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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JOHN PATTERSON HILL

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Before: Morgan LCJ, Treacy LJ and Sir Donnell Deeny

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MORGAN LCJ (delivering the judgment of the court)

[1] On 8 May 1998 the appellant pleaded guilty to offences of arson, possession of firearms with intent, criminal damage and intimidation at Belfast Crown Court arising from his part in an Ulster Volunteer Force ("UVF") attack upon the Golden Hind public house in Portadown on 20 August 1997. He was sentenced to a custodial sentence of three years. He appeals with the leave of Colton J on the basis that as a result of failures of disclosure he was denied the opportunity to pursue an application for a stay of the proceedings on the grounds of abuse of process. Mr Kelly QC appeared with Mr Toal for the appellant and Dr McGleenan QC with Mr Simpson QC for the PPS.

Background

[2] In the summer of 1997 in Carrickfergus there were tensions between two loyalist paramilitary organisations, the UVF and the LVF. As a result of these tensions a number of men associated with the LVF caused damage to a public house "belonging to" the UVF. A number of senior local UVF members met to consider how to respond and it was determined that authority should be sought to attack the Golden Hind public house in Portadown which was a stronghold of the LVF.

[3] The most detailed account of the preparations for the attack is contained in the statements of Gary Haggarty, an assisting offender who subsequently pleaded guilty to 202 counts including 5 murders, 5 attempted murders, one count of aiding and abetting murder, 23 counts of conspiracy to murder, various serious offences involving firearms, explosives and punishment beatings and 4 counts of directing

terrorism. It was decided that a group of UVF men should drive to Portadown to wreck the Golden Hind bar and murder a leading LVF figure if he was there.

[4] In order to carry out this task those broadly responsible for the scheme were required to put together teams who would carry out the operation. Haggarty enlisted the support of the appellant and three others. They made their way in a convoy of 20/30 cars to Portadown and parked in a car park close to the bar. About 30 men then entered the bar causing damage and shouting that they were the Tiger's Bay UVF. One of their number painted Tiger's Bay UVF over an LVF mural in the bar. The bar was then set alight.

[5] A member of the public spotted what was happening and informed the police. A number of patrol cars came into the area and pursued the UVF vehicles stopping two of them on the motorway. One was the vehicle comprising Haggarty, Hill and three others. They and seven men in the other vehicle were arrested, charged in respect of their participation in the incident and all pleaded guilty.

[6] A further account relating to the incident is contained in the Public Statement published by the Ombudsman in respect of his investigation into the murder of Raymond McCord junior. At chapter 26 he deals with the attack on the Golden Hind. He stated that on 19 August 1997 an informant told Special Branch about a UVF meeting attended by senior UVF members. The informant advised that the attack was planned to take place the following evening at the Golden Hind but this intelligence was not disseminated to local police. There was, however, dissemination of general information noting that six premises, including the Golden Hind, in the Portadown area could be the scene of a confrontation between the UVF and the LVF.

[7] The Ombudsman indicated that the duty inspector was not given details of the time of any proposed attack or what individuals would be involved. The subsequent arrests were reactive on the part of the police rather than proactive. Because of a lack of information the inspector was not in a position to mount a police operation prior to the attack. The Ombudsman concluded that by their failure to act appropriately in the dissemination of information Special Branch allowed a situation to develop in which life and property were put at risk. He concluded that this situation arose because of collusion. That is a reference to the failure to take preventative action in respect of anticipated crime. There is nothing to indicate that police were aware of the intended crime prior to 19 August 1997 nor that the crime was instigated or incited by any state agency.

[8] When arrested the appellant was wearing a gold UVF ring and had a UVF tattoo on his body. He had a conviction for riotous behaviour on 12 July 1989 and a small number of other convictions for assault, disorderly behaviour and criminal damage. At interview he explained that the people in the car were lifetime friends. He said that he would have been most friendly with Haggarty as he knew him from school. He had enjoyed a couple of drinks before going to Haggarty's house on the evening of the attack as it was his birthday. He claimed that he got into the car and

then fell asleep until he was stopped by police. He denied being a member of the Tiger's Bay UVF. He pleaded not guilty at arraignment on 30 April 1998 but was re-arraigned and entered a guilty plea on 8 May 1998.

The Application for New Evidence

[9] The appellant applied pursuant to section 25(1)(c) of the Criminal Appeal (Northern Ireland) Act 1980 to adduce in evidence an affidavit sworn by him on 25 August 2017. The substantive portions of the affidavit stated as follows:

> "3. These offences were instigated, planned and directed by Mark Haddock and Gary Haggarty, both of whom I now believe were working at the material time for the RUC Special Branch. Before the offences were committed, I approached Gary Haggarty to query why had I had been ordered to attend a meeting place on 20 August. I informed Gary Haggarty that my birthday is 20 August and I didn't want to go with him as I had plans with my friends and family that day. Gary Haggarty dismissed my request not to go to the Golden Hind Bar and stated: "I need you there beside me". I repeated that I didn't want to go with him and he said: "I need you there and you have to come".
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> 4. I have lived in North Belfast all my life and I was aware at the time that Gary Haggarty was responsible for an unrelenting campaign of murder and serious punishment attacks, some of which descended into the former. It was in this context that I felt that I had no choice but to comply with the demand from this notorious figure.
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> 5. I also intended to contest these charges at the time as I believed that I had a workable defence in accordance with the legal advice that I received at the time. Whilst in prison, Gary Haggarty put me under pressure to accept a deal whereby we knew what sentence we would get before we pleaded guilty. Gary Haggarty said the following to me: "You will have to take this deal, we've about half the sentence done, we will be out in nine months". I felt very pressurised into changing my plea as a result of this conversation."

[10] These assertions directly contradict the account given by the appellant at interview when he described those in the car as his lifetime friends and Haggarty as the person to whom he was closest. In considering whether to admit evidence under

section 25 the court is required to have regard in particular to whether the evidence appears to the court to be capable of belief and whether there is a reasonable explanation for the failure to adduce the evidence at the trial. There was no indication that any of these assertions were disclosed to his lawyers at the time of his trial.

[11] In light of the fact that this evidence was adduced for the first time 20 years after the events in question and directly contradicted what had been said at the time by the appellant we considered that the affidavit on its own was not capable of belief. We indicated that we were not prepared to admit the affidavit evidence but offered the appellant the opportunity to give evidence in order to deal with the obvious discrepancies. The appellant chose not to do so. In those circumstances we leave out of account the contents of the affidavit.

The Claim

[12] The appellant's case was put on both a narrow and wider basis. The narrow basis was that these were crimes which Haggarty and Haddock together with other senior UVF figures promoted and the appellant was directed by Haggarty to take part in the operation. It was asserted that Haggarty and Haddock were at the material time providing information to the police and that their status as police informants was such that the incitement of others to participate in criminal activity instigated by them was sufficient to establish entrapment and rendered the proceedings against the appellant an abuse of process.

[13] The wider argument starts on the premise that in order to defeat terrorism in Northern Ireland during the Troubles the security forces engaged in the recruitment of those in a position of power within republican or loyalist terrorist organisations. In order to protect those assets Special Branch withheld intelligence from investigative teams in the RUC and turned a blind eye to evidence suggesting criminal activity by such sources. That created a culture of impunity. Those recruited were encouraged to progress through the ranks of the organisations in order to increase their access to useful intelligence.

[14] Such practices were the subject of the Stevens Inquiry which reported in 2003 and understood collusion to include the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder. Judge Peter Cory who conducted a series of inquiries into allegations of collusion in 2004 adopted a similarly broad definition. He stated that army and police officers must not act collusively by ignoring or turning a blind eye to the wrongful acts of their servants or supplying information to assist them in their wrongful acts or encouraging them to commit wrongful acts. Any lesser definition would have the effect of condoning or even encouraging state involvement in crimes thereby shattering all public confidence in these important agencies. Both Stevens and Cory concluded that collusion was widespread and systematic.

[15] The appellant's argument then proceeded on the basis that Haggarty was an obvious example of someone who was supplying information to the police while at the same time committing serious terrorist offences. It was submitted that in respect of Haggarty and any other person in a similar position involved in this offence it was necessary for this court to conduct a disclosure exercise taking into account every act of unlawful conduct that such a person was linked with and make an assessment by inference of whether pre-authorisation was given or protection from prosecution conferred after the fact. If the person was given free rein to commit crimes or order others to do so and then avoid prosecution that was state created crime regardless of whether each individual crime was sanctioned in advance. That was the wider abuse of process claim.

Entrapment

[16] R v Latif [1996] 1 WLR 104 was a case in which the defendants submitted that it was an abuse of process to try him as he would probably not have committed the offence of attempting drug importation were it not for the conduct of a paid informer and a customs officer who illegally imported the drugs. Lord Steyn gave the judgment of the House of Lords indicating that entrapment was not a defence under English law. He approached the issue in the following passage:

> "In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42* . *Ex parte Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Ex parte Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the

> competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

[17] What amounts to entrapment for the purpose of establishing abuse of process was considered by the House of Lords in R v Looseley [2001] UKHL 53. The hearing was concerned with two cases arising from the involvement of undercover police officers in the supply of drugs. Lord Nicholls indicated that the overall consideration was always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. He then set out at [26]-[29] some of the circumstances which are of particular relevance:

> "26. *The nature of the offence*. The use of pro-active techniques is more needed and, hence, more appropriate, in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.
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> 27. *The reason for the particular police operation*. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.
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> 28. *The nature and extent of police participation in the crime*. The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the defendant's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade,

> whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.
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> 29. *The defendant's criminal record*. The defendant's criminal record is unlikely to be relevant unless it can be linked to other factors grounding reasonable suspicion that the defendant is currently engaged in criminal activity. As Frankfurter J said, past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing repeated convictions, from which the ordinary citizen is protected: see *Sherman v United States 356 US 369*, 383."

[18] Lord Hutton said at [101] that balancing the relevant factors the English courts place particular emphasis on the need to consider whether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity to commit a similar crime, and when he freely took advantage of the opportunity presented to him by the officer. Lord Hoffmann said at [48] that the theme which runs through all the discussions of the subject is that the state should not instigate the commission of criminal offences in order to punish them.

[19] The authorities were reviewed recently by Lord Burnett presiding in R v TL [2018] EWCA Crim 1821. That was a case in which an adult male who ran a group called "Predator Hunters" engaged in communications online with a male who believed he was talking to a 14 year old girl. As a result the male was arrested and his electronic communication seized. An application was made to stay the proceedings as an abuse of process on the basis of entrapment. The trial judge acceded to the application.

[20] On appeal Lord Burnett indicated that the authorities make clear that there was a distinction between the actions of state actors and non-state actors. The principles in Looseley applied to the conduct of agents of the state. It was the court's unwillingness to abrogate seriously wrongful conduct by the state by entertaining the prosecution that was the foundation of this aspect of the abuse jurisdiction.

[21] Lord Burnett reviewed the decision of Goldring J in Council for the Regulation of Healthcare Professionals v The General Medical Council and Saluja [2006] EWHC 2784 (Admin) and accepted that it was not inconceivable that given sufficiently gross misconduct by a private citizen it would be an abuse of process for the state to seek to rely on the product of that misconduct. There was no reported case in which such activity had founded a successful application for a stay although there had been a number of applications based on alleged entrapment by

investigative journalists. Given the absence of state impropriety the situations in which that might occur would be rare.

[22] In this case we have conducted a careful disclosure exercise in respect of the intelligence available to police about the conduct of this crime at the request of the appellant. The police became aware on 19 August 1997 that a decision had been made on 15 August 1997 to carry out the crime. There was no instigation of the crime by the police nor was there any inducement to carry it out. Some intelligence was provided by Special Branch to local police about the potential for violence between groups of UVF and LVF members but the particular intelligence concerning the crime received the day before its commission was not transmitted.

[23] The failure of Special Branch to provide the specific intelligence which would have enabled local police to mount an action to intercept the commission of the crime was described by the Ombudsman as evidence of collusion in accordance with the approach adopted by the Stevens Inquiry and the Cory Report. Intelligence was critical in the fight against terrorism in this jurisdiction and the disclosure of precise intelligence had to be balanced with the need to take into account the risks to the informant should the source of the information become known to the terrorist groups. Although Special Branch had specifically asked the UK Government to provide a legal framework within which the management of intelligence could operate as far back as 1985 no such framework was provided until the Regulation of Investigatory Powers Act 2000. Until then Special Branch were left to make their own assessments about the public interest.

[24] This was a case where the decision to commit the crime was taken by a group of senior UVF personnel among whom were persons who provided information about terrorist activity to the police. That did not make this a state created crime and neither did the conduct of the Special Branch by failing to pass on relevant intelligence.

[25] We consider that the entrapment argument advanced on behalf of the appellant cannot succeed. The crime was instigated by non-state actors. The appellant's admissions in interview indicate that he was entirely familiar with the background of those with whom he was associating. There were clear indications that if he was not a member of the UVF he supported its broad aims. Even if there had been some pressure to participate in this offence the observations of Lord Lowry in R v Fitzpatrick [1977] NI 20 at 31D are appropriate:

> "If a person behaves immorally by, for example, committing himself to an unlawful conspiracy, he ought not to be able to take advantage of the pressure exerted on him by his fellow criminals in order to put on when it suits him the breastplate of righteousness. An even more rigorous view which, as we have seen, prevails in the United States, but does not arise for consideration in this

> case, is that, if a person is culpably negligent or reckless in exposing himself to the risk of being subject to coercive pressure, he too loses the right to call himself innocent by reason of his succumbing to that pressure."

[26] This was plainly a case where the appellant was provided with an unexceptional opportunity to commit a crime which he duly accepted. The failure to disclose the participation of informers in the commission of the crime did not deprive the appellant of any opportunity to stay the proceedings on the basis of entrapment.

Abuse of Process

[27] The wider argument on abuse of process does not depend upon entrapment. There have been a number of investigations dealing with the relationship between police and members of the security forces with those involved in terrorist organisations who have provided information which in some cases has been responsible for the saving of lives. We have already referred to the Stevens Inquiry and Cory Report at [14] above.

[28] The Report of Sir Desmond da Silva into the murder of Patrick Finucane examined the role of agents in that crime including the position of Brian Nelson who was appointed by the Ulster Defence Association, an unlawful paramilitary organisation, as their head of intelligence while acting as an agent for an organisation within the Army.

[29] Although none of these reports were opened beyond the references made above it was submitted that they supported the view that police and security forces enlisted the assistance of those involved in terrorist organisations and at the very least were happy to see them rise to positions of seniority within those organisations. In order to protect those resources and use them to maximum benefit there was evidence of a practice or policy of preventing the dissemination of relevant intelligence material which might assist investigators in establishing the guilt of those responsible and turning a blind eye to the commission of terrorist crimes by those sources within their terrorist organisations. The conduct of Haggarty was, it was submitted, an example of the latter.

[30] As indicated above at the request of the appellant we carried out a review of the intelligence material relating to the circumstances of the offences in this appeal. That established the involvement of informers in the promotion and commission of the crimes and the failure of Special Branch to disseminate information to local police. In order to deal with the abuse of process case the appellant submitted that it was necessary for the court to examine the previous offending of any relevant person in this offence who had an intelligence relationship with the police in order to examine whether in relation to other such offending a culture of impunity had been established. The submission was that if such a culture had been established the

prosecution of those involved in this offending was an abuse of process even though police neither instigated nor induced the commission of the offences nor gave any express undertaking or authority in respect of participation in the offence by the source.

[31] In answer to the appellant's submission that a further disclosure exercise should be carried out the PPS relied on R (Nunn) v Chief Constable of Suffolk Police [2015] AC 225. In that case Lord Hughes gave the judgment of the Supreme Court dealing with the disclosure obligations arising at the appellate stage. Any obligation arose at common law since the obligations under the Criminal Procedure and Investigations Act 1996 ("CPIA") only applied at trial. The principle of fairness informs the duty of disclosure at all stages of the criminal process. Where there has been a failure of disclosure at the trial the duty after trial will extend to pre-existing material which was relevant to the appeal.

[32] This is a case in which the trial process ended in May 1998 but the appellant wishes to have examined and disclosed material thereafter. Nunn makes clear that if the police and prosecution come into possession of something new which might afford arguable grounds for contending that the conviction was unsafe it is their duty to disclose it to the convicted defendant. That is consistent with guidelines issued by the Attorney General of England and Wales in 2013. In this case insofar as it may be relevant that would include the statements made by Haggarty as an assisting offender.

[33] Unlike Nunn this is a case in which it is maintained that the obligation of disclosure was not properly carried out at the trial under the CPIA. In order to deal with the argument about a culture of impunity at least those offences committed by relevant persons prior to the commission of the offence would on the appellant's case have to be disclosed. We doubt, therefore, whether Nunn is of much assistance in dealing with the issue in this case.

[34] The most recent analysis of the obligation of the court to stay criminal proceedings as an abuse of process was the decision of the Supreme Court in R v Maxwell [2011] 1 WLR 1837. At [13] Lord Dyson said that it was well established that the court has power to stay proceedings where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In that category of case the court is concerned to protect the integrity of the criminal justice system and a stay will be granted where the court concludes that in all the circumstances the trial will offend the court's sense of justice and propriety or will undermine public confidence in the criminal justice system and bring it into disrepute.

[35] This is a case in which we are satisfied that there was no instigation or inducement by the police nor was there any manipulation of the appellant. The argument is that because some of those involved in the commission of the crime may have had a culture of impunity it must follow that others who willingly accepted this

unexceptional opportunity to commit a crime should no longer be prosecuted. If the proposition were correct it is difficult to see that it would not also apply to those who were the providers of information to the security forces.

[36] In other words the submission would change the culture of impunity, if established, into a get out of jail free card for all. We consider that such an outcome would inevitably undermine public confidence in the criminal justice system and bring it into disrepute. The wider argument on abuse of process is in our view without substance and no further disclosure in respect of it is required.

Conclusion

[37] For the reasons given the conviction is not unsafe. The appeal is dismissed.