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(subject to editorial corrections)

IN THE CROWN COURT FOR FERMANAGH AND TYRONE
(SITTING AT BELFAST CROWN COURT)

THE QUEEN

-v-

H

BILL NO. 034/2004

HART J

[1] In February 2003 the defendant's daughter, to whom I shall refer as L, alleged that she had been subjected to various sexual offences by the defendant between 30 June 2001 and 10 February 2003. The accused was sent for trial on 2 January 2004 and pleaded not guilty to all of the counts on arraignment. Subsequently L contacted the police and advised them that she wished to withdraw her complaint because her mother had left her and she only had her father left and she wanted him to return to her. She did not indicate that her previous statement was false or inaccurate. Following an application by the Crown, and, having heard argument on behalf of the prosecution and the defence, His Honour Judge McFarland made an order that the "matter be stayed and left on the books of the court, not to be proceeded with, without leave of the Crown Court or the Court of Appeal." See his ruling at [2004] NICC 8.

[2] Subsequently L has indicated her wish to proceed with the charges and the prosecution now apply to court for leave to proceed with the indictment. This appears to be a unique situation, at least in the experience of counsel and myself, and as the defence objected to Judge McFarland's order being made and now object to the court granting leave, it is necessary to explore in some detail what actually occurred before Judge McFarland, the nature of the application which was made to him, the nature of the order he made and whether he had jurisdiction to make it, and, if he had jurisdiction to make the

order, whether the court should now grant leave to the prosecution to proceed. Mr Laurence McCrudden QC, who appears for the defendant with Mr Mc Cann, advances two arguments. The first is that when the judge granted a "stay" he brought the proceedings to an end and it was not possible to reactivate them subsequently. If the judge did have power to make an order which had the effect of bringing the proceedings to an end but preserved the possibility of the prosecution applying to the court for permission to reactivate the case, then he argues that the court should not grant permission because the order which should have been made was one to order the charges to lie on the file not to be proceeded with without leave of the court, and that such an order should not have been made without the consent of the defendant.

[3] When the prosecution applied to the Crown Court for an order that leave be granted the matter was transferred to a High Court Judge by order of the Lord Chief Justice. However, it is necessary to look at what actually did occur when the application was made before Judge McFarland because there was a dispute between counsel as to what the nature of the prosecution application had been, and so a transcript of the argument before Judge McFarland was obtained.

[4] Before Judge McFarland Mr Mateer, who was and is junior counsel for the prosecution, identified three options which he suggested were open to the court in the following passage:

> "The first option, and I think is the option the defendant and his lawyers would insist upon, is to require the Crown to proceed in the case and to call its evidence. And failing that to have a jury find the accused not guilty for a lack of evidence.
>
> The other two options, your Honour, are options of slightly different type. One is to adjourn the case generally or for a specific period of time. And the other is to mark the indictment not to be proceeded with without leave."

When he developed these submissions Mr Mateer referred to the court's power to enter a "stay". Thus at p. 9 he said:

> "We in fact, your Honour, on the Crown side, are asking the court for that third option, to mark the indictment not to be proceeded with without the leave. We are content to have the case stayed subject to the leave."

Again at p. 10 he referred to the court allowing "a stay", but in his final submissions at p. 11 he suggested that the appropriate order for the court to make in the circumstances of this case "would be an order ordering that this indictment should lie on the books of the court not to be proceeded with without leave of the court."

[5] As Mr McCrudden now frankly accepts, in the course of his submissions he also referred to the power of the court to order charges to be left to lie on the file not to be proceeded with without leave of the court or the Court of Appeal in the context of an application to stay the proceedings. See pp. 13 and 14 of the transcript.

[6] Was it possible for Judge McFarland to make an order in the terms which he did, namely by ordering that the matter "be stayed and left on the books of the court, not to be proceeded with without leave of the Crown Court or the Court of Appeal"? Such an order may be inherently contradictory if an order that the prosecution "be stayed" has the effect that the prosecution is thereby permanently brought to an end and cannot be reactivated, whereas an order that the charge or charges "be left on the books of the court, not to be proceeded with without leave of the Crown Court or Court of Appeal" may have a different effect, namely that the case is terminated but the option of reactivating the case with the leave of the court is retained.

[7] That there is a difference between the two orders appears from the judgment of Watkins LJ in R v Central Criminal Court, ex parte Randle [1992] 1 AER at p. 386 where he said:

> "A stay on grounds of abuse of process contemplates that there never will be a trial whereas an order that the indictment lie on the file marked not to be proceeded with without leave contemplates that there may be. It matters not that there are circumstances in which a stay on grounds of abuse of process might be revoked or lifted, the crucial point is that such a stay, a direction that there shall be no trial, is intended to be final."

In R v Crown Court at Norwich, ex parte Belsham [1992] 1 AER at 403 Watkins LJ described the purpose and effect of the two forms of order in somewhat greater detail.

> "An order that an indictment or a count remains on the file generally is made at the conclusion of the trial when the accused has been convicted or acquitted on another indictment or other counts in

> the same indictment in such circumstances that it is unlikely that the prosecution will proceed further on these matters which are the subject of the order. It leaves open the possibility that in the light of further events it may be necessary to proceed, as for example where the Court of Appeal quashes the conviction recorded on the whole indictment on those counts which have been tried. Once again the order is one, like a motion to quash, which directly relates to the conduct of the trial. A stay on the other hand, while it may be applied for at anytime, is not concerned with the conduct of the trial. Indeed its purpose is to stop the trial taking place or continuing."

[8] The references in this passage to "the conduct of the trial" are to the provisions of Section 29(3) of the Supreme Court Act 1981, (a provision which does not have an equivalent in the Judicature (NI) Act 1978) which has spawned considerable debate as to the power of the High Court to exercise a power of judicial review over decisions of the Crown Court relating to trials on indictment. Randle and Belsham are two of the many decisions in which this issue was considered. Although the decisions in Randle and Belsham that judicial review did not lie in respect of the decision of a Crown Court judge that the whole or part of an indictment should be stayed as an abuse of process were overruled by the House of Lords in DPP v Crown Court in Manchester [1993] 2 AER 663, the distinction drawn by Watkins LJ between the effect of a stay and an order that the charges lie on the file was not challenged. Indeed Lord Slynn (with whom the remainder of their Lordships agreed) expressly recognised that there were differences between the two situations. Having quoted the first sentence of the passage from the judgment of Watkins LJ in Randle already cited above, he continued "There are differences between the two situations but in my opinion they are not material for present purposes.." See p. 669 j.

[9] The power to order a count to lie on the file is a power that has been exercised without question by criminal courts for many years. In 1953 Lord Goddard CJ referred to such orders as being "quite common practice" in R v Chairman, County of London Quarter Sessions ex parte Downes [1953] 2 AER at p. 752.

> "Again, if there is more than one indictment against a prisoner it is quite common practice, after the trial of one indictment, to direct that the other indictment or indictments are to remain on the file and not to be prosecuted without leave."

[10] In Connolly v The DPP [1964] 2 AER at p. 441 Lord Devlin referred to this as being "a common form of order that is constantly being made. It is meaningless except on the hypothesis that the court has power to order an indictment not to be proceeded with."

[11] This brings me to R v Central Criminal Court ex parte Raymond [1986] 2 AER 379. This also involved the question whether the High Court had power to make an order for judicial review against the Crown Court, and in the course of his judgment Woolf LJ (as he then was) analysised the nature of an order that an indictment should lie on the file at p. 383.

> "It starts off by having the same effect as an order for an adjournment but an adjournment which is accepted may never result in a trial. Frequently the order is made to safeguard the position of the prosecution and the defence in case a defendant, who has been convicted should appeal it being the intention of the court if there is no appeal or if the appeal is unsuccessful that the defendant should never stand trial. That the defendant can still stand trial is indicated by the limits on the discretion of the court (laid down by the House of Lords in Connolly v DPP) to prevent the Crown proceeding with the prosecution if it wishes to do so. However, in the majority of cases where such an order is made, there would be no trial and there will certainly come a stage when either the prosecution would not seek a trial or, if it did seek a trial, the court would regard it as so oppressive to have a trial that leave to proceed would inevitably be refused."

[12] The authorities therefore indicate that where an order is made that a count or counts, or indeed an entire indictment, should lie on the file, not to be proceeded with without leave of the Crown Court or the Court of Appeal, it is intended that whilst in the majority of cases there would be no trial, it is still open to the prosecution to reactivate the charges provided it obtains the permission of the court to do so.

[13] The power of the court to order a stay is similar in that it has the immediate effect that the charge or charges ordered to lie on the file do not proceed. However, the objective is not identical because it is intended that the prosecution will be brought to an end without the possibility of being reactivated. The power to stay proceedings, as opposed to ordering charges to lie on the file, was first recognised by the House of Lords in Connolly where it was held to be part of the court's inherent power to protect its

process from abuse. At p. 446C Lord Devlin described the form of the order that would be necessary when a stay would be granted.

> "The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused is being tried, or form or are part of a series of offences if the same or similar character as the offences charged in the previous indictment."

When Lord Devlin referred to a stay as being achieved by an order that the indictment "remain on the file not to be proceeded with" he did not add the caveat to which he had referred to earlier that it was not to be proceeded with "without the leave of the court etc", the effect of which is, as Woolf LJ pointed out in ex parte Raymond, that the defendant can still stand trial if the court gives permission.

[14] In none of the reported cases does it appear that a judge ordered a stay coupled with that an order that the charges be not be proceeded with except with leave of the Crown Court or the Court of Appeal. Both before Judge McFarland and myself Crown counsel referred to R v Potts Bill No. 107/02 at Belfast Crown Court, where Coghlin J granted a stay a stay for a fixed period of time in a murder case where an adult witness said that he or she would not testify. However, as the decision is unreported it is not possible to ascertain whether the matter was argued in the way it has been in the present case.

[15] In the passage already cited from Randle Watkins LJ observed "It matters not that there are circumstances in which a stay on grounds of abuse of process might be revoked or lifted: the crucial point is that such a stay, a direction that there shall be no trial, is intended to be final." Given that a stay is intended to bring a prosecution to an end where to allow it to proceed would be an abuse of the process of the court, and that reactivation of a case can be achieved by an order that the charges are to lie on the file and not to be proceeded without leave of the court, it is difficult to see how a stay can be combined with a provision that is intended to leave open the possibility of the charge being reactivated. In Belsham Watkins LJ did not repeat this observation.

[16] With the exception of Randle the authorities to which I have referred do not support the proposition that there is a third type of order which the Crown Court judge can make where the case does not proceed, namely that the indictment be stayed not to proceeded with without the leave of the court etc. This appears to me in principle to be an order which the court does not

have power to make. The power to order a "stay" is a power which is now well recognised. It is made where it would be unjust to allow the prosecution to proceed because to do so would be an abuse of the process of the court. It has the effect of stopping the prosecution in the sense that it is permanently terminated. It is, in my opinion, inconsistent with the exercise of such power that the stay should be expressed in terms that it is conditional. If it is the position that the court considers that the charge should not be proceeded with, but the option to reactivate the charges should be retained, then the court can take either of two courses. First of all, the case may simply be adjourned to a specific date in the future. Alternatively, if the charges are not to be proceeded with at the present time but it is desired to leave open the possibility that the charges may be proceeded with in the future, then the proper course may be to order that the counts lie on the file not to be proceeded with without leave of the Crown Court or the Court of Appeal. This order has the effect of preserving the ability of the prosecution to bring the charges forward again provided that they obtain the approval of the court to do so. Given that when the order is made the normal expectation is that the charges will not be reactivated there may come a point at which the court considers that it would be unjust to allow the charges to be reactivated. That is why the ability to reactivate the charges is subject to the safeguard that prosecution obtain the permission of the court as Woolf LJ stated in Raymond.

[17] I therefore consider that Judge McFarland made an order which he did not have power to make when he expressed the order as being a stay but added to it the proviso that it was not to be proceeded with without the leave of the court or the Court of Appeal. It is, however, abundantly clear from the terms of his judgment, and the transcript, that what Judge McFarland was being asked to do, and intended to achieve, was to enable the prosecution to bring the charges again if the court gave approval. Were it not for the fact that some confusion of terminology appears to have crept into the discussion before Judge McFarland I am confident that he would not have expressed himself in terms of a stay, but would have ordered the charges to lie on the file. As I discussed with counsel, if there were any doubt about what Judge McFarland intended to achieve the proper course would be for the matter to be remitted to Judge McFarland to consider whether his order should be amended. However, counsel did not dispute that it is clear from the transcript what order the judge was being asked to make, and from his judgment, as opposed to the order he expressed, that he intended that the prosecution were to have the ability to reactivate the charge in certain circumstances. I therefore do not consider it necessary to refer the matter back to Judge McFarland to amend his order.

[18] As Mr McCrudden helpfully pointed out, the Crown Court has a power to amend an order to ensure that it conforms to the court's intention by curing an accidental slip or omission. See the very helpful review of the

authorities in this area by Judge Rubin in R v Michael [1976] QB at pages 418 and 419, which was approved in Agitraders [1983] QB at 470. Whilst it would be unusual for a judge to change an order made by another judge where the court believed that there may have been an accidental slip or omission in the wording of the order, nevertheless there must always be such a power, as for example where the judge has died or is unavailable to deal with the matter, perhaps because he is retired. Therefore, given that it is clear that Judge McFarland intended that the prosecution should be allowed to reactivate the charges if the court were to give permission, I am satisfied that if it is necessary to change the wording of his order that I have power to do so in the exceptional and most unusual circumstances of this case.

[19] Mr McCrudden for the defendant did not seek to argue that the defendant would be prejudiced by the passage of time were the matter reactivated, nor do I consider that there is any basis upon which such an argument could be mounted. The defendant is aware of the nature of the evidence against him because he was committed for trial and the committal papers are available which contained the prosecution allegations. The allegations themselves relate to matters that allegedly occurred comparatively recently as I have already indicated at the beginning of this judgment. Therefore, subject to the point to which I now turn, I am satisfied that the defendant would not suffer an injustice were the matter to be allowed to proceed because he has not been prejudiced in any way by the passage of time or any other matter.

[20] Part of Mr McCrudden's argument was that such an order should not be made where the accused refuses his consent, or at least does not acquiesce, and it is convenient to refer at this stage to two cases where the court considered whether to permit charges to be reactivated.

[21] In R v Riebold [1965] 1 AER 653 the prosecution elected to proceed with a substantive count of conspiracy and the defendant was convicted. The court ordered the remaining accounts to lie on the file, not to be proceeded upon without leave of the court. The conspiracy conviction was quashed on appeal. The prosecution then applied for leave to proceed on the remaining counts. Applying Connolly, Barry J refused leave on the grounds that the prosecution were in effect seeking to secure a re-trial of the whole case and that would be oppressive when the charges were founded on the same facts as the charges in a previous indictment. In R v Thatcher, [1967] 3 AER 410 the accused, with others, had been tried on an indictment containing a single count of capital murder. It was the prosecution's case that all four were engaged in an armed raid in which a man was murdered. The accused were all included in a second voluntary bill of indictment in which they were charged with armed robbery based on the same facts. At the conclusion of the murder trial the trial judge ordered that the voluntary bill was to "remain on the file marked not to be proceeded with without the leave of this court or the

Court of Criminal Appeal." Thatcher subsequently successfully appealed his conviction for capital murder and a verdict of simple murder carrying life imprisonment was imposed. Some considerable time later he applied to the Recorder of London at the Central Criminal Court for an order that the voluntary indictment be proceeded with. The report does not explain why the defendant sought a trial but one may perhaps surmise that his objective was to seek to undermine the reliability of the conviction for murder if he were to be acquitted on a charge of armed robbery based upon the same facts as the murder conviction. Be that as it may, the Court of Appeal refused to entertain the application because he had not been convicted on the second indictment and the court's jurisdiction only arose in cases of appeals by persons convicted on indictment. However, without deciding the point, the court expressed the view that if an application were to be entertained to allow the second indictment to be tried it would be an abuse of the process of the court.

[22] Therefore, in both Riebold and Thatcher the court refused to allow the charges to be reactivated, in Riebold's case when the application was made by the prosecution, in Thatcher's case when the application was made by the defendant.

[23] Mr McCrudden's argument that the court should not grant leave had two limbs. One was that the prosecution should not be granted leave because of the changes that had been made by virtue of the Criminal Justice (Evidence) (Northern Ireland) 2004 which which, inter alia, permit the court to allow the introduction of evidence of bad character and to direct a jury that evidence of recent complaint is evidence of the truth of the matters complained of. He also pointed to the prosecutor now having a statutory right to appeal against rulings in the course of the trial. I do not consider that these are proper grounds to refuse leave if leave is otherwise justified. I do not consider that it can be said that the prosecution have manipulated the proceedings in this case to achieve this object. No one was under any doubt at the time Judge McFarland made his order that the reason for the prosecution not proceeding at that time was because this child was not prepared to go ahead with giving evidence in court. It may be different if there was evidence to suggest that in some way the prosecution had not acted bona fide in relation to the application before Judge McFarland, but there is no such evidence and I do not consider that it can be asserted that a change in the law renders it inappropriate for a charge to proceed if it is otherwise proper to permit that course to be adopted.

[24] The more substantial objection which Mr McCrudden made was that to allow the prosecution to proceed would be an abuse of process because Judge McFarland should not have made the order which he did in the face of the defendant's clearly expressed objections at the time. In this respect he pointed to the view expressed the learned editors of Archbold 2006 at 4-

191where it is stated that an order that the charges should lie on the file "should never be made where the defendant pleads not guilty and the prosecution are disinclined to proceed, but are unwilling to offer no evidence; in such circumstances the defendant's consent is insufficient reason for ordering a whole indictment to lie on the file." However, as Mr McMahon pointed out, the learned editors of Blackstone's Criminal Practice 2006 at page 1463 expressed a view which is not quite as emphatic where they say:

> "It is thus still arguable in theory that orders to lie on the file should be dependant on the defence consent but, whether that be right or wrong, there is nothing *in practice* to prevent a judge doing what the judge in Raymond's case did, that is, making the order in the face of defence objections."

[25] It is necessary at this stage to return to Riebold and Thatcher. In Riebold the prosecution were refused leave to reactivate the charges, whereas in Thatcher it was the defendant who was refused permission to reactivate the charges. That the court can deal with these matters in the absence of the consent of either party appears to be inherent in the orders made in those cases. In R v Preston Crown Court, ex parte Fraser [1984] Crim LR p. 624 the trial judge ordered a count to lie on the file not to be proceeded with without leave of the court or the Court of Appeal despite the defendant's objection. Although this was a case where the application was refused in view of Section 29(3) of the Supreme Court Act 1981, the report would suggest that the Divisional Court did not consider that the order was one which was outside the judge's power. In that case the count was ordered to lie on the file because the witness was too ill to give evidence and the report states that "if the witness was fit to give evidence the Crown Court could consider the justification for bringing such a trial on after a long lapse of time". That would suggest that the court saw nothing improper in the order which the judge made.

[26] A similar order was made by Mr Justice Henry (as he then was) in R v Spens, The Times 31 December,1992, the prosecution arising out of the takeover of Distillers Plc by Guinness Plc. However, in that case the Divisional Court considered it had power to quash the trial judge's order and held that the judge had no power to order the permanent stay. In that case the stay had been entered even though the prosecution were apparently prepared to offer no evidence, and despite the defendant's request that a verdict of not guilty be entered. The Divisional Court held that "Abuse of process was the essential foundation of the court's power to stay a prosecution". The case appears to be a very different one to the present case, and the court does not appear to have considered the power to order the counts to lie on the file. It is therefore distinguishable from cases such as Raymond.

[27] In Connolly's case at page 438 Lord Devlin observed "that nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused." Although the radical changes which have been made to the criminal laws of procedure and evidence in the four decades since Connolly's case mean that this statement now has much less force, nevertheless I consider that it is a striking affirmation that judges have a residual power to ensure that what is fair and just is done between prosecutors and accused. I agree with Judge McFarland that the court has a power to order that charges lie on the file not to be proceeded with without the leave of the court even though the defendant objects, although it would be rare in practice that it would be done in the face of such objection as the defendant is entitled to seek a verdict. However, the authorities to which I have referred suggest that the defendant's right to seek a verdict is not an absolute right. In his judgment Judge McFarland carefully considered the position of both the prosecutor and the defence, and whilst his order was undoubtedly a novel exercise of jurisdiction I am satisfied that it was one which was lawfully open to him, and it is not for me to sit by way of appeal from that order.

[28] This child is now two years older, and in the video taped interview has explained why she did not want to go ahead with the case and now feels able to do so. She was told by her grandmother that if she gave evidence she might have to go into a home and she was scared by this, and by going to court. She now feels different because she is now living with her mother who says she supports her 100% whatever decision she makes. She is now fifteen, feels braver and able to go to court, and is worried as her father is living in the area. She had also been worried about her brother's attitude towards her if she gave evidence. These are understandable reasons for a change of mind and I do not consider that the interests of justice would be well served by holding a child of this age to a decision made two years ago in very understandable circumstances, even though this has the effect of placing the defendant on trial when he may well have thought that this would not occur.

[29] As the order was properly made and I consider that the defendant will not suffer any prejudice to his ability to defend himself as a result of this trial being reactivated after a delay of in or around two years by the time the trial actually takes place I consider that I should grant the prosecution leave to proceed with the charges upon which the accused was originally indicted and to which he has pleaded not guilty, and I therefore grant the prosecution leave to proceed with this indictment..

[30] There are a number of procedural matters which now must be addressed. The first is that an inevitable effect of Judge McFarland's order was, it appears to me, that any order for custody or bail applicable to the

defendant was revoked. Had that not been so, the defendant could have remained indefinitely in a state where, although there were no active charges against him, he was on bail and subject to any conditions that the court might have imposed upon him. That cannot be right. I will hear counsel as to whether the accused should be remanded in custody or admitted to bail pending trial. The defendant has been arraigned and the indictment is still in existence, so there is no need for a new indictment. I will also hear counsel as to when the case can be listed, and where the trial should be heard.