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Judgment: approved by the Court for handing down | *Delivered:* **26/9/06**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

EDWARD FRANCIS MAGILL
AND
ALAN McKENZIE

[Admissibility in Evidence of Documents Seized at Ravensdale, Co. Louth]

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DEENY J

[1] Part of the prosecution case against Edward Francis Magill in this matter is that documents were found in his home at Doolargy, Ravensdale, County Louth when those premises were searched by law enforcement officers in the Republic of Ireland on 12 March 2003. The prosecution submit that the nature and character of these documents point to the smuggling and distribution of cigarettes, which were either counterfeit or on which duty had not been lawfully paid. The prosecution case is that a number of these documents are actually in Mr Magill's handwriting and therefore point all the more strongly towards him having the necessary criminal intent on the charge he faces.

[2] In the course of an application to stay the proceedings for abuse of process, commenced on Monday 18 September 2006, Mr John McCrudden for Mr Magill raised the use of these documents as a ground of his application. At that stage he was complaining because the prosecution were seeking to put them in evidence without adducing any documentation to the court to show that they were lawfully entitled to do so. He was at that stage able to hand in a folder (purple in colour) which contained the transcript of hearings before Judge Gerard Haughton in the Dublin District Court relating to various other accused. Despite express requests nothing of that kind nor any Letter of Request had been adduced in respect of his client.

[3] The prosecution reaction to this was to say that these documents did indeed exist. They complained that Mr McCrudden had not set out this issue

in his Defence Statement. However Mr McCrudden was able to point out that his solicitor had written seeking documents of this nature the previous year without receiving them. Indeed it was those requests that had led him to get the other transcripts. It seems to me that the Customs and Excise were at fault in failing to respond to the reasonable requests of the solicitor, but I also have to say that the Defence Statement only adverted to this issue in the broadest way so as to give no true indication to the prosecution that the point was being taken. The parties are to an extent even therefore.

[4] Mr Thompson QC for the prosecution seeks to put in evidence the documents concerned. By agreement this is a matter on which I have been asked to rule prior to the opening to the jury. As in the other matters it is just and convenient to do so as the jury have been kept waiting while the court had prolonged submissions on this and other issues on the 18,19,20,21,22 and 25 September. Mr Thompson accepts that in the event of his witnesses on this matter significantly failing to come up to their proofs serious consequences may result. But he is content to take that risk because he feels it is important for the jury to hear the whole picture when he opens the prosecution to them. This ruling therefore is made on the basis of the documents put before me but not oral evidence. Inevitably it overlaps with Mr McCrudden's application for a stay.

[5] Mr Thompson first relied on a warrant which had been issued in the Republic of Ireland on 10 March 2003 on the application of Detective Garda Vincent Byrne. He applied and was granted the warrant under Section 14 of the Criminal Assets Bureau Act 1996. He and other officers carried out the search of Mr Magill's home on 12 March 2003. Mr Thompson submitted that this court was not entitled to go behind the warrant. Mr McCrudden did not seem disposed to dispute that submission. In any event the warrant appeared to be a perfectly proper one. In the circumstances I will say no more on that point.

[6] The prosecution wish to put in evidence, as indicated above some of the documents found in the course of the search. They do so on foot of the Criminal Justice (International Co-Operation) Act 1990 which is the relevant statute at the time in question, although it has since been superseded by the Crime (International Co-Operation) Act 2003. This is the nature of Mr Thompson's application so that it has not been necessary for me to consider whether any common law basis exists for putting in evidence material obtained outside the jurisdiction.

[7] One essential aspect of the statutory scheme is that an appropriate authority in the requesting state sends a Letter of Request to the appropriate authority in another State seeking evidence. When this was first discussed on Monday 18 September Mr McCrudden had not been furnished with that document. Indeed Mr Thompson QC said that it would be subject to an

application for public interest immunity. In the event, on the following day he provided two letters of request, both from Sir Alasdair Fraser, Director of Public Prosecutions for Northern Ireland. One was dated 29 April 2003 and one 21 May 2003. He furnished these letters to the defence in a redacted state. Subsequently Mr McCrudden was to claim that this was a mere sham. The material which had been redacted related to the co-accused and was known to the defence either threw them or through an application in connection with the Criminal Assets Bureau. However it is right to say that Mr Thompson QC had furnished the court with unredacted copies as well as redacted copies. There could be no question therefore of him trying to mislead the court in any way, which Mr McCrudden accepted. It is puzzling, nevertheless, that somebody should tell Mr Thompson that this letter ought to be covered by public interest immunity. He told the court frankly that when he said this on 18th he had not seen the letters concerned which I entirely accept. Therefore in saying, as I do, that there seems to be something in Mr McCrudden's suggestions, I exclude counsel from any criticism in the circumstances.

[8] In any event the suspicions of the defence that no Letters of Request have been sent have not been vindicated. The letters are in an appropriate form. The second letter of 21 May, at paragraph 9(i) expressly seeks:

> "The material uplifted by the Criminal Assets Bureau on 12 March 2003 during the house search of Edward Magill's home address of 3 Doolargy, Ravensdale, County Louth."

This is important because Section 3(7) of the Criminal Justice (International Co-Operation) 1990 provides as follows:

> "Evidence obtained by virtue of a letter of request shall not without the consent of such an authority as is mentioned in sub-section (iv)(b) above be used for any purpose other than that specified in the letter; and when any document or other article obtained pursuant to a Letter of Request is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to such an authority unless that authority indicates that the document or article need not be returned."

I therefore find that in this case the provisions of Section 3(7) have been complied with.

[9] Mr Thompson relied on Article 17 of the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 20 April 1959). It provides that: "Evidence or documents transmitted pursuant to this Convention shall

not require any form of authentication." However I pointed out that the statute itself did at Section 3(4) impose a burden which it seemed to me he had to fulfil. I quote:

> "Subject to subsection (5) below, a Letter of Request shall be sent to the Secretary of State for transmission either –
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> (a) to a court or tribunal specified in the letter and exercising jurisdiction in the place where the evidence is to be obtained; or
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> (b) to any authority recognised by the Government of the country or territory in question as the appropriate authority for receiving requests for assistance of the kind to which this section applies."

It therefore seemed and seems to me that the prosecution, when relying on this Act, must show that the Letter of Request was sent to the Secretary of State and that it was received in compliance with either Section 3(iv)(a) or (b). No claim was or could have been made in this case that Section 3(v), cases of urgency, applied.

[10] To that extent I accept Mr McCrudden's submission that the court should reject evidence supposedly under the Act where the procedure had not been followed on the face of the documents. Mr Thompson was not minded to dispute that. Mr McCrudden relied, inter alia, on Creaven and Others and The Minister for Justice Equality in Law Reform and Others [2004] IESC 92. In that case the Supreme Court per Fennelly J found that the Letter of Request had not come from a court or authority in the United Kingdom authorised to make such a request to the Minister for Justice but from the Customs and Excise itself which, they concluded lacked that authority. In the circumstances of this case I have no difficulty with that decision. In passing I note the decision of the Court of Appeal in England in BOC Limited & Another v Instrument Technology Limited & Others [2002] QB 537; [2001] EWCA Civ 854. There the court held that there was no general principle of common law or of European Community Law that unlawfully obtained evidence was inadmissible, although it might be excluded in the exercise of judicial discretion. In that case material obtained from Switzerland for a criminal prosecution was then used in civil proceedings although they had not been mentioned in the Letter of Request. Nevertheless the Court of Appeal permitted their use.

[11] I respectfully note the decision of Lord Lowry LCJ in Re Burns Application [1985] NI 279. Although the facts there are very different, my view that Section 3 should be complied with is consistent with that decision.

I note also the decision of Lord Lowry in Campbell's case cited by counsel. I note the view taken by the Court of Appeal in R v Malcolm Gooch [1999] 1 Cr. App. R. (S) 283 but I do not think this affects the decision to which I come. I point out that the European authorities show that even if there were a breach of Mr Magill's Article 8 rights in regard to the search of his home that would not necessarily or be likely to mean that evidence thereby obtained could not be used against him. The European Court views the application of Article 6 quite differently from that Article 8 which would have its own remedies. See Lester and Pannick: Human Rights Law in Practice para. 4.6.

[12] I observe that in the course of his submissions Mr McCrudden placed great stress on the events that happened in the course of a prosecution of a number of accused in a trial involving Paul Eugene Kelly and Others. However it seems there it ultimately transpired that the evidence had been forwarded from the court in Dublin in respect of a man called Hanratty and not in respect of Kelly at all. This clearly is a major discrepancy on the face of the record and one can understand why the Crown ultimately offered no evidence in that case.

[13] On the afternoon of Tuesday 19 September, following Mr McCrudden's demand to see a transcript of any hearing in the Dublin court Mr Thompson replied that no transcript existed as there had been no application to the court. The handover had been in the precincts of the court. This subsequently proved to be quite wrong. The prosecution case now is that there was indeed an application and that a transcript exists. Mr McCrudden submitted that Mr Thompson could only have made that statement on instructions from Mr Tracey. It is part of the Crown case that Mr Tracey did intend to get the documents. How could Mr Tracey have so misled Mr Thompson and thus the court? I do not consider that I have had a satisfactory answer to this point. But in the light of the documents that subsequently appeared it is not a ground for refusing admissibility under the Act. At that time counsel was not in possession of documents which subsequently came to light. On Wednesday 20 September he informed the court that there was a signed transcript of the court hearing in the Republic of Ireland and that it and other documents should be available by late on Thursday. Mr McCrudden not surprisingly drew attention to this marked volte face. I note that this statement was again made without any apology for the earlier misstatement. It is separate from and more serious than the confusion about whether the notebooks of the officer or officers who attended at the Dublin court were in the bundles of unused materials. At first we were told they were but it subsequently transpired that it was admitted that they were not. Indeed, perhaps surprisingly, if I have understood correctly, Mr Tracey's only record of his visit to Dublin seems to be a travel application form to his own authorities to travel down on 28 January 2004 and return on 29th. As already indicated the defendant's solicitor had sought this group of documents, at least, on 8 July 2005 and 15 September 2005. He neither got

them nor got any apology for their non-delivery. Even on Wednesday 20 September Mr Thompson, no doubt on instructions, was drawing a distinction between the applications to the Dublin court with regard to the other accused which he was instructed involved court hearings because third parties such as banks were involved. No summons he was instructed was required for the papers seized from Mr Magill's house because they were already in possession of the Garda. This proved to be wrong again.

[14] The documents which Mr Thompson sought were not available on Thursday 21 September. I indicated that Mr Thompson must be ready to proceed on the following day the Friday 22nd. The court then dealt with the handwriting issue.

[15] On Friday 22 September Mr Thompson made available a bundle of documents relating to this issue and went through them. They are available and I do not propose to itemise them in detail. Suffice it to say that subject to oral evidence demonstrating something significantly different they do satisfy me that Section 3(4) of the 1990 Act has been complied with. They show clearly that the Public Prosecution Service did forward the Director's Letter of Request to the Secretary of State for Northern Ireland who in turn passed it to the Home Office. As I pointed out, in constitutional law there is one Secretary of State and I would have been content with satisfactory evidence of communication to a Secretary of State. In any event it is clear that the matter, in accordance with what our normal procedures, went from the Northern Ireland Office to the Home Office. From there they clearly proceeded to the Department of Justice, Equality and Law Reform in the Republic of Ireland. I am satisfied that it has the authority "recognised by the government of the country or territory in question, as the appropriate authority for receiving requests for assistance of the kind to which this section applies." I will briefly assess the documents supporting that conclusion in the light of Mr McCrudden's attack upon them. There was a transcript of the evidence heard before Judge Gerard Haughton, of the District Court, Dublin Metropolitan District, to whom the matter had been referred by the Minister for Justice. He sat on 28 January 2004 and heard Detective Garda Vincent Burn examined by Mr Patrick O'Reilly, counsel for the Minister. Mr McCrudden's first point is that the transcript is unsigned. It is unsigned by the judge. But it is verified by "Doyle Court Reporters Limited of 2 Arran Quay, Dublin 7, "who prepared the transcript. It is in identical formal to the other transcripts which I have seen. Subject to some evidence to the contrary it seems persuasive.

[16] Mr McCrudden commented that the face of the document referred to a supplemental letter of request dated 7 October 2003 from the DPP of Northern Ireland, whereas the two letters concerning his client were of April and May 2003. However, it is clear from the transcript and from the letters from the Minister that a number of letters had been written in connection with this matter. It is quite clear that the judge was hearing references to the 27 April

letter of 2003. Mr McCrudden pointed out that there is a reference to a letter of request dated 27 April 2000 on the first page of the transcript. The correct date should be 29 April 2003. Counsel on the second page refers to the letter of request, "dated April 2003". One has, of course, a letter before one and it can be seen that counsel's questions and the Garda's answers and the judge's ruling are relating to paragraphs in that letter. I really see no merit whatsoever in taking a point which reflects either a slip of the tongue on the part of those concerned, or an error in transcription.

[17] Again counsel urges me to disregard the documents because there is no express reference to Sir Alistair Fraser's letter of 21 May 2003 seeking the material obtained from the search of Mr Magill's house. He says it is not mentioned at any stage but a letter from the Department of Justice, Equality and Law Reform, dated 20 January 2004 and describing itself as being from the Central Authority for Mutual Assistance, refers to "Your letter of request, dated 22 May 2003, supplementary request, 20 June 2003 and 24 October 2003 in relation to the above matter." I really find it difficult to believe that this not again a typographical error relating to the letter of 21 May. My views on that matter are reinforced by the fact that if one goes through the various letters from the Department of Justice they all bear the same reference, ie MLO03/241/0468. There is lengthy correspondence between the Department of Justice and the Home Office and prosecutors of one kind or another dealing with this matter, and it seems to me clearly proven that the court in Dublin had seisin of the matter on reference from the Minister who was indeed the appropriate authority in the Republic.

[18] Mr McCrudden urged me to go behind this. He did not have an express authority to support his contention that I should do so. Mr Thompson submitted that it was contrary to Article 17 of the Convention. I would observe myself that it seems contrary to the principle of judicial comity that I should seek to question whether a judge in an adjoining jurisdiction had properly performed his statutory duties under his own domestic legislation. I would need some persuasion that that was an appropriate course to take. In any event the only point that Mr McCrudden could really refer to is that Mr Tracey may have been given documents on 28 or 29 January directly by Detective Garda Byrne, rather than those going back through the Minister and the Home Office. Mr Thompson's answer to that is the factual one, that Mr Tracey was given copies. Originals only came north through the official channels when they were needed by the handwriting expert. Other originals will be proved by Detective Garda Byrne when he appears before this court. If, therefore, Mr McCrudden was right in his submissions in this regard, which I doubt very much, it does not seem to me that he has shown a breach of section 51 of the Criminal Justice Act (Ireland) 1994. He had been relying on the Second Schedule of that Act referred to in section 51 which says that evidence received by the judge shall be furnished to the Minister for transmission to the court, tribunal or authority that made the request. It does

not seem to me that that provision, if it is a matter for me at all, precludes the handing over of copies between law enforcement officers.

[19] I do not propose to go through these documents in any more detail than I already have, save to say that I have a strong impression that counsel before Judge Haughton did not have the letter of 21 May 2003 in front of him. However, he and the Garda knew that the Garda had the documents and it is clear that they expressly raised the matter before the judge and that it was received as relevant by Judge Haughton. I would also add that in a letter of 5 April 2004 to the Home Office from the Department of Justice the author, Nora M. Ni Dhomhnaill, expressly says:

> "You will note that the presiding judge ordered the immediate handover of additional evidence/exhibits to the visiting customs and excise officials on 28 January 2004."

[20] To summarise, therefore, I am satisfied that the United Kingdom legislation which I must apply has been complied with (subject to any failure of proof on the part of the Crown's witnesses). I do not consider that I must ensure that the legislation in the Republic has been complied with but in any event I am not persuaded that it has not been.