

Neutral Citation No. [2010] NIMag 4

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 31/03/10

<p>The Director of Public Prosecutions</p> <p style="text-align: right;">Complainant</p> <p>AND</p> <p>MARTIN RAYMOND JUDE MURRAY LIAM PATRICK KEVIN MURRAY KEVIN MICHAEL TOYE WILLIAM McDONAGH KEVIN MURRAY</p> <p style="text-align: right;">Accused</p>	<p>Petty Sessions District of East Tyrone</p> <p>County Court Division of Fermanagh and Tyrone</p>
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RULING AT MIXED COMMITTAL

1. It cannot be disputed that it is in the public interest and, more especially, in the interests of all parties concerned that the trial of persons accused of a crime be completed without avoidable delay. This is all the more so in cases of serious crime, of which murder ranks amongst the most serious of all.
2. The present proceedings arise from the events which took place in the early hours of 13th September 2008, already a year and a half ago. Mr. Eamonn Hughes was stabbed to death while making his way home from his daughter's 18th birthday party, with maybe up to 20 people, family and friends, including his wife and children, in his company. In addition, two women who came to his aid, Mrs. Martina Donaghy and Miss Emma Donaghy, who were kneeling beside him, seeking to administer first aid during his final moments, were then hit by a motor vehicle. All this happened in the full view of many people. The police arrived within minutes and, passing over the hostility with which they appear to have been greeted by the gathering crowd,

were able to make arrests almost immediately in a neighbouring housing estate. Meanwhile, the deceased's son, Mr. Kevin Hughes, distraught at witnessing the death of his father and convinced as to the family responsible, ran the short distance to the house of that family's senior member and smashed a number of windows there. Moments later as Kevin Hughes headed back to where his father lay, the prosecution allege that it was only the warning shouted by a third party that had him spin round, so that an arrow fired from a cross bow, which would otherwise have struck him in the back, was caught in his arm as he raised it instinctively in self-defence.

3. Matters moved quite swiftly in the initial stages and 5 men were charged as early as 15th September 2008, being produced at Dungannon Magistrates' Court the following day, those being Mr. Martin Murray, his brother Mr. Liam Murray, their father Mr. Kevin Murray, together with Mr. Kevin Toye and Mr. William McDonagh. For the most part, Kevin Murray and William McDonagh have been on High Court bail since then, while the other 3 young men have been remanded in custody, to await the trial.
4. On 9th December 2009, almost 15 months later, the Director of Public Prosecutions was finally in a position to issue a notice of intention to request the Court to conduct a preliminary inquiry, accompanied in the usual manner by the written statements of all witnesses, numbering upwards of 80, and returnable on 5th January 2010. The charges are as follows, in short form;
5. In respect of Martin Murray, Liam Murray, Kevin Toye and William McDonagh;
 - 1 The murder of Eamonn Hughes
 - 2 The attempted murder of Martina Donaghy
 - 3 The attempted murder of Emma Donaghy
 - 4 The hijacking a taxi
6. In respect of Kevin Murray
 - 5 The attempted murder of Kevin Hughes
7. It was hoped initially that such committal proceedings might take place on 6th January 2010. Howsoever, on 28th January, after the defence had been allowed an additional period, at their request, to consider the served papers, it was announced on behalf of some that the committal process was expected to take 5 days, since 13 prosecution witnesses would be required to attend the committal

hearing . Mr. McStay, BL. on behalf of Kevin Toye did intimate to the Court that he was not participating in such mixed committal proceedings. Messrs. Kevin R. Winters & Co., though, representing Liam Murray, Kevin Murray and Martin Murray, had written to the Court by letter dated 21st January, stating that they objected to the tendering in evidence of the written statements of 14 named persons, including those of the deceased's widow and of the 3 injured survivors. The consequential administrative difficulties meant that it was not possible to find such an exceptional quotient of court time within Dungannon Magistrates' Court lists until the week commencing 22nd March, almost 3 months from the date originally identified for the preliminary inquiry (6th January 2010). (A slot offered in the month of February had suited neither defence nor prosecution representatives).

8. Back on 8th October 2008 a Deputy District Judge (Magistrates' Courts) certified for counsel in respect of each of the accused, with respect to their legal aid provision. Article 28 of The Legal Aid, Advice And Assistance (Northern Ireland) Order 1981, insofar as relevant, provides;

28. - (1) If it appears to a magistrates' court that the means of any person charged before it with any offence, or who appears or is brought before it to be dealt with, are insufficient to enable him to obtain legal aid and that it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence before it, the court may grant in respect of him a criminal aid certificate, and thereupon he shall be entitled to such aid and to have-

(a) a solicitor; and

(b) subject to paragraph (2), counsel,

assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36.

(2) Free legal aid given for the purposes of any defence before a magistrates' court shall not include representation by counsel except in the case of an indictable offence where the court is of opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable.

9. Article 28(1) focuses attention upon the needs arising with respect to the presentation and conduct of a person's defence before the

Magistrates' Courts. Where an application is made to have counsel, in addition to solicitor, assigned under the free legal aid scheme in the case of an indictable offence, the focus of Article 28(2) is also upon the defence of the charges before the Magistrates' Courts. Should the charge be one triable either way and where it is to be tried in the Magistrates' Court, there is no difficulty in seeing that counsel, if certified, would be engaged in the defence of the matter before the Magistrates' Court, within the wording of Article 28(2), above.

10. In the absence of an authoritative ruling, different views exist at present as to whether it is appropriate to certify for the services of counsel with regard to an indictable offence which will be tried in the Crown Court. The Magistrates' Courts have no jurisdiction with respect to the prosecution of such a matter other than the process of managing the remand appearances whilst the police and PPS put the case together, and then the determination as to whether the prosecution can show a prima facie case against the accused. In particular, the Magistrates' Courts have no jurisdiction to try the case, as such. The judgment on the case, beyond the limited issue as to whether the prosecution can show a prima facie case, is exclusively a matter for Crown Court. So far as matters dealt with in the Magistrates' Courts, including the committal process, be concerned, the circumstances which make the case "unusually grave or difficult", it might be argued, must be circumstances specific to that stage and not to a separate and substantive stage in the Crown Court.
11. Article 29(1) makes it clear in any event that, should an accused be committed for trial in the Crown Court and granted free criminal aid, he is thereby entitled to the services of counsel, as well as solicitor, "... in the preparation and conduct of his defence at the trial."
12. Article 31 of The Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") provides for the process of a preliminary inquiry (previously called a preliminary enquiry and still referred to as a "PE") and states as follows;

31. - (1) If the prosecution requests a magistrates' court to conduct a preliminary inquiry and the accused does not object to such an inquiry, a magistrates' court, instead of conducting a preliminary investigation, may conduct a preliminary inquiry into an indictable offence.

(2) If the prosecution does not request the court to conduct a preliminary inquiry or if the accused objects to such an inquiry the court shall conduct a preliminary investigation.

(3) ... -

(a)

(b)

....

13. Article 33 then provides that a preliminary inquiry usually involves only the consideration of the written statements and other documents collated by the prosecution;

33. - (1) A magistrates' court conducting a preliminary inquiry may admit the statement of the evidence to be given by a witness to the like extent as oral evidence to the like effect by that person if the following conditions are complied with, that is to say-

(a) the statement shall be in writing,

(b) the statement shall purport to be signed by the person who made it,

(c) the statement shall contain a declaration by that person to the effect that-

(i) it is true to the best of his knowledge and belief, and

(ii) he made the statement knowing that, if it were tendered in evidence, whether at a preliminary inquiry or at the trial of the accused, he would be liable to prosecution if he wilfully said in it anything which he knew to be false or did not believe to be true,

which declaration shall be endorsed with the signature of the person who recorded the statement, or to whom the statement was delivered by the maker of the statement for the purposes of the proceedings,

(d) none of the parties objects to the statement being admitted in evidence upon a ground which would constitute a valid objection to oral evidence to the like effect as the contents of the statement,

(e) ...

(f) ...

(2) ...

(3) ..

14. Article 34, in turn, provides for what is commonly referred to as a “mixed committal”, a mixture of written statements from some of the witnesses and formal depositions taken from others;

34. - (1) A magistrates' court conducting a preliminary inquiry shall-

(a) consider the documents mentioned in Article 32(1)(b) other than a statement which is not admitted in evidence by reason of an objection taken to it under Article 33(1)(d), together with the exhibits admitted in evidence, and

(b) read aloud so much of every written statement as is admitted in evidence, or the purport thereof, if requested to do so by either the prosecution or the accused, and

(c) consider any submissions which may be made by or on behalf of the prosecution or the accused.

(2) The court, the prosecution and the accused may each require any person, whether his statement has been tendered in evidence or not, to attend and give evidence on oath which evidence shall be recorded as a written deposition and any such witness may be cross-examined and re-examined on his evidence; and where the evidence of a person is so recorded as a written deposition the court shall disregard any statement made by that person which has been furnished under Article 32.

(3) The court shall ask the accused if he has anything to say in answer to the charge and at the same time shall caution the accused that he is not obliged to say anything unless he wishes to do so and that whatever he does say may be taken down in writing and may be given in evidence at his trial; and whatever the accused says in answer after such caution shall be taken down. in writing and read over to him and shall be signed by the resident magistrate conducting the preliminary inquiry.

(4) The accused's statement made and appearing to be signed under paragraph (3) may be given in evidence at his trial without further proof unless it is proved that it was not signed by the resident magistrate by whom it purports to have been signed.

(5) It shall be a sufficient compliance with this Article requiring the court to read aloud the contents of any

written statement, or the purport of any such statement, or to address the accused, for the presiding resident magistrate to cause the statement, or the purport of that statement, to be read or the accused to be addressed in the appropriate manner, by an official of the court.

It can be seen, then, that it lies within the power of the accused, and more especially his legal representatives, either to consent to a simple preliminary inquiry, or to require a mixed committal (disregarding for present purposes the statutory provision for the still more time-consuming preliminary investigation procedure).

15. Almost all committals are now by way of simple preliminary inquiry, in this petty sessions district at least. In those rare cases where the accused opts for a fuller scrutiny here it is by way of a mixed committal, rather than a full-scale preliminary investigation. Then again, the great majority of those mixed committals collapse on the day in my own experience, the accused's counsel then informing the Court that his client consents to the matter proceeding by way of preliminary inquiry, on the paperwork.
16. When the mixed committal in this case opened on 22nd March I was informed by Mr. Richard Green, BL, on behalf of Martin Murray, that only 5 witnesses were now required to give evidence by deposition. In the course of the morning, one of those was also excused by consent of the defence, leaving just 4.
17. I now come to the evidence taken from those 4 witnesses by way of formal deposition. I am very mindful of the fact that it is no part of my function to determine the guilt or innocence of the accused. That is a matter for a jury at trial. My function is no more than to determine whether a prima facie case has been made out. I am not going to lay out the evidence of any witness here, so far as his or her written statement be concerned. I have read or heard only the prosecution case. I know nothing other than the merest hint of what the accused might say later in response to that case. Indeed, I am to make the decision as to whether a prima facie case has been made out even before the accused are asked whether any of them wishes to give any evidence or call any witnesses before me.

Mrs. Colette McGuckin

18. Mr. Reid, BL for the Prosecution explained at the outset that he had been asked by Mr. Green merely to seek some clarification from the

witness on a couple of points arising in her written statement, before tendering her for cross-examination. I have since had occasion to reflect upon whether this manifestly expedient course is consistent with the terms Article 34(2) of the 1981 Order. In any event, the proposal seemed perfectly reasonable and Mr. Reid turned to that part of the statement where Mrs. McGuckin had recounted that she saw the manager of the INF speaking to Eamonn Hughes, the deceased, who then spoke to her husband, Sean. Could she elaborate upon Sean's reaction at that point? Again, later in her statement, she said she had been leaving the premises and saw the deceased's son Kevin and Dane Jackson fighting; could she describe any further the fighting she observed? Nothing much arose out of these invitations (in particular, the witness had been too agitated to pay much attention to the fight itself) and Mr. Green then rose to cross-examine.

19. Mr. Green established that the witness had not consumed any drink. He spent a little time, to no great effect, seeking a better fix on precisely what time it was that she saw the manager speaking to the deceased and her husband Sean. She knew there was something amiss, from her husband's reaction, so she decided to follow him and the deceased to the smoking area, where it seems that some sort of altercation had arisen between Kevin Hughes and Dane Jackson. Counsel had the witness reaffirm that, having decided to follow her husband and the deceased on that account, she met them coming back already and her husband told her it was just a matter of 2 boys having too much to drink. She was assured that everything was OK. Mr. Green sought to suggest that her husband's tone or speech when reassuring her, about which of course his client had no evidence, suggested that it was more than just 2 boys having had too much to drink, but the witness did not agree.
20. Mr. Green then turned to that episode when the witness came out of the INF and actually saw Kevin Hughes and Dane Jackson fighting. Counsel spent a little time exploring how the witness acquired Mr. Jackson's name, not that it mattered. As to the fight itself, Mrs. McGuckin was clear that she only saw the event from the point at which the two young men charged at each other and could not say what had provoked the encounter. Of course, nothing of this had any bearing on the issues before this Court.

Peter Carey

21. As with every other witness which Mr. Green required to be called from this point onward, the Prosecution simply tendered him for the

purposes of cross-examination on matters arising from his written statement (*pace* Article 34(2)).

22. The cross-examination focused better on the events out in the street, after Mr. Green's client had come to the scene in a taxi, with others, and caused it to be pulled up ahead of the score or so revellers making their way back to the Hughes' house, with Mr. Green's client, Martin Murray, allegedly stepping out of the taxi, brandishing a knife and challenging the assembly to a fight.
23. Mr. Green first concentrated upon the distance between the witness and the taxi, when the car had pulled up, further along the Lisnahull Road. He wanted the witness to be absolutely clear about that, for reasons which never became apparent to me, given the issues before the Court. He had the witness mark on a map just where he was standing when he first saw the stationary taxi and where, in turn, the taxi was. The witness obliged.
24. After that, Mr. Green established that it was the people in Mr. Carey's company who rushed at those at the taxi, rather than both sides rushing toward each other.

Patrick Vincent

25. This witness was also asked by Mr. Green to mark on a map where he was stationed when he first saw the taxi and, in turn, the position of the taxi. The results were appreciably - and unsurprisingly - different from the markings of the previous witness.
26. It was established, though, that Mr. Green's client had turned toward the witness, while brandishing the knife, and said "I'll fucking kill you", causing the witness to walk backward, in fear, watching his oppressor all the while. Again, I did not see that this advanced the defence to any degree, despite Mr. Green's emphasis that Martin Murray did not actually move toward the witness when saying these words. By the same token, counsel established that people behind this witness lunged forward to engage with the accused.

Patrick Bell

27. Quite an amount of time was taken up initially - by the Defence - in establishing that Mr. Green's client (Martin Murray) and another would have been unwelcome at the Hughes' private function in the INF Club and that their decision to enter the function room (beyond

the public area), was probably the start of the unpleasantness on that fateful evening. It is worth recalling, in all of this, that no charges have been laid against anyone in respect of the clash between Kevin Hughes and Dane Jackson which ensued in the smoking area.

28. One then moved on to the critical episode, out on the Lisnahull Road. Mr. Bell was one of those who responded to sight of Mr. Green's client, at the taxi, brandishing a knife. Mr. Bell removed his trouser belt and sought to explain this by saying it was for protection. No doubt a jury will make what they will of this. The witness saw no-one with a chain or a concrete block. In all, Mr. Green went some way toward demonstrating that the testimony of this particular witness might be thought questionable by a jury; but, again, none of this had any bearing upon the issues before me. Moreover, if I may say so, if a witness is to be seen as possibly less than reliable on satellite issues, it is best, from the defence perspective, that the demonstration be conducted, live, before the jury, at trial. I therefore have little doubt that all this will be re-run in front of the jury in due course.
29. Finally, in the course of the cross-examination, Mr. Green had this witness, like the others, make his marks upon a map and, once again, he positioned both the taxi and his crowd in appreciably different positions than either of the other two witnesses.
30. And that was that. It took until 3.25 pm that Monday to complete the laborious process of having every question and every answer of this cross-examination typed up verbatim as it came, to read over the deposition and to have it signed, as well as entering the 3 maps as exhibits, one for each witness concerned. By that time of the day, it was perfectly sensible on Mr. Green's part to suggest that the court adjourn for another day, before the taking of submissions, although I did think that he pushed it rather far to add that I might also want to reflect upon "the turn of the evidence" obtained that day. In any event, I had decided that these events warranted some written comment and was therefore not minded to surrender jurisdiction just yet.
31. Due to prior commitments on my own part which took up the intervening two days and which could not be disturbed by reason of this booking, the Court did not resume until Thursday, 25th March. On the 25th, then, Mr. Reid gave a succinct though fluent outline of the material evidence presented by the prosecution in the papers as

served and referred me, in particular, to the judgment in R v Rahman and Ors. [2009] 1 AC 129. In doing so, he intimated his understanding that none of the accused challenged the proposition that there was a prima facie case in regard to the murder charge, or to the charge of affray and it was also confirmed that Kevin Murray did not challenge the charge of the attempted murder of Kevin Hughes. In any event, since one witness had declared himself unwilling to attend the committal proceedings, the prosecution were not asking that any of the accused be returned on the charge of hijacking the taxi involved and would be considering alternative methods of adducing the relevant evidence for the purposes of the actual trial in the Crown Court. Mr. McStay had been excused at the start of the day, upon advising that he had no contrary submissions to make on behalf of his client (Kevin Toye), whereas he did have business to attend to in another Court.

32. Mr. Green then made his submissions on behalf of Martin Murray. He confirmed that these were limited to the charge of attempted murder of the two women, arising from circumstances in which the taxi, driven by Kevin Toye at the material time, had appeared to witnesses to have been actually driven at the injured parties. One will note in passing that nothing of the questions he put on 22nd March, to any of the 4 witnesses whom he required to appear, addressed this charge. The defence point was that, whereas the prosecution might have adduced enough to raise a case of common enterprise among those concerned in respect of the murder of the late Eamonn Hughes, it was insufficient in law to establish common enterprise merely that the others accused of the attempted murder of the two females had been travelling as passengers in the taxi at the time. What if, for example, one of them had been asleep throughout? He contended that no prima facie case had been made out. Mr. McCreanor, BL, on behalf of Liam Murray, made similar submission and Mr. Nugent, BL, adopted all such defence submission on behalf of William McDonagh.
33. I can deal with these submission in brief form by stating that I preferred the detailed reasoning advanced by Mr. Reid on behalf of the prosecution and I therefore rule that there is a prima facie case made out against each accused concerned and in respect of all charges upon which I am asked to return them for trial.
34. These submissions, on all sides, took a total of 55 minutes, less than one hour. Following that, I declared my intention to give a written

judgment and to adjourn the committal proceedings through to today, within the regular Court lists. I then turned to an enquiry into my core concerns.

35. Mr. Reid confirmed that on 28th January last the PPS were notified that 13 witnesses were required by a number of the accused to attend the committal and give their evidence by deposition. He further confirmed that discussions with defence representatives on Monday 22nd March had not resulted in any edit of the statements tendered on behalf of the 8 witnesses in respect of whom objections had been abandoned; their statements had simply been restored to the papers as originally filed and served last December. All witnesses, bar the taxi driver, had been in attendance at Court on 22nd March, ready to depose.
36. The questions which I put to Mr. Green, in turn, were constrained. It would have been improper to press counsel to disclose anything about his client's intended defence, or counsel's tactics in a continuing criminal process. It is only fair to point out that Mr. Green, equally, is to be taken to have been limited in the responses he could make to this Court, for much the same reasons.
37. I asked Mr. Green why he had required 13 witnesses to attend Court, when he had called only 4 of the 12 who did so. He responded that each had been required to attend "for good and sufficient reason". When I went on to ask, in terms, what I was to make of the fact that 8 of those who had duly attended were not then required, he said that he had reflected upon the issues and reconsidered. When asked, further, whether it would not have been possible to reflect upon such issues any time within the previous 4 months (counting from service of the papers in December), Mr. Green's response was a simple "No."
38. I also asked Mr. Green if he could indicate anything in his cross-examination of the 4 witnesses who had actually engaged the Court throughout Monday which could be said to bear upon the issue with which this Court was concerned. Mr. Green replied that, for reasons which he could not go into, the evidence thereby adduced had nothing to do with the matter of a prima facie case. The purpose in calling those 4 was never to adduce evidence on which to challenge the committal. I refer back to the issues raised at paragraph 10, above. If Mr. Green was exercised by "unusually grave or difficult" issues, they clearly did not concern the defence of the case before this Court.

39. This Court remains concerned about the significant delay occasioned by defence counsel requiring a Court to provide 5 days for a committal process, for no reason which could be explained to the Court and for no discernible advantage to the defence, but as of right. A case of sudden death in circumstances such as these, followed immediately by the institution of criminal proceedings, is one which will cause great distress, grief and anxiety to the deceased's family and to the injured parties who have survived. I fail to see, in particular, why it was necessary to leave such people for 2 months (counting from the point at which their attendance was confirmed to be necessary by defence counsel - 28th January 2010), working themselves up for an ordeal which then seems merely to have been waived away on the appointed day.
40. Mr. Green might well contend, for good reason, that it is unacceptable for police and PPS to take 15 months to declare such a matter as this ready for trial (at 9th December 2009), so much longer than is likely for a similar case in England and Wales, but that hardly justifies defence lawyers being accorded upwards of another 4 months in a Magistrates' Court where this achieves nothing and while Mr. Green's client remains in jail, waiting for that same trial. One would have thought that the logic of such a complaint on his behalf would demand that the case be removed to the Crown Court so soon as the PPS declare it ready. It is of some importance that everyone concerned have a care for public confidence in the justice system.
41. There are those who question whether committal proceedings in their present form serve a useful purpose in Northern Ireland, especially since this feature of the criminal process was swept away in England and Wales, to effect, a decade ago. I do not expect that the history of this case will assuage such concerns.
42. The text of this judgment will be supplied to the legal representatives of all parties in the near future and will join the Court papers. It will not be released to the public, however, until after the conclusion of the trial.

Dated this 31st March 2010

Judge John I Meehan
District Judge (Magistrates' Courts),
Dungannon