraph 4 of the Code of Practice under part 11 of the Criminal Procedure & Investigations Act 1996. The judge therefore ordered that the proceedings against Mr Grindy be stayed. He made that ruling on the afternoon of 15 December 2005, having heard submissions in the morning of that day. At the conclusion of his ruling Judge Lockie observed that he had not had time to deal with all the authorities that had been opened to him by counsel in their submissions and that he would expand on his ruling by "addressing the legal issues if and when it is required". He then asked whether the defendant should be permitted to leave the dock and senior counsel for the prosecution, Mr Donaldson QC, agreed that this should happen. Mr Grindy then left the dock and, without demur from the Crown, the jury was brought back to court and discharged by the judge.

[6] Some twenty or thirty minutes after the judge had discharged the jury, the prosecution informed the clerk of the court that they wished to seek an adjournment under Article 17(4)(b) of the Criminal Justice (Northern Ireland) Order 2004 in order to consider whether to appeal against the judge's ruling. A message to this effect was also left on the mobile phone of junior counsel for the defence and Mr Grindy's solicitors were informed and asked to notify their client. The judge indicated that he would hear the application the following morning, 16 December 2005.

[7] Mr McDowell, junior counsel for the Crown, moved the application on 16 December. He asked the judge to adjourn the proceedings so that the Crown could consider whether they wished to appeal his ruling. He indicated that

they wished to see any further observations on the law that the learned judge might make in fulfilment of his undertaking the previous afternoon. Thereafter the Crown would wish to consider the matter further. Mr Lyttle QC for the defendant opposed the application, pointing out that the proceedings were at an end and could not therefore be adjourned. He also submitted that the judge was by that time *functus officio* since he had discharged the jury and had no further role to play.

[8] After considering the matter for a short period the judge announced that he had concluded that the proceedings before him had come to an end and that he was therefore not competent to entertain an application for an adjournment. He also stated that the reference in his ruling the previous afternoon to the case of *R v Haddock* [2005] NICC 15 adequately covered the legal issues and that he would not, after all, provide any further judgment. He was then informed by Mr McDowell that the prosecution wished to appeal the ruling that had stayed the proceedings and he sought the judge's leave to do so. This was again opposed by Mr Lyttle on the basis that the proceedings were at an end and the judge had no further function. Although the learned judge expressed agreement with that view, he nevertheless gave leave to appeal.

The statutory provisions

[9] Part IV of the Criminal Justice (Northern Ireland) Order 2004 introduced a system of prosecution appeals from rulings made by judges in relation to trials on indictment. Article 16 (1) provides that the prosecution is to have the rights of appeal for which provision is made by Part IV but the prosecution is to have no right of appeal in respect of a ruling that a jury be discharged – article 16 (2) (a). Paragraph (4) provides that an appeal may be brought only with the leave of the judge or the Court of Appeal.

[10] Article 17 applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment – paragraph (1). 'Applicable time' is defined in paragraph (13) as any time (whether before or after the commencement of the trial) before the time when the judge starts his summing-up to the jury. Article 17 (2) stipulates that appeals against such rulings are to be taken in accordance with the provisions of the article. Article 17 (3) provides that the ruling is to have no effect whilst the prosecution is able to take any steps under paragraph (4). Article 17 (4) is the provision which is directly involved in this appeal. It provides: -

> "(4) The prosecution may not appeal in respect of the ruling unless, following the making of the ruling –

> (a) it informs the court that it intends to appeal; or
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> (b) it requests an adjournment to consider whether to appeal and if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal."

[11] Article 17 (10) deals with the effect on the ruling of the prosecution informing the court that it intends to appeal. It provides: -

> "(10) If the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, the ruling mentioned in paragraph (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued."

[12] Article 17 (11) deals with the consequences of the suspension of the effect of the ruling. It provides: -

> "(11) If and to the extent that a ruling has no effect in accordance with this Article –
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> (a) any consequences of the ruling are also to have no effect;
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> (b) the judge may not take any steps in consequence of the ruling; and
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> (c) if he does so, any such steps are also to have no effect."

[13] Article 18 deals with the two types of appeal that may be taken – expedited and non-expedited. Where the judge has been informed by the prosecution that it intends to appeal he must decide which type of appeal should be undertaken (paragraph (1)). If he decides that the appeal should be expedited, he may order an adjournment (paragraph (2)); if he decides that the appeal should not be expedited, he may order an adjournment or discharge the jury (if one has been sworn) (paragraph (3)). If he decides that the appeal should be expedited, he or the Court of Appeal may subsequently reverse that decision (paragraph (4).

[14] Article 20 specifies how the Court of Appeal is to deal with appeals. On an appeal under Article 17, it may confirm, reverse or vary any ruling to

which the appeal relates – (paragraph (1)). Where the court reverses or varies a ruling, paragraph (4) comes into play. It provides: -

> "(4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following –
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> (a) order that proceedings for that offence may be resumed in the Crown Court;
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> (b) order that a fresh trial may take place in the Crown Court for that offence;
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> (c) order that the defendant in relation to that offence be acquitted of that offence."

[15] Article 32 of the Order contains the rule making power. It provides (in paragraph (1)) that the rule making authority (in this instance the Crown Court Rules Committee) may make such provision as appears to them to be necessary or expedient for the purposes of Part IV. Paragraph (2) provides: -

> "(2) Without limiting paragraph (1), rules of court may in particular make provision –
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> (a) for time limits which are to apply in connection with any provisions of this Part;
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> (b) as to procedures to be applied in connection with this Part;
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> (c) enabling a single judge of the Court of Appeal to give leave to appeal under this Part or to exercise the power of the Court of Appeal under Article 17(12)."

[16] In exercise of its powers under article 32 the Crown Court Rules Committee made the Crown Court (Prosecution Appeals) Rules (Northern Ireland) 2005 SR&O No 75. Rule 2 (1) requires that a request for an adjournment in order to consider whether to appeal a ruling must be made immediately after the ruling has been given. The terms of this provision are critical to the outcome of this appeal and we shall therefore set them out in full. They are as follows: -

> "**2.** - (1) Subject to paragraph (2), a request by the prosecution for an adjournment under Article

> 17(4)(b) of the 2004 Order shall be made to the judge immediately following the making of a ruling to which Article 17 of the 2004 Order applies."

[17] It was somewhat faintly argued to be anomalous that the requirement of immediacy should appear in the Rules rather than the legislation. It was not suggested, however, that the creation of such a requirement was *ultra vires* the Crown Court Rules Committee. Rather the somewhat veiled contention appeared to be that the concept of immediacy should reflect the fact that no such requirement had been articulated in the Order. Immediacy should, on that account, be regarded as an elastic rather than an absolute requirement, it was suggested. But we do not find it in the least incongruous that this requirement found expression in the Rules rather than the Order. The rule making power contained in article 32 (2) (a) and (b) precisely foreshadows the imposition of such an obligation in the Rules. The fact that there is no explicit requirement of immediacy in the legislation is relevant, however, to the question whether failure to comply with the Rule will render any appeal against the ruling impossible and we will return to this question presently.

[18] The need for urgency in transacting applications under article 17 is reflected in the succeeding provisions of Rule 2. Rule 2 (3) requires the judge to grant the application for an adjournment "unless there are exceptional circumstances which make it necessary for the prosecution to indicate immediately whether or not it intends to appeal". Paragraph 4 provides: -

> "(4) Where the judge grants an adjournment under Article 17 (4) (b) of the 2004 Order, the trial shall be adjourned –
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> (a) until the next business day; or
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> (b) where there are exceptional circumstances, for such longer period as the judge considers necessary."

[19] The theme of urgency is also apparent in Rule 3. The relevant paragraphs are these: -

> "**3.** - (1) Where the prosecution intends to appeal against a ruling under Article 17 of the 2004 Order, it shall inform the judge of its intention –
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> (a) immediately following the making of that ruling; or

> (b) where proceedings have been adjourned pursuant to Article 17 (4) (b) of the 2004 Order, immediately upon the resumption of the said proceedings.
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> (2) The prosecution may apply orally for leave to appeal at the same time as it informs the judge of its intention to appeal.
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> (3) Before determining an application for leave to appeal, the judge may hear oral representations from the defendant.
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> (4) An oral application for leave to appeal shall be determined by the judge on the day on which it is made or, where there are exceptional circumstances, on the business day next following the day on which it is made."

The arguments

[20] Mr McDowell's first submission was that the prosecution's notification of its wish to have an adjournment twenty or thirty minutes after the ruling satisfied the requirement of immediacy in Rule 2 (1). Alternatively, he argued, a failure to comply with the Rules was not fatal to an appeal under article 17. The Rules were directory rather than mandatory in effect. The defendant had not suffered any prejudice by having the Crown's intention to apply for an adjournment notified to him twenty or thirty minutes after the ruling had been given. It was not prejudicial to him to face the possibility of another trial.

[21] Mr Lyttle argued that the appeal was not properly before this court since the learned trial judge did not have jurisdiction to grant leave. The proceedings before the judge had ended and he was *functus officio.* The purpose of article 17 was, he said, to allow for appeals against rulings while the proceedings were extant. The application was not made immediately following the ruling. While the requirement of immediacy might vary according to the circumstances in which the application to adjourn was made, in the present case the defendant had been permitted to leave the dock and the jury was discharged. This brought proceedings to an end and they could not be revived for the purpose of entertaining the Crown's application.

Immediacy

[22] A dictionary definition of 'immediate' is 'having no intermediate event or medium'. We consider that this captures the essence of the requirement that

an application for an adjournment be made immediately following the ruling where an appeal is being considered. Nothing should be allowed to occur between the making of the order and the application for the adjournment to frustrate the implementation of the relevant statutory scheme.

[23] The scheme of the legislation contemplates an appeal being taken without necessarily bringing criminal proceedings to an end. Various provisions are designed to preserve that possibility in appropriate cases. Thus, for instance, the ruling will not have effect where the prosecution informs the court that it intends to appeal. Likewise no consequence of the ruling will have effect and the judge may not take any steps in consequence of the ruling. And, of course, an expedited hearing, where it can take place, will allow for the resumption of the trial if the ruling is reversed (or, in certain circumstances, even where it is upheld). Where an adjournment is granted it should be to the next business day, consistent with the need to preserve the possibility of the trial continuing. The prosecution should therefore make its application so as to allow that possibility to be maintained.

[24] In the present case Mr McDowell accepted that an expedited hearing of the appeal should have been possible since the ruling of the judge was on a net issue. The possibility of such a hearing and of the trial continuing was, of course, effectively nullified by the discharge of the jury. The prosecution had raised no objection to this course; indeed it acquiesced in the jury being discharged. This critical intermediate event rendered unfeasible the possibility of the criminal proceedings resuming after the hearing of an appeal. We have therefore concluded that the statutory requirement of applying for an adjournment immediately following the ruling was not fulfilled in this case. The crucial factor in this conclusion is not the period of time that had elapsed between the ruling and the application but the occurrence of a decisive intermediate event. In other circumstances the elapse of half an hour might not have made an application to adjourn less than immediate; it was because the jury had been discharged that the element of immediacy could no longer be accomplished.

The effect of failing to comply with Rule 2 (1)

[25] Does the failure to comply with the obligation to apply immediately for an adjournment render an appeal impossible? We do not consider that this question is answered conclusively by characterising Rule 2 (1) as mandatory or directory. In *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231, 238/9 Lord Woolf CJ dealt with the classification of statutory requirements as mandatory or directory in the following passage:-

> "… I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the

> majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test … Which questions will arise will depend on the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not."

[26] Lord Woolf's approach was favoured by Carswell LCJ in *Re Robinson's application* [2002] NI 206 and by this court in *Re Misbehavin'* [2005] NICA 35. As we said in the latter case, it is necessary to concentrate on the intention of the legislature as to the consequence that should flow from the failure to abide the terms of the particular legislative provision. Was it intended that no appeal would ever be possible where an application for an adjournment was not made immediately? We cannot believe that it was. In the first place, if such a sweeping prohibition had been intended, one would have expected to see it provided for in the Order rather than left to be dealt with by the rule making body. Of perhaps even greater importance is the consideration that the failure to apply immediately will in many cases have no impact on the progress of the criminal proceedings. If an application to adjourn would inevitably give rise to a non-expedited hearing of the appeal and the discharge of the jury, it would surely not be right to refuse to entertain an appeal simply because the immediacy requirement was not fulfilled.

[27] We are of the view, therefore, that the prosecution is not precluded from applying for leave to appeal solely because it has failed to comply with the requirement that it either apply immediately for an adjournment to consider whether to appeal or inform the judge immediately of its intention to appeal. It may well be that the prosecution *is* excluded from applying for an adjournment in order to consider whether to appeal if it has been dilatory in making that application but that is a different matter from being prohibited altogether from applying for leave to appeal. We are satisfied that it is open to the prosecution to apply for leave to appeal, notwithstanding that it failed to make the necessary application immediately.

[28] The opportunity to apply for leave to appeal does not, of course, equiparate with an entitlement to proceed with the appeal. We shall have to consider later in this judgment whether the Crown should be allowed to prosecute its appeal where its failure to apply for an adjournment timeously has deprived the defendant of the prospect of securing (whether from the learned trial judge or this court) an expedited hearing.

Was the judge functus officio?

[29] In light of our conclusion that it was open to the prosecution to apply for leave to appeal, we can deal with this argument shortly. The judge was certainly not *functus officio* in relation to such an application. We consider that it is likely that the proceedings before him had come to an end with the discharge of the jury and that therefore he could no longer entertain an application to adjourn the case. But he was entitled – indeed required – in our judgment to deal with the application for leave to appeal and was right to do so.

Should the prosecution be allowed to proceed with the appeal?

[30] The Crown argues that the defendant will not be placed at any disadvantage if the appeal is allowed to proceed. If the ruling of the trial judge is reversed and a new trial is ordered, he will, the prosecution says, be entitled to all the elements of a fair hearing that were previously accorded to him. The possible loss of the forensic benefit derived from the omission of the police to properly investigate the question of CCTV footage should not, the Crown submits, operate to prevent a retrial if this court considers it appropriate to reverse the judge's ruling.

[31] The defendant contends that it would be unfair and prejudicial to him to allow the Crown the opportunity to repair the deficit in its case, particularly where he cannot now seek an expedited hearing that would allow (in the event that the ruling was reversed) the trial to be resumed.

[32] We consider that this issue must be decided on the basis of the facts of the case rather than by recourse to any general principle. There will be circumstances where it would be fair to allow the appeal to proceed, notwithstanding that the defendant has lost the opportunity to seek an expedited hearing. In this case, however, we have decided that this should not be permitted. Not only has the defendant been deprived of the chance of an expedited appeal; he has lost the opportunity to apply for a direction of no case to answer on the basis that a vital piece of evidence was absent from the Crown case. These are substantial advantages that cannot be disregarded in the balancing of the competing rights of the prosecution and the defence. It seems to us likely that the judge was understandably influenced to grant leave to appeal in this instance because this is the first case of its kind to come before our courts. We rather doubt that he would have granted leave otherwise. Certainly, we consider it highly improbable that this court would have granted leave had it been refused by the judge. The appeal cannot therefore be allowed to proceed and must be dismissed.