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(subject to editorial corrections)

IN THE CROWN COURT SITTING IN NORTHERN IRELAND

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BILL NO. 20B/05

THE QUEEN

-v-

EDWARD FRANCIS MAGILL
AND
ALAN McKENZIE

_____

DEENY J

[1] A jury was to be sworn on the trial of these two accused on Monday 18 September 2006. Mr John McCrudden who appears with Mr Martin Mulholland for Edward Francis Magill indicated that he had an application for a stay of the proceedings as an abuse of process on grounds that had arisen not only since his earlier application but since the preparatory hearing into this matter in the previous week. With the consent of all parties I swore a jury but released them to hear this application. The accused were subsequently put in charge of the jury on Wednesday 20 September.

[2] In the events it became clear that there were issues of the admissibility of evidence as part of the Crown case which overlapped to a greater or lesser extent with the application that Mr McCrudden was bringing. While I will rule on those issues separately the degree of overlap between the application to exclude evidence taken from the defendant's home at Ravensdale, County Louth is inextricably linked with Mr McCrudden's application.

[3] Mr John Orr QC who appears with Mrs Fryers for the defendant Alan McKenzie reserved his position subject to only one point. Mr Thompson QC, who appears with Mr McCaughey for the prosecution, was able to clarify that the cigarettes and tobacco found on the person of Mr McKenzie on his arrest were not considered unlawful and were not part of the prosecution case. He also dealt with a matter raised by Mr Orr ie. that new witness statements which had just been served from employees of tobacco companies

were in substitution for earlier statements from similar witnesses because those other witnesses were no longer available. On a factual basis Mr Orr confirmed that his solicitors had not been informed of the matter which constituted Mr McCrudden's first ground with which I will deal below.

[4] Mr McCrudden submitted that the cumulative effect of the matters to which he drew attention can justify the stay both on the basis that his client could no longer have a fair trial and that it would be unfair to try him. I think it helpful to set out paragraphs 24 and 25 of the judgment of Lord Bingham in Attorney General's Reference No. 2 of 2001 (2004) 1 All ER 1049:

> "(24) If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under art. 6(1). For such breach there must be afforded such remedy as may be just and appropriate (s 8(1) of the Human Rights Act 1998) or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless
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> (a) there can no longer be a fair hearing, or
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> (b) it would otherwise be unfair to try the defendant.
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> The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which it has accrued and not in the prospective hearing. If the breach of the reasonable time

> requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgment of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.
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> (25) 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 AER 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."

It can be seen that the House of Lords there was principally concerned with the issue of delay but I take into account the other cases set out in Archbold, 2006 edition at paragraphs 4-48 to 4-75.

[5] Mr McCrudden's first complaint referred to the 435,000 cigarettes which his client is said to have been knowingly concerned in carrying, removing etc. as set out in the only count on this indictment, contrary to Section 171(1)(b) of the Customs and Excuse Management Act 1979. Mr McCrudden said from the Bar that his solicitor, Mr Michael McVerry of Tiernans, Solicitors, Newry had been seeking access to seeing and counting the cigarettes since 2003. He had made many such applications directly on

the telephone to Mr S Tracey, Higher Investigation Officer of what is now known as HM Revenue and Customs who is the officer in charge of the case. Furthermore he had written to him seeking to "inspect and copy all material seized by HM Customs and Excise in respect of this investigation on 28 may 2003". As indicated he says there are further oral communications. Mr Tracey wrote on 2 May 2005 saying he would be in contact about material gathered during the inquiry. On 5 June 2005 he wrote to say that there were "several cigarette/tobacco items (as shown in the schedule) which have been retained as unused material." No schedule was apparently enclosed. He went on to ask expressly for Tiernans to reply by return as to whether they wished to view "the **unused** cigarette/tobacco items or not". Tiernans wrote regarding a long list of items on 27 June 2005. There was further correspondence and on 11 July 2005 they wrote to say:

> "Your letter of 5 July 2005 refers. We have already indicated to Mr Paul Clarke that we wish to view ALL 'cigarettes/tobacco' held items by customs in this case whether his exhibits are unused material."

Although Mr Tracey wrote back on 14 July he was replying to an earlier letter and did not address this issue. I was informed from the Bar that Mr McVerry continued to pursue the matter informally but was only admitted to Carne House, Belfast, a warehouse used by the Revenue and Customs on Wednesday 13 September 2006, just before the trial. Mr Tracey was neither there nor contactable but the lady he had left to represent him said that the bulk of the cigarettes had in fact been destroyed.

[6] Subsequently Mr Thompson QC in reply regretted that the cigarettes were no longer available. He said that it had happened not on the watch of Mr Tracey. His best information was that it had happened in November 2003. They were perishable goods without any legal market as they were counterfeit cigarettes. They had been destroyed.

[7] It can be seen immediately that the letters from Mr Tracey in 2005 were therefore quite misleading. This either discloses a degree of incompetence that the customs did not know that they themselves had destroyed over 400,000 cigarettes which, I was told would fill a van, or although this does not seem likely in the circumstances, that they were misleading the solicitors for the defendant. Mr McVerry was particularly anxious to inspect the cigarettes because in another case in which he had been instructed a similar inspection had disclosed that the count made by the Customs and Excise was wholly inaccurate. In that case the judge had permitted the prosecution to amend from the original figure to the phrase "a quantity of". I had in fact raised this possibility myself before being informed of this. In the event it was not a course that Mr Thompson wished to take. He proposes to prove the original amount of cigarettes to the satisfaction of the jury by calling the customs

officer who counted them. That is a matter for him. I think, without having had any express submissions on the point, that the maxim de minimis non curat lex applies here. I will hear counsel in due course as to whether the jury have to be satisfied that the count is accurate to within a few boxes or to some larger measure. Mr Thompson accepts that Mr McCrudden will be entitled to raise this matter before the jury. It may be quite an effective jury point. However he says that no prejudice has been caused to the defendant.

[8] However it is certainly a breach of the Code of Practice under the Criminal Procedure and Investigation Act of 1996. Indeed Section 23(1)(d) of that Act expressly envisages that the Code should secure that material obtained in the course of a criminal investigation which may be relevant to that investigation is retained. That is reinforced in stronger language in the Codes themselves which say the material must be retained. See paragraph 5.1, 5.6 and 5.7. One might have thought that a clear breach of these Codes would at least elicit some apology from the prosecution either in correspondence or from the Bar but none was forthcoming. This is particularly so as there was in effect an undertaking in addition to retain it to allow Mr McVerry to examine the cigarettes.

[9] However, the prosecution have managed, although they had mislaid some of them for some time, to locate the five samples of cigarettes which had been retained by the customs officer and described as DR1-5. These were the only cigarettes that they ever intended to use. Some of them had been with a tobacco company witness which caused further confusion at one stage. Given that the only purpose in inspecting the other cigarettes which Mr McCrudden could put before me was to count them, it does not seem to me that this failure on the part of the prosecution could come close to justifying a stay of the proceedings.

[10] Mr McVerry also asked to see, when he attended on Wednesday 13 September, the BMW vehicle, which once bore the plates GDZ36, which his client was seen driving on 21 February 2003 on the Beersbridge Road, Belfast and which he was driving when he was arrested, although he does not appear to have been the legal owner of that vehicle. Again he was surprised to learn that it was not available, It had in fact been stolen from secure premises while in the custody of the Customs and Excise. Again it should clearly have been retained.

[11] Mr Thompson QC was even more robust in his response to this. He said that in accordance with Government guidelines for outsourcing responsibilities the car had been committed to the care of a well known company. It had in fact been stolen from their premises. A crude hole had been cut in the fence of the premises and the car driven through it. He said that it was likely the car would have been damaged in this theft with the implication that it had not been stolen for resale, but for some other reason.

Once more Mr McCrudden faced the difficulty that he was not in a position to say that his client was prejudiced by the absence of the car. There were no forensic leads which it was sought to obtain from it. He resented the suggestion that it may have been stolen by someone seeking to assist his client.

[12] I can only deal with it on the basis that it is currently before the court. Counsel for the defendant may, or may not, wish to cross-examine about this. It may be that it is a double-edged sword, Mr McCrudden suggested for the prosecution, but it may also be a double-edged sword for the defence. In any event it is not a matter for me, except to say that it does not ground an application to stay.

[13] At this stage Mr McCrudden referred to a number of the relevant authorities in Archbold on this topic including R (Ebrahim) v Feltham Magistrates' Court; Mouat v DPP [2001] 1 All ER 831. He submitted that the suggestion in Archbold, on the authority of this case, that the defence must show on a balance of probabilities that owing to the absence of the relevant material the defendant would suffer serious prejudice to the extent that a fair trial could not take place was a misstatement of the law. He relied on the decision of the Divisional Court in Re DPP for NI 1999 NI 106 where Sir Robert Carswell LCJ, as he then was, accepted counsel's submission that it was enough to show a risk of prejudice and that to speak of burdens of proof was not applicable. I accept that submission on Mr McCrudden's part. Nevertheless the non-availability of the car and of the cigarettes do not seem to me to create a risk of any significant prejudice to the conduct of the defence in this case not to prevent a fair trial. Whether or not the Customs and Excise are blameless in this matter is something which I could only resolve if I did hear evidence on oath, which I do not direct. But it would not affect my ruling.

[14] The third of Mr McCrudden's grounds with which I wish to deal is his contention that, again in breach of the Code under the Criminal Procedure and Investigations Act of 1996 the prosecution failed to properly investigate two lines of enquiry. One of those was in respect of two persons arrested next door to the premises on the day in question. The second was with regard to a Mercedes motor vehicle identified in the papers, and seen on the video which the Crown wished to rely on, as parked outside the premises at the relevant time on 21 February 2003. He also made some reference to a Rover motor vehicle which also appears on that video. Mr Thompson described the two persons who were arrested as mere urchins about whom a decision was taken not to prosecute. He submitted that if the Customs and Excise had had to pursue every motor vehicle visible on the video it would open a floodgate of enquiries with which it would not be possible to cope.

[15] I think this is, again, rather too laissez-faire an attitude to adopt. The Mercedes motor vehicle is certainly parked outside the premises for a prolonged period of time when these cigarettes were being moved in and out. It certainly appears that the driver of that vehicle, who should be identifiable, went into the premises and came out at highly relevant times. It would take little to persuade me that he was involved in this illegal enterprise in some way. I therefore reject the argument put forward by Mr Thompson. However I think the better answer as to why this does not ground a stay is on more general grounds. Merely because somebody else may have also committed an offence but is not before the court, the accused is not entitled to be acquitted. It is no defence to a criminal charge to say that not all the defendants are before the court. One is led into speculation as to why this man is not before the court. He may be dead. He may be outside the jurisdiction. He may be an informer. It seems to me that if the matter were raised I should direct the jury along those lines and invite them not to be concerned about that.

[16] This is a very different situation from that which more often arises in fiction than in fact where there may be somebody who has committed a crime on his own and the police have allegedly not troubled to trace him, but have concentrated their efforts on a sole suspect who could be entirely innocent. Here the prosecution have a prima facie case that Mr Magill was in the proximity of and involved in shepherding the movement of these cigarettes. Even if the man in the Mercedes was before the court that would not relieve Mr Magill of any liability, if such properly falls upon him. Counsel referred me to various cases which he felt were of assistance eg. where a video tape had been destroyed which if it existed could have made out the defendant's defence (Mouat v DPP). That is not this case. Nor is it a case where the defendant has always claimed that a tape contained in a particular CCTV camera could show that he was not one of the persons who had committed a robbery. In all the circumstances therefore I do not consider this matter assists the defence. Whether or not they wish to cross-examine about it is however a matter for them. I understand Mr Thompson to concede that they would be entitled to do so.

[17] I refer to my ruling on the admissibility in evidence of the documents seized at Mr Magill's home in County Louth. I have ruled that the statutory conditions have been complied with and that those documents are admissible in evidence. I have made some critical comments about the handling of this matter by those instructing the prosecution. It does not seem to me that those matters amount to an abuse warranting a stay of the proceedings, either on their own or cumulatively. It may be that they may justify some lesser remedy of the sort contemplated by Lord Bingham but I reach no final conclusion on that at this time.

[18] On Monday 25 September, Mr McCrudden QC drew to my attention some correspondence that had emerged. The Crown says that photographs were taken of the inside of the Quality Car premises where the cigarettes, the subject of the charge, were seized by the Customs and Excise. However a prosecution letter suggests that Mr Tracy has been told by Mr Trevor Young, photographer, that although he has no real recollection, the photographs may not have "come out". This is a most unusual circumstance in my experience. The Crown do wish to rely on a video of the outside of the premises but will be unable to show any photographs of the actual cigarettes, the subject of the charge, or of the vehicle in which they were alleged to have been found. This circumstance, if I accepted the explanation given, is most regrettable. However, I conclude that it is not enough, even with the other matters to lead to a stay of the proceedings. It may well be, again, that it is a matter which the defence will use before the jury in a way that will redound to their benefit, thus emphasising that they should not be prejudiced by the absence of photographs.

[19] For completeness, I have taken into account the provisions of Section 26 of the Criminal Procedure and Investigations Act 1996. I note that a failure to comply with the Code does not expose persons to civil or criminal proceedings. I note the provisions of Section 26(4). In the light of the authorities referred to in my earlier ruling on abuse of process, including the Bell case, it seems to me that these matters may have to be taken into account at the conclusion of the case.

[20] Mr McCrudden submitted to me that if I was against him on the issue of the stay I should consider whether I should exclude the evidence on foot of Article 76 of PACE. I will not repeat the matters extensively set out above. I conclude that the admission of the evidence to which he objected would not have such an adverse effect on the fairness of the proceedings that I ought not to admit it. I do not consider that the obtaining of the evidence from the car or from the home is at all unfair. The unsatisfactory handling of the matter by an individual officer or officers of the Customs and Excise should not preclude the admission of the evidence. I refuse the application.