

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

Delivered: 08/06/2011

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

AIDAN QUINN

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ

[1] The defendant has been arraigned and has pleaded not guilty to a single count of assisting in managing a meeting on 23 March 2008 which he knew was to be addressed by persons who professed to belong to a proscribed organisation, contrary to Section 12(2)(c) of the Terrorism Act 2000.

[2] At the start of the trial the defendant applied to the learned trial judge for a voir dire to determine the admissibility of two pieces of video evidence on which the prosecution case depended. The learned trial judge decided that the video clips were inadmissible. The prosecution now apply pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2004 for leave to appeal that ruling.

The Prosecution Case

[3] On 8 December 2008 Detective Constable McKee received a complaint regarding certain activities on 23 March 2008. He was directed to commence an investigation in relation to an Easter commemoration at Edendork, Dungannon on that date during which persons professing to be from the Continuity IRA made a declaration and fired two shots from a handgun. It appeared that the events had been filmed and distributed on the YouTube website. Sergeant Bleakley was instructed to download the recording from that website.

[4] The recording consisted of two video clips. The first and longer clip showed a number of men led by one carrying a Tricolour flag who were dressed in paramilitary uniforms. They were followed by persons in civilian clothes walking in line behind the group. The group were filmed entering church grounds and the date on the film was 23 March 2008. Police have taken photographs of the area around St Malachy's Church and graveyard at Cullion Road, Dungannon in the area known as Edendork. The prosecution case is that a comparison of those photographs and the video demonstrates that the video was taken at the same location.

[5] The video recording then shows two masked men in paramilitary uniforms coming from the left of a man identified as the defendant. It is principally on the basis of what is shown in the video recording that the prosecution say that the defendant had an organisational and management role in the meeting. One of the men read a statement on behalf East Tyrone Continuity IRA. The statement among other things called upon all Republicans to fall in behind the Continuity IRA and was made on behalf of that organisation. When the statement had finished the other masked man then raised a pistol and fired two shots into the air before both men ran away from the scene.

[6] During the course of the masked men's actions the man identified as the defendant had a document in his hand and during the course of the statement held a microphone to the speaker throughout. The video clip downloaded from YouTube consisted of two quite separate and distinct pieces of film clearly taken by two cameramen both depicting the scene and both apparently showing the defendant with the document in his hand and the microphone in his hand. The prosecution also rely on the discovery at the defendant's home of a document which it is alleged is an order of events for an event similar to that shown on the video.

[7] On 9 June 2009 the defendant was arrested and interviewed at Antrim Serious Crime Suite in relation to the events at Edendork. After caution he stated that he was "at Easter in my capacity as a member of Republican Sinn Fein". Later in the interview the police officer put to him that he had already stated that he was in attendance at the meeting at Edendork as a member of Republican Sinn Fein. He did not respond. He was asked if he was aware that these two men were going to appear. He said no. He was then asked how he was able to stand holding the microphone when two masked men appeared. It was put to him that he would have been a bit perturbed at two men running out, one with a gun. His solicitor intervened at that stage pointing out that he had already said that he was not expecting them and then went on enquire whether it was being suggested that he should have thrown the microphone at one.

[8] It will, of course, be a matter for the trial judge in due course but where a defendant remains silent in face of comments made by his solicitor in his presence the court may be invited to draw an inference, depending on the circumstances, that the defendant has accepted the statement (see R v Norton [1910] 2 KB 496). It seems to us that in the circumstances of this case the judge will have to consider whether the comments of the solicitor are capable of amounting to an admission that the defendant was holding the microphone in close proximity to the two masked men.

[9] At 21.18 on 9 June 2009 he was again interviewed in the presence of his solicitor. It was put to him that police officers had identified him in the video clips which had been made available to him. At that stage his solicitor intervened to say that he did not think that ID was an issue here because the defendant had already said he was at the event. In the course of that interview it was again put to him that he had full knowledge that the masked men were going to be there and that he facilitated them to make their speech. His solicitor again intervened and is recorded as saying as follows:

“You know he hasn’t said here before these DVDs, he hasn’t said at the commencement here you know I wasn’t there, I didn’t do anything. Before, prior to this being shown he has given an account of what he was doing and why he was there and his purpose, he even went further when he was asked a question, did you know they were coming and he said, no. Is that not evidence, could you not accept that as a factor, you are saying that you are disbelieving him.”

Again it seems to us that it would be for the trial judge to determine whether it was proper to infer from the circumstances that by his silence he was accepting that the DVDs demonstrated his activities in relation to the events which occurred at Edendork on 23 March 2008.

[10] The learned trial judge carefully considered the leading authority on the admissibility of videos in respect of which there are concerns about authenticity in this jurisdiction, R v Murphy and Another [1990] NI 306. That was a case in which it was sought to admit video evidence in relation to the murder of two soldiers. The first was a continuous heli-tele which was captured by a helicopter flying overhead. The second film was taken by a European film cameraman who was not called at the trial. The original of the film was also not available. The Court of Appeal noted that the heli-tele film was authentic beyond doubt and corresponded in detail with the film taken by the European cameraman.

[11] By contrast in this case although it is evident that there were two cameramen neither of them has been identified. There is no evidence of continuity from the point at which each film was made to it being downloaded from YouTube by Sergeant Bleakley. It appears that the material was uploaded on to YouTube by a person who has previously uploaded similar propaganda material on 22 occasions but it appears that no investigation or enquiry has been made to determine his or her true identity. It is accepted that once downloaded, digital material can be altered, edited and changed in many respects and can thereafter be uploaded once more in its new altered form. There is no way of knowing whether it has been manipulated or altered unless one has the original unedited material with which to compare it. In the absence of a valid comparative standard the learned trial judge considered that the test for admissibility was not met. He held that the provenance of the film had to be established by the prosecution by evidence in a way that permitted the defence to investigate and examine that provenance and the reliability of the material. In the absence of such evidence the video was not prima facie admissible. Although he was referred to the interviews the learned trial judge noted that at no time in the course of the interviews did the defendant expressly acknowledge or accept that he was the person shown in the videos.

Consideration

[12] The learned trial judge correctly identified R v Murphy and Another [1990] NI 306 as the leading authority in this jurisdiction on the authentication issue. The first step is to determine whether the material shown on the video would, if authentic, be relevant. There was no real issue between the parties as was shown by the approach adopted in relation to the admissibility of this piece of evidence, namely that the evidence was not just relevant but critical to the issue of whether the prosecution could proceed. The prosecution accept that they are not in a position to establish the provenance and history of the video clips and indeed accept that one at least of the video clips has been subject to considerable editing. They further accept that in the absence of the matters upon which they rely as admissions the prosecution could not properly contend that a prima facie case of authenticity had been made out in relation to the materials. To that extent, therefore, there is a considerable measure of agreement between the parties.

[13] Although he recognised that Murphy was binding on us Mr O'Rourke submitted that the issue of authenticity had to be determined by the court in favour of the prosecution beyond reasonable doubt before such a video could be admitted in evidence. We do not accept that submission. Such a video is potentially relevant evidence. It is for the jury to decide whether the video is authentic and if so what reliance to place on it. In general the court will not prevent the jury receiving potentially relevant evidence in the absence of some statutory or other prohibition upon its receipt. Such a statutory

framework governs, for example, the admissibility of alleged confessions but in our view has no application in this case. The test of whether the video is prima facie authentic is no more than a test of potential relevance.

[14] Although the learned trial judge correctly noted that at no time did the defendant make any express admissions about the video clips no consideration appears to have been given to the inferences which properly could be drawn from the statements made by the solicitor in the course of the interview in the presence of his client. Mr O'Rourke contends that even if the remarks are to be construed as admissions that does not affect the admissibility of the material. We do not agree.

[15] If there is an admission that the video clips portray the actions of the defendant the clips are admissible as real evidence for the purpose of establishing that to which the appellant has admitted. The admissibility of the evidence does not strictly depend, therefore, on the authenticity of the video. It is, however, of note that in Murphy the Court of Appeal stated that authenticity like most facts may be proved circumstantially and it seems to us to follow that authenticity can also be established by admission.

[16] We consider, therefore, that the significance of the interventions of the solicitor were not taken into account in considering the admissibility of this material. We note that in his careful ruling no reference was made to these interventions and we cannot say whether they were directly brought to the attention of the learned trial judge. In any event, we consider that for the reasons set out the prosecution have established a prima facie case for the admission of this potentially relevant material. We indicated at the outset that we would deal with the leave to appeal and the appeal together. Accordingly we grant leave and allow the appeal.