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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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[BELFAST]

_____

THE QUEEN –v- MICHAEL PATRICK CLARKE
and
STEPHEN PAUL McSTRAVICK

_____

RULING NO. 4: SECTION 46, CRIMINAL JUSTICE ACT 2003

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McCLOSKEY J

I INTRODUCTION

[1] This is the ruling of the court under Section 46 (3) of the Criminal Justice Act 2003, which applies in circumstances where the jury sworn to try an accused person/s has been discharged on account of tampering. Where discharge occurs for this reason, the trial judge is empowered to continue without a jury. The question to be determined is whether it is appropriate to exercise this power in the present case.

II THE ISSUE

[2] The Defendants are jointly charged with the six offences specified in the Bill of Indictment. These consist of one count of robbery, three counts of false imprisonment and two counts of kidnapping. All of the offences are alleged to have occurred on 28th May 2008. The locations of this alleged offending are, in sequence, a private residence at an address in County Down; a house on the Ravenhill Road, Belfast; and at Duncrue Road, Belfast. Collectively, the alleged offences disclose a *soi-disant* "tiger kidnapping" scenario.

[3] The events precipitating this ruling arose initially on the eleventh day of trial, when a note was received from the jury foreperson. At this stage of the trial, the prosecution case had closed and the court had just rejected an application on behalf of the Defendants that verdicts of not guilty should be directed on the ground of no case to answer. The court had been informed that all that remained of the trial was the evidence of the two Defendants, to be followed by the conventional closing addresses. The note having been received, the juror concerned was separated from the other jury members from the outset of this phase of the trial. It appears that upon the juror's arrival at the courthouse, the aforementioned note was handed to a jury keeper, who immediately took this sensible step.

[4] The contents of the note were duly probed by me, mainly in open court, in the presence of the two Defendants, their legal representatives and prosecuting counsel. No other person was permitted to be present. With the consent of all parties, a little further probing occurred in chambers, with a stenographer present. The main purpose of this part of the exercise was to ascertain whether the juror would reveal the names and addresses of certain protagonists. She seemed to me unlikely to do so in open court and, further, I had a duty to treat this frightened lady as humanely as possible, consistent with the Defendants' right to a fair trial. The ensuing transcript was disclosed immediately to all parties' legal representatives and is attached [see Appendix 1]. The questioning was designed to ensure that the transcript is comprehensive of all matters probed and ventilated both in open court and in chambers.

[5] After the parties' legal representatives had considered the transcript, the court reconvened. All were agreed that the juror concerned should be discharged, without further ado. I duly discharged the juror. Upon being discharged, the juror concerned was instructed not to make any contact with any of the other jurors. Ultimately, at around 12.30pm, the remaining eleven jurors were discharged for the rest of the day.

[6] As appears from the transcript the person who was involved in the telephone communication with the relevant juror's son-in-law stated, inter alia, "*We are all going down to court on Monday*" [viz. the tenth day of trial]. At the time of making the aforementioned ruling, it seemed improbable that the caller would have known that the jury had been excused from attendance on that day, to enable the court to deal with an application for a direction of no case to answer and any related matters and to make rulings. Further, I was informed that on the morning of the tenth day of trial, a larger than normal group of persons assembled in the public gallery. This was notable, as the public gallery had been virtually deserted, and was sometimes empty, from approximately the third day of trial.

[7] A reporting restrictions order under Section 4(2) of the Contempt of Court Act 1981 concerning the entirety of the proceedings on the eleventh day of trial was made without delay.

[8] Logically, the next question to be addressed was what was to become of the remaining eleven jurors. An adjournment ensued, to enable the police to conduct some preliminary enquiries into the matter. The court reconvened the following day (viz. the twelfth day of trial). At that stage, I exercised my power under Article 26B (9) of the Juries (Northern Ireland) Order 1996 (as amended) to authorise disclosure by the Northern Ireland Court Service of the personal particulars of the juror concerned to the police, to facilitate their enquiries.

[9] All of the parties uniformly advanced the submission that the court should discharge the remainder of the jury. In ***The Queen –v- Mackle and Others*** [2007] NIQB 105, it is recorded in paragraph [9] that in determining to discharge the entire jury in circumstances of intimidation of a single juror, Hart J stated:

> "*I think in those circumstances there is really no alternative but to discharge the jury because one does not know whether there have been similar approaches to other jurors and a mere reference to that or any inquiry, I think, would lead to a situation where one would have prejudiced the jury against the accused*".

Thus it is apparent that the learned judge considered, and rejected, the possibility of assembling the remaining eleven jurors and attempting to question them (whether individually or collectively) in appropriate terms, with a view to ascertaining whether any of them had been the subject of any kind of improper approach or communication or otherwise felt unfairly disposed against the accused.

[10] By the twelfth day of trial, it was unavoidably apparent to the remaining eleven jurors that their foreperson no longer counted as one of their members. I considered that this would inevitably stimulate unhealthy speculation about why this had occurred, notwithstanding the clear instruction given by the court the previous day, when no evidence was adduced in their presence and an unforeseen adjournment ensued, following a delay of some two hours. It seems to me that one must constantly bear in mind that in this field *appearances* are all important. The principles are summarised in Ruling No. 1, given on 8th January 2010 [McCL7712]: see paragraphs [8] – [11]. I consider that, in this sphere, a *possibility* of contamination or infection which is not trivial or fanciful is sufficient to warrant the discharge of a jury, while treating this always as a measure of last resort.

[11] Following careful reflection, and having considered the submissions of the parties, it appeared to me that it would be virtually impossible to formulate appropriate questions to be addressed to the remaining jurors, in the circumstances prevailing. I found myself unable to devise any form of words which would avoid the risk of the remaining jurors (a) suspecting or believing or discovering that the foreperson had been discharged on account of fear or intimidation *or (b)* becoming otherwise prejudiced against either or both of the Defendants. I also had to acknowledge the risk that one or more of the remaining jurors had some knowledge or belief regarding the contents of the note and/or its implications for the juror concerned. Furthermore, the affected juror was visibly apprehensive from the first day of trial, by reason of what is described in an earlier note submitted by her [see Appendix 2]. In short, a cloud was gradually descending on the remaining jurors and there seemed to me no satisfactory mechanism for dispelling it. In these circumstances, I concluded, with a degree of reluctance, that the remaining jurors must be discharged and ruled accordingly. This ruling was a prelude to the ruling made in this judgment. The legal framework within which this ruling was made is enlarged in the following paragraphs.

III PART 7, CRIMINAL JUSTICE ACT 2003

[12] Before making the aforementioned ruling, all parties' legal representatives were afforded an opportunity to address the court in relation to Part 7 of the Criminal Justice Act 2003 ("*the 2003 Act*"). The provisions in Part 7 are arranged under the banner "Trials on Indictment Without a Jury". This new statutory regime complements the related common law principles , while singling out the scourge of jury tampering for special treatment. Section 43 is concerned with applications by the prosecution for certain fraud cases to be conducted without a jury. Next, Section 44 provides:

> "***44 Application by prosecution for trial to be conducted without a jury where danger of jury tampering –***
>
> *(1) This Section applies where one or more defendants are to be tried on indictment for one or more offences.*
>
> *(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.*
> *(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a*

jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place –

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial."

In the circumstances which materialised in the present trial, Section 46 of the 2003 Act is especially pertinent. This provides:

"46 Discharge of jury because of jury tampering

(1) This section applies where –

(a) a judge is minded during a trial on indictment to discharge the jury, and

(b) he is so minded because jury tampering appears to have taken place.

(2) Before taking any steps to discharge the jury, the judge must –

(a) inform the parties that he is minded to discharge the jury,

(b) inform the parties of the grounds on which he is so minded, and

(c) allow the parties an opportunity to make representations.

(3 Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied –

(a) that jury tampering has taken place, and

(b) that to continue the trial without a jury would be fair to the defendant or defendants;

but this is subject to subsection (4).

(4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.

(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.

(6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.

(7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial."

It is clear that Section 46 came into operation on 8th January 2007 at latest: see the meticulous analysis of Stephens J in ***Mackle***, paragraphs [36] – [41]. I would add that while the Court of Appeal made the final decision in that case – see ***The Queen –v- Mackle*** [2007] NICA 37 - the context of the proceedings was an application and order under *Section 44*, with Section 46 featuring only tangentially.

[13] Per Section 46(2), where a trial judge is minded to discharge a jury on the ground that jury tampering appears to have taken place, the parties are to be informed accordingly and given an opportunity to make representations. Prior to making the aforementioned ruling, this requirement was fully observed in the present case. All of the legal representatives adopted the uniform position that the remaining eleven jurors should be discharged *en bloc***.** However, there was a difference between prosecution and defence. While Mr. Hunter QC submitted that this was a clear case of *apparent* jury tampering, within section 46(1) (b), Ms McDermott QC and Mr. Weir QC disagreed, submitting that the court should discharge the jury in the exercise of its common law powers, outwith the framework of Section 46. Accordingly, the first issue to be determined was whether, within the language of Section 46(1)(b), *jury tampering appeared to have taken place* by reason of the matters outlined in paragraphs [3] – [5] above and in the appended transcript.

[14] In determining this issue, I noted that the statute offers no definition of the phrase "*jury tampering*". On reflection, this is unsurprising. Furthermore, there is no suggested definition in any reported case (to my knowledge) or in any of the leading texts. In **Blackstone 2010**, it is stated in paragraph D 13.68 [p. 1609]:

> " *'Jury tampering' is likely to include threatened or actual harm to, or intimidation of bribery of, a jury or any of its members, or their family or friends or property.*"

I initially considered that "*jury tampering*" includes any conduct designed to frighten, intimidate, influence or suborn a juror, or any conduct having any of these tendencies. However, on further reflection, I consider that the central focus must be on conduct which actually has any of these consequences. While the presumed, or suspected, intention of the miscreant may be of some relevance, depending on the context, the court's s scrutiny is likely to focus mainly on the impact of the offending conduct on the juror/s concerned.

[15] In my view, the verb 'to tamper' has a readily ascertainable and widely accepted meaning: it is to meddle or interfere. I consider that, at their heart, the statutory words "jury tampering" connote conduct interfering with the conscientious and unhindered discharge of a juror's oath. In my view, any attempted exhaustive judge made definition would be misguided. In common with the elephant in the room, instances of jury tampering will usually be readily recognisable when they occur. Clearly, every

case will depend upon its particular facts. At both stages of the exercise, I would expect the court to consider all available information in the round. At the first stage, where the court is concerned with appearances, there seems to me no intrusion of conventional burdens or standards of proof (compare ***Re McClean*** [2005] UKHL 46, paragraphs [73] and [74] especially, per Lord Carswell). Rather, what is required is a rational evaluative judgment on the part of the court. However, at the second stage, a different approach is required: see paragraph [21], *infra*. Moreover, it is possible that additional information will be available to the court at the second stage (as occurred in the present case).

[16] In the present case, the matrix confronting the court at the first stage had three main components:

(a) The contents of the transcript viz. the information supplied and assertions made by the juror concerned.

(b) The court's assessment of the juror's presentation and demeanour, when questioned about the relevant matters.

(c) The information about the assembly in the public gallery on the morning of the tenth day of trial, which was the first weekday following the material communication.

The juror concerned was a demonstrably candid and truthful person. I accepted fully what I was told about the events in question. Furthermore, the juror was visibly apprehensive and nervous. Finally, the events in the public gallery of the court on the tenth day of trial contrasted markedly with previous days, to the extent that I was satisfied that they had a nexus with the material communication two days previously. In these circumstances, I concluded that, within the meaning of Section 46(1)(b), jury tampering appeared to have taken place. The ruling that the jury be discharged followed accordingly [See Appendix 2].

[17] Having made the aforementioned ruling within the framework of Section 46(1) and (2), a judicial discretion is now engaged, by virtue of Section 46(3). In short, a second stage has been reached and it is now open to the court to order that the trial of the Defendants is to continue without a jury if, *but only if,* satisfied about two matters:

(a) that jury tampering has taken place; and

(b) that to continue the trial without a jury would be fair to the Defendants.

I contrast the first of these conditions with Section 46(1)(b): clearly, at this stage, the threshold is of a more elevated nature. As regards the second of these conditions, I am

mindful that I *must* terminate the trial if I consider this to be "*necessary in the interests of justice*".

[18] The context within which Part 7 of the 2003 Act is to be construed and applied has been considered by the English Court of Appeal in ***The Queen –v- T and Others*** [2009] 3 All ER 1002 and [2009] EWCA. Crim 1035 and is illuminated by the following passages (per Lord Judge CJ):

> "*10. In this country trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a right, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation. The constitutional responsibilities of the jury are, however, flouted if the integrity of an individual juror, and thus of the jury as a whole, is compromised. Such a compromise occurs when any juror, whether because of intimidation, bribery or any other reasons, dishonours or becomes liable to dishonour his or her oath as a juror by allowing anything to undermine or qualify the juror's duty to give a true verdict according to the evidence". (per Lord Bingham CJ in R v Comerford [1998] 1 Cr. App. R. 235, BAILII: [1997] EWCA Crim 2697).*
>
> *11. In summary any attempt at interference with the jury constitutes an abuse or misuse of the process. Comerford suggested that one possible response would be to dispense with a jury altogether in a case where an attempt to nobble the jury was apprehended. In such a case, the outcome would be a judge sitting alone. However, as Lord Bingham explained at the time when Comerford was decided, that solution had not then been adopted. Now it has.*
>
> *12. The Criminal Justice Act 2003 (the 2003 Act) has imposed fresh restrictions on the right to trial by jury, by identifying two particular situations in which such a trial on indictment may be conducted not by a judge and jury, but by a judge sitting alone. Where it arises the judge assimilates all the functions of the jury with his own unchanged judicial responsibilities. This function, although new in the context of trial on indictment, is well known in the ordinary operation of the criminal justice system and is*

exercised, for example, by District Judges (Magistrates Court) in less serious, summary cases."

To these observations one may add the principle that, in every criminal case, the trial judge is presumptively independent and impartial. : see paragraph [25], infra. This is, of course, a rebuttable presumption.

[19] The judgment in ***T and Others*** is clearly designed to provide general guidance and, in this setting, the Lord Chief Justice said the following of Section 46:

> *"[20] The provisions in section 46 relating to the discharge of a jury where tampering appears to have taken place require attention, not least because although the second rather than the first of the legislative provisions dealing with the possible consequences of jury tampering, in this case and no doubt in others, the first event chronologically was and will be the decision to discharge the jury mid trial. The judge is then faced with two alternatives, either to continue the trial or to terminate it. As we have narrated, in this case Judge Roberts brought the trial to an end. We understand his reasons, and what follows is not intended to be seen as a criticism of the decision. However, given that one of the purposes of this legislation is to discourage jury tampering, and given also the huge inconvenience and expense for everyone involved in a re-trial, and simultaneously to reduce any possible advantage accruing to those who are responsible for jury tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, the judge faced with this problem should order not only the discharge of the jury but that he should continue the trial. The fact that he has been invited to consider material covered by PII principles, whether during the trial, or in the course of considering the application, should not normally lead to self-disqualification."*

This passage contains a strong emphasis on both pragmatic and public interest considerations. I consider its orientation to be clear: where a trial judge, operating within the new statutory regime (as here), determines to discharge the jury on account of tampering, the trial should *as a general rule* continue before the judge alone. The decision whether to do so should be informed by the consideration that the power created by Section 46 to discharge a jury on account of tampering enhances the court's

ability to protect the integrity of the trial. It is a new, additional power designed to address what I have described as the scourge of jury interference. This power in no way dilutes or diminishes the well established principles by reference to which a jury may be discharged on grounds other than tampering.

[20] Decisions of the English Court of Appeal are considered to be of persuasive, rather than binding, authority in this jurisdiction: see ***Re McKiernan's*** Application [1985] NI 385 (at p. 389, per Lowry LCJ) and the comparable statement in ***Re Staritt's and Cartwright's*** Applications [2005] NI 48 (at paragraph [21], per Campbell LJ). Thus the decision in ***T and Others*** is of persuasive authority. As I find the reasoning and philosophy enshrined in the above passages compelling, I propose to follow it. I would add that the general rule propounded is not inflexible and the judge must, therefore, be alert to the question of whether it would be inappropriate to continue alone in a given case. The potency of the general rule is illustrated in the suggestion of the Lord Chief Justice that even where the trial judge has had to consider material embraced by a PII framework, this should not normally stimulate self-disqualification. As in every case, context will be vitally important.

[21] With specific reference to the first of the two conditions enshrined in Section 46(3), which requires the court to be satisfied that jury tampering has taken place, it is necessary to consider whether any onus or standard of proof is engaged and, if so, the terms thereof. In the comparable context of Section 44, the first condition to be satisfied is that there is "*… evidence of a real and present danger that jury tampering would take place*". The second condition is that notwithstanding the availability of measures (including police protection) designed to prevent jury tampering, the likelihood that it would take place "*… would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury*". These provisions were considered in ***T and Others***, where the Lord Chief Justice stated:

> *"16. This legislation is unequivocal and unambiguous. Its meaning is not clarified by reference to the pre-enactment Parliamentary debate. The judge is required to make the order if the conditions in section 44(4) and 44(5) are fulfilled. There was some discussion in argument before us about the standard of proof. It was agreed by both sides that as these were criminal proceedings the criminal standard should apply and that the application made by the prosecution should not be granted unless the judge is sure that both statutory conditions are fulfilled. It is unnecessary to involve ourselves in this debate. We take the same view. The right to trial by jury is so deeply entrenched in our constitution that, unless express*

> *statutory language indicates otherwise, the highest possible forensic standard of proof is required to be established before the right is removed. That is the criminal standard.*
>
> *17. Both conditions in section 44(4) and 44(5) are predictive. The first condition addresses the risk that jury tampering may take place at any stage of the trial before the jury has returned their verdict. The real and present danger to be addressed therefore relates to the entire trial process. Where the court is sure that there is a real and present danger that the right to jury trial will be abused, or misused by jury tampering, the first condition is established."*

There seems to me no reason in principle or logic warranting a different approach to Section 46(3), subject to the following qualification. I consider that condition (a) lends itself more readily to the concept of burden and standard of proof than condition (b). It clearly envisages the ventilation and exploration of factual issues and the making of findings by the court. In such an exercise, the operation of burdens and standards of proof in a trial context which is adversarial in nature is a familiar one.

[22] In contrast, however, I consider that condition (b) is not obviously susceptible to this approach. This condition requires the court to consider fairness to the Defendant and the interests of justice. It seems to me that what is required here is an overall evaluative judgment. This, in my view, would be considered orthodox dogma where issues of fairness and interests of justice arise, in most litigation contexts. As Lord Mustill observed, as a prelude to enunciating his celebrated six precepts, an assessment of fairness by the court "*… is essentially an intuitive judgment*": ***Doody –v- Secretary of State for the Home Department*** [1993] 3 All ER 92, p. 106e. While I note that in ***T and Others,*** in his separate consideration of Section 46 the Lord Chief Justice made no explicit distinction between the two statutory provisions in this respect - see paragraph [20] - there is no extended consideration of this discrete issue. This is unsurprising, given that the subject matter of ***T and Others*** was an interlocutory appeal to the Court of Appeal against a decision of the judge refusing the Crown's application for a trial on indictment to be conducted without a jury, in accordance with Section 44 of the 2003 Act: the original trial judge had previously discharged the jury and declined to continue with the trial as a judge alone. Thus the provisions of Section 46 did not arise directly in the appeal.

[23] Furthermore, the second statutory condition embraces, in my view, the "triangulation of interests" articulated by Lord Steyn in a celebrated passage in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584:

> "*The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests.* ***It involves taking into account the position of the accused, the victim and his or her family and the public***."

[My emphasis].

One can readily identify echoes of this passage in ***T and Others,*** paragraph [20]. I would add that fairness will always entail a contextualized evaluation by the court, tailored to the specific features and circumstances of the individual trial. It requires an evaluative judgment on the part of the trial judge, something which could give rise to differing opinions, a truism noted in the commentary in the Criminal Law Review, in the context of the decision in ***The Queen –v- JAK*** [1992] CLR30, at p. 31:

> "*Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form differing opinions*".

Every case will be unavoidably fact sensitive and the importance of context requires no emphasis.

[24] It is also necessary to consider the impact of Article 6 ECHR on Section 46 of the 2003 Act, bearing in mind the court's interpretative obligation under Section 3 of the Human Rights Act 1998 and the duty of the court as a public authority under Section 6. In this respect, a useful point of departure is the recognition that trial by jury is not one of the rights protected by Article 6, in criminal cases. In ***X and Y –v- Ireland*** [No. 8299/78] the European Commission stated:

> "*[19…A] Article 6 does not specify trial by jury as one of the elements of a fair hearing in the determination of a criminal charge*".

I am unaware of any Strasbourg or domestic jurisprudence which either questions or dilutes this unequivocal statement. Of course, where a Defendant is tried by a jury, the constituent elements of the right to a fair trial both under Article 6 and at common law must be respected. However, these protections do not differ in principle where trial is by judge alone. In my view, the circumstance that a Defendant has been tried by a jury

until a certain stage of the trial, whereupon the jury is discharged – in the interests of securing a fair trial, it may be emphasized - does not, *per se*, render unfair the perpetuation of the trial by the presiding judge under Section 46, whether in contravention of Article 6 or common law principles. In this context, I note also the observation of the Lord Chief Justice in ***T and Others***, paragraph [18]:

> "*The trial would take place before an independent tribunal and, as it seems to us, for the purposes of Article 6* [ECHR] *it is irrelevant whether the tribunal is judge and jury or judge alone*".

[25] In common with other criminal trial contexts, I consider that the kind of unfairness to which Section 46(3)(b) is directed is something of a tangible, concrete kind, going beyond mere assertion or bare complaint. Approaching the matter through the lens of Article 6, it is predictable that the main question in the present context will frequently be whether the judge alone would be an independent and impartial tribunal. In answering this question, one must apply the well established tests and principles, in particular: would a fair-minded and informed observer conclude that, having regard to the particular factual matrix, there was a real possibility of bias on the part of the presiding judge? (***Porter –v- Magill*** [2002] 2 AC 357, per Lord Hope, paragraph [103]).

[26] One of the ingredients in this context will be the presumption that the trial judge is impartial, which is implicit in all the speeches in ***The Queen –v- Connor and Mirza*** [2004] 1 AC 1118 and explicit in the opinion of Lord Rodger, paragraph [152]:

> "*The risk that those chosen as jurors may be prejudiced in various ways is, and always has been, inherent in trial by jury. Indeed, only the most foolish would deny that judges too may be prejudiced, whether, for example, in favour of a pretty woman or a handsome man, or against one whose dress, general demeanour or lifestyle offends. The legal system does not ignore these risks: indeed it constantly guards against them. It works, however, on the basis that, in general,* ***the training of professional judges and the traditional oath that they take means that they can and do set their prejudices on one side when judging a case***".

[My emphasis].

Furthermore, in the Strasbourg jurisprudence, there is a presumption that the court is impartial. In common with any presumption, this is capable of being rebutted. See ***Hauschildt –v- Denmark*** [1989] 12 EHRR 266, paragraph [47] and [48]:

> "*As to the subjective test, the Applicant has not alleged … that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary …*
>
> *There thus remains the application of the objective.*
>
> *[48] Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.* ***Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw****.*
>
> *This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive.* ***What is decisive is whether this fear can be held objectively justified.***"

[My emphasis].

In the domestic context, the topic of judicial impartiality is considered *in extenso* in ***Locabail –v- Bayfield Properties*** [2000] QB 451.

[27] From the above analysis, three guiding principles emerge. The first is that where a trial judge discharges a jury on account of apparent tampering, the judge should, as a general (but not inflexible) rule, pursue the trial to completion. The second is that before taking this course, the judge must be satisfied beyond reasonable doubt that jury tampering has taken place. The third is that the judge must also be satisfied (in the sense explained above) that to continue the trial without a jury would be fair to the Defendant. To these three principles one must add a *rule*: where the judge considers it necessary in the interests of justice for the trial to be terminated, he *must* do so: while I consider that the first element of Section 46(4) requires the court to form an evaluative judgment, the second element is framed in the terms of a duty, excluding any discretion.

IV THE EVIDENCE, ARGUMENT AND CONCLUSIONS

[28] Following an adjournment to enable the police to investigate the events described in paragraph [3] above (and in the transcript in Appendix 1 hereto), the prosecution formally applied to the court to exercise its discretion under Section 46(3) of the 2003 Act to continue the trial by the mode of judge alone. In passing, I record my view that this discretion would fall to be exercised irrespective of any such application. For this purpose, the materials relied upon by the prosecution were the following:

(a) The discharged jury foreperson's note and the Appendix 1 transcript.

(b) The witness statement of the jury foreperson's son-in-law, who was directly involved in the relevant telephone communications.

(c) A summary of the police interview of the caller.

(d) A solicitor's attendance note.

These materials were considered by the court by the agreement of all parties. No oral evidence was adduced. For present purposes, I shall describe the protagonists in the following terms:

(i) "JF": the discharged jury foreperson.

(ii) "SL": the discharged jury foreperson's son-in-law.

(iii) "D": the discharged jury foreperson's daughter.

(iv) "C": the caller, cousin of SL.

(v) "G": the Defendant's Clarke's girlfriend.

[29] The witness statement of SL recounts that C telephoned him initially, unsuccessfully, on the seventh day of the trial. SL returned the call on the Saturday following the ninth day of trial [a Friday]. According to SL's statement, C said:

> "*I was just phoning to find out, I seen* [JF] *down in court – she's sitting on the jury that my mate's accused of. I was just looking to find out did you hear anything or have any insight behind the scenes*".

The statement continues:

> "[C] *went on to say that him and the girl called [G] who I don't know had been down at the court and told the solicitor that they knew one of the jurors.* [C] *said to me that the solicitor told him to just stay out of court when the jury's sitting.* [C] *told me that him and [G] intended to go in on the Monday … 25th January … They were going into the court for the last few days*".

Next, the statement explains how the conversation came to an end, following which SL recounted it to his wife ["D"], who in turn telephoned her mother ["JF"] and relayed its contents to her. The statement of SL then describes a further telephone communication from C on the eleventh day of trial, some hours after JF had been discharged from the jury. The following words are attributed to C:

> "*That* [JF] *was in there handing over a letter to the judge … what … did you say to* [D] *or* [JF] *about all that there for …*
>
> *He ranted and raved and we shouted a bit at each other. He was talking about retrials and that the cops would be looking him. He then hung up on me.*"

It would appear from the final passages of this statement that, in making this call, C utilized a mobile phone other than his own.

[30] The interview synopsis noted in paragraph [27](c) above discloses that C was interviewed by the police the following day. It is unclear whether this occurred following arrest or as a so-called "voluntary attender". In interview, C stated that he had attended the trial on four occasions. He admitted to knowing the first Defendant (Clarke) and his girlfriend (G). He disclosed that he had recognised JF amongst the jurors. He claimed that he was prompted to initially telephone SL upon learning that the latter was planning to emigrate to Canada. The synopsis continues:

> "*I believe your mother-in-law is on the jury of a friend I know …*
>
> [C] *says to* [SL] *I believe your … is on the jury of a fella I know … the tiger kidnappings. We talked about it. I said have you any information for me, is there anything you know? It was a joke with a jag. Sort of a joke …*

> [C] *asks* [SL] *why would I call down to … house as I hadn't seen …in years …*
>
> [C] *states he told* [SL] *he had been down the court. When* [C] *said 'What's the scoop'. All I wanted was for me and [G] to sit in the court I didn't know if he might have told me what she … had said or if she had said anything …*
>
> [C] *asked by police if anyone has asked him about the juror he knows. His answer was no …*
>
> *Police ask if* [C] *in fear of anyone/under duress answers no to both.*
>
> [C] *states I never meant to find out any information. I only wanted to go down to the court and see the last two days of the sentencing. I thought I was doing the right thing only going into court when the jury went out of court …*
>
> *I told* [SL] *was going on Monday. I knew that Monday, Tuesday and Wednesday were the last days … I just wanted to go and watch..*"

C further described an encounter with (apparently) JF's husband (who was present, coincidentally, for an evidently unrelated purpose) in the court building, on the eleventh day of trial. He claimed that upon arrival at the courtroom he was informed that JF had provided a letter to the court. The summary continues:

> "*Julie McStravick's husband's solicitor said somebodys handed a letter in.* [C] *thought why has … done that. I didn't want anything to happen. I wanted to get it over and done with.*"

The remainder of the synopsis is suggestive of contact between C and the respective entourages of *both* Defendants, in the context of the trial. The overall impression is of infrequent previous contact between C and the family circle to which JF, SL and D belong.

[31] The third documentary item considered by the court is a species of attendance note, created by a solicitor employed in the firm representing the second Defendant (Mr. McStravick), on 28th January 2010. This document appears to describe certain

events outside the courtroom on the tenth day of trial. It recounts that C enquired why the court was "*closed*" and stated to the second Defendant's spouse, Julie McStravick:

> "*I hope it has nothing to do with my phone call to my cousin*".

The note also reports a further aspect of the conversations between C and Mrs. McStravick, to the effect that C had been speaking to JF's husband in the court building that morning. It concludes with these words:

> "[C] *was then told by* [JF's husband] *not to worry because his wife was discharging herself today* [i.e. 26th January]".

By way of elaboration, I would add that members of the public were excluded from the court beginning on the morning of the tenth day of trial and thereafter, through a succession of reporting restriction orders.

[32] On the basis of these materials, it was submitted by Mr. Hunter QC that there was proof to the requisite standard that jury tampering had taken place. He argued that the conduct of C had reduced JF to a state of fear, to the extent that she could not discharge her oath. The offending conduct, he contended, was designed to produce this result. Alternatively, and in any event, this was the result which it brought about, whatever its motivation. Mr. Hunter also emphasised the clear indications of acquaintanceship between C and the first Defendant (which is undisputed).

[33] Replying on behalf of their respective clients, Miss McDermott QC and Mr. Weir QC acknowledged, with reference to the first stage of the statutory process, that the information available about the offending conduct had been sufficient to warrant the discharge of JF from the jury. I remind myself that, in the situation which ensued, all parties were agreed that the remainder of the jury would have to be discharged. It was submitted, however, that the further information now available puts a somewhat different complexion on the limited information initially at the disposal of the court. It was contended that, in hindsight, the discharge of the remaining jurors was unnecessary. Mr. Weir emphasized the distinct position of his client, whom he suggests is remote from the matrix in question, the protagonists being C and the first Defendant. With regard to the second statutory qualifying condition, neither counsel submitted that it would be *unfair* to either Defendant to continue the trial without a jury. The sole focus of all parties' submissions was the *first* of the qualifying conditions viz. jury tampering.

Conclusions

[34] My assessment of materials before the court is as follows:

(a) Prior to the seventh day of trial, when the first telephone call was made, it is apparent that there had been no contact between C and JF for at least a couple of years and infrequent contact between C and any member of JF's family circle. Thus the telephone contact initiated by C was somewhat unexpected and was unsolicited.

(b) The timing of this rather unexpected contact initiated by C, in mid-trial, is inevitably striking. Also noteworthy is the time at which the first of C's telephone calls was made – 1.00am on a weekday.

(c) It is common case that C is an acquaintance of the first Defendant, Mr. Clarke. He is also acquainted with Mr. Clarke's girlfriend (G).

(d) In my view, there was nothing casual or jocular about the questions posed by C during the main telephone communication. According to SL, C asked him whether he had heard anything about the trial or had "*any insight behind the scenes*". I interpret these as specific, pointed questions. C's own account when interviewed ("*… I said have you any information for me, is there anything you know …*") differs in no material respect from that of SL.

(e) During the two telephone communications, C had ample opportunity to state that his enquiries were of a jocular, casual or purely inquisitive nature *and* to emphasize that they should not be channelled to JF. Strikingly, he did neither.

(f) According to SL's statement, C acknowledged that one of the Defendant's solicitors had instructed him to remain out of court during the jury sittings. However, C enunciated to SL his intention that he and [G] would be present in court during the last few days of the trial. He did not dispute this when interviewed. In my view, this has overtones of defiance and belligerence which do not readily attract an innocent interpretation.

(g) In my estimation, C was plainly attempting to elicit indirectly from JF information belonging to the forum of the jury room.

(h) According to SL's statement, during the second telephone communication C spoke about "*handing over a letter to the judge*". This is a clear reference to the note mentioned in paragraph [3] of this judgment. The provision of this note to me occurred privately and was followed by a session in court from which members of the public were excluded. I find nothing in the

materials presented to provide any satisfactory explanation for C's knowledge of this.

(i) The materials in their totality reveal an unhealthily intense interest in the trial on the part of C. His explanations for his conduct and the events which occurred I find shallow and unconvincing.

[35] The above analysis raises substantial concerns about the true motivation of C. I find no satisfactory innocent explanation for either the nature or timing of his conduct. Many of the features highlighted above can only be described as disturbing. However, I do not propose to dwell further on C's state of mind and I do not find it determinative of the question I must decide. I have been informed that the police investigation stimulated by C's conduct is uncompleted and, in the circumstances, it would be inappropriate for this court to consider the motives of C any further.

[36] In deciding whether jury tampering has actually (and not just apparently) taken place, I consider it appropriate to examine mainly the *impact* of C's conduct. In paragraph [3] of my discharge ruling [Appendix 2], I stated:

> "*… I have concluded that the juror is in a state of fear and I attribute this to what I have found is an* ***apparent*** *act of jury tampering. There is no competing cause, to the knowledge of the court*".

I refer to, but do not repeat, paragraphs [14] and [15] above. In determining whether jury tampering has occurred, I consider the overarching test to be whether the conduct under scrutiny has interfered with the conscientious and unhindered discharge of any of the jurors' oaths. Furthermore, in my view, the statutory words "*jury tampering*" invite an expansive, rather than narrow, interpretation. The question will always be a fact sensitive one. Finally, I remind myself that in the setting of Section 46 of the 2003 Act, the court must be satisfied beyond reasonable doubt that jury tampering has occurred.

[37] I am thus satisfied in the present case. I find that the conduct of C has interfered with the conscientious and unhindered discharge of JF's oath, initially and the oaths of the other jurors, consequentially. The offending conduct placed JF in a state of fear and apprehension, quite unable to discharge the oath sworn at the outset of the trial. Consequentially, the same conduct impaired irredeemably the ability of the remaining jurors to be faithful to their oaths, applying the well established principles of apparent bias. Whatever its aims or motivations, the conduct has had this effect. In short, interference with the jury of the kind contemplated by the statute has occurred. It follows that the condition enshrined in Section 46(3)(a) is satisfied.

[38] As regards the second of the statutory conditions – contained in Section 46(3)(b) – I must consider whether to continue the trial without a jury would be fair to both Defendants. In this respect, there was (as noted above), no submission on behalf of either Defendant that it would be unfair to continue the trial without a jury. No attempt was made to impugn my independence or impartiality or to identify any other asserted unfairness. I remind myself of ***T and Others,*** paragraph [20] and I refer to the framework of legal principles set out in paragraphs [18] – [26] above. For my part, I can conceive of no unfairness. In particular, nothing has occurred either before or during the currency of the trial to displace the presumption that, as a judge alone, I would constitute an independent and impartial tribunal – and no argument to the contrary was advanced.

[39] Accordingly, in the exercise of the power contained in Section 46(3) of the 2003 Act, I order that this trial shall continue without a jury. All parties shall have an opportunity to address the court on any consequential or ancillary matters.

ADDENDUM [02/02/10] – PERMISSION TO APPEAL

[40] An appeal against this ruling to the Court of Appeal is possible. As the various provisions of both primary and subordinate legislation governing appeals are somewhat scattered, I shall summarise them here, for assistance in future cases.

[41] Section 47 of the 2003 Act provides:

> ***"Appeals***
>
> *(1) An appeal shall lie to the Court of Appeal from an order under section 46(3) or (5).*
>
> *(2) Such an appeal may be brought only with the leave of the judge or the Court of Appeal.*
>
> *(3) An order from which an appeal under this section lies is not to take effect—*
>
> *(a) before the expiration of the period for bringing an appeal under this section, or*
>
> *(b) if such an appeal is brought, before the appeal is finally disposed of or abandoned.*
>
> *(4) On the termination of the hearing of an appeal under this section, the Court of Appeal may confirm or revoke the order.*
>
> *(5) Subject to rules of court made under section 53(1) of the Supreme Court Act 1981 (c. 54)(power by rules to distribute business of Court of Appeal between its civil and criminal divisions)—*
>
> *(a) the jurisdiction of the Court of Appeal under this section is to be exercised by the criminal division of that court, and*
>
> *(b) references in this section to the Court of Appeal are to be construed as references to that division.*

(6) In section 33(1) of the Criminal Appeal Act 1968 (c. 19)(right of appeal to House of Lords) after "1996" there is inserted "or section 47 of the Criminal Justice Act 2003".

(7) In section 36 of that Act (bail on appeal by defendant) after "hearings)" there is inserted "or section 47 of the Criminal Justice Act 2003".

(8) The Secretary of State may make an order containing provision, in relation to proceedings before the Court of Appeal under this section, which corresponds to any provision, in relation to appeals or other proceedings before that court, which is contained in the Criminal Appeal Act 1968 (subject to any specified modifications)."

Section 47 arguably came into operation on 24th July 2006: see the Criminal Justice Act 2003 (Commencement No. 13 and Transitional Provision) Order 2006 [SI 2006 No. 1835]. I refer also to the Criminal Justice Act 2003 (Commencement No. 15) Order 2006 [SI 2006 No. 3422]. The net position is that Section 47 came into operation on 8th January 2007 at latest (in common with Section 46: see paragraph [12], *supra*).

[42] There was a consequential amendment of the Crown Court Rules (Northern Ireland) 1979. Rule 44AA (inserted by SR 2006/449) provides, in material part:

"(8) An application to the judge of the Crown Court for leave to appeal under Section 47(1) of the Criminal Justice Act 2003 shall be made orally within two days of the making of the order or ruling to which it relates.

(9) Unless the application is made on the occasion of the order or ruling to which it relates, the appellant shall serve notice in writing thereof, specifying the grounds of the application, on the Chief Clerk and on every other party to the proceedings directly affected by the order or ruling which is the subject of the application for leave to appeal.

(10) The court may, if it considers that it is in the interest of justice to do so –

(a) allow a notice required under this rule to be given in a different form, or orally; or

(b) extend or abridge the time for service of a notice required under this rule, either before or after that period expires".

In the Schedule to the Rules, no special Form regarding an application for leave to appeal under Section 47(1) is prescribed.

[43] Section 49 of the 2003 Act provides for the making of appropriate rules of court. Section 49(2) provides:

> "*Without limiting subsection (1), rules of court may in particular make provision –*
>
> *(a) for time limits within which applications under this Part must be made or within which other things in connection with this Part must be done;*
>
> *(b) In relation to … appeals under Section 47*".

This provision illuminates the somewhat opaque terms of Section 47(3)(a), which adverts to a time limit for appealing without specifying one. Rules of Court were duly made and these are contained in the Criminal Appeal (Trial without Jury where danger of Jury Tampering and Trial by Jury of Sample Counts Only) Rules (Northern Ireland) 2006 [SR 2006/487] which, per Rule 1(1), came into operation on 8th January 2007. In summary, where the trial judge grants leave to appeal, the consequential Notice of Appeal must be served within seven days and must be accompanied by "*any documents necessary for the proper determination of the appeal or application for leave to appeal …*". The relevant Notice is found in Form 1, while Form 2 prescribes a Respondent's Notice. Ultimately, any application for leave to appeal to the Supreme Court must be made orally, upon promulgation of the decision of the Court of Appeal or by notice in writing served within seven days: see Rule 13. The unspoken, but clearly identifiable, theme of the rules is that of expedition.

[44] In the present case, the second Defendant only applies for leave to appeal to the Court of Appeal against the order made under Section 46(3). In moving this application, Mr. Weir QC has emphasized the apparently unprecedented nature of the order made and the general importance of the statutory provisions in play. It would appear that these provisions have not been considered by the Northern Ireland Court of Appeal on any previous occasion. At a specific level, the grounds contained in the hastily completed Form 1 also question whether there has been any error of law in the court's construction of Section 46(3)(b) and Section 46(4). The grounds further challenge the court's construction of "*jury tampering*" and the finding that this occurred in the present case. On behalf of the prosecution, Mr. Hunter QC adopted a neutral stance.

[45] The provisions contained in Part 7 of the 2003 Act are of unquestionable importance. While they were considered to some extent by the Court of Appeal in

Mackle, I have already observed that Section 46 featured only peripherally in that appeal, where the context was constituted by an application and order under *Section 44*: see paragraph [12], *supra*. I take into account further that the same may be said of the decision of the English Court of Appeal in ***T and Others***: see my observations in paragraph [22]. Moreover, it would be preferable for the Court of Appeal, rather than a judge at first instance, to rule on the weight to be given to the decision in ***T and Others*** in Northern Ireland: see paragraph [20] above. I conclude that the general issues raised by this ruling are of such importance that they should properly be considered by the Court of Appeal and I grant leave to appeal accordingly. The effect of this is that, in accordance with Section 47(3), the order made under Section 46(3) is suspended until final determination of the appeal.

[46] It is my understanding that, fortunately, the Court of Appeal will be able to accommodate this matter within one week. This is most welcome, given that the first Defendant is not appealing and remains in custody, a powerless onlooker in the circumstances. The trial stands adjourned in the meantime.

POSTSCRIPT

[47] On 12 February 2010, the Court of Appeal dismissed Mr. McStravick's appeal and the trial continued thereafter, without a jury.

APPENDIX 1

THE CROWN COURT IN NORTHERN IRELAND

SITTING AT BELFAST

REGINA

-V-

STEPHEN McSTRAVICK & MICHAEL CLARKE

HEARD BEFORE

THE HONOURABLE MR JUSTICE McCLOSKEY

ON TUESDAY, 26th JANUARY 2010-01-27

DISCUSSION WITH JUROR IN CHAMBERS

Transcript supplied by:
J Harper
Official Court Stenographer

MR JUSTICE McCLOSKEY: It is just after ten past 11 and today's date is 26th January and we are well into the second week of this trial. You are juror 115?

JUROR: That's correct.

MR JUSTICE McCLOSKEY: I have just discharged you because of the matter that you brought to the attention of the court this morning in the note which you submitted. And that note says: "*The jury foreperson needs to speak to the judge urgently on a personal matter concerning previous notes which have been sent up.*"

In open court I asked you some questions about that in the presence of the two defendants and their legal representatives.

JUROR: Yes.

MR JUSTICE McCLOSKEY: And you confirmed to us in open court that last Saturday, 23rd of January, your daughter contacted you by telephone and the issue was a telephone call that had been made by your son-in-law's cousin.

JUROR: Yes.

MR JUSTICE McCLOSKEY: To your son-in-law.

JUROR: Yes.

MR JUSTICE McCLOSKEY: Your son-in-law is this daughter's husband.

JUROR: Yes.

MR JUSTICE McCLOSKEY: And the caller who is the cousin said he was a friend of one of the accused.

JUROR: Yes.

MR JUSTICE McCLOSKEY: He asked your son-in-law did he know anything about the case and your son-in-law said he didn't.

JUROR: Yes.

MR JUSTICE McCLOSKEY: The caller said he had been in the court with the lady called [L].

JUROR: Yes.

MR JUSTICE McCLOSKEY: And he had recognised you on the jury.

THE JUDGE: Yes.

MR JUSTICE McCLOSKEY: He said: "*We are all going down to court on Monday*".

JUROR: Yes.

MR JUSTICE McCLOSKEY: And that was it.

JUROR: Yes.

MR JUSTICE McCLOSKEY: Then just for the record, in the first note you sent to me on the first day of trial you said the following: *"I am concerned that I might know someone sitting in the public gallery."*

JUROR: Yes.

MR JUSTICE McCLOSKEY: "*I am worried as jury spokesperson that she might recognise me. I think her name is [L] and I worked with her for a few months about five years ago."*

JUROR: Yes.

MR JUSTICE McCLOSKEY: You have confirmed in court today that from that moment on you didn't have this concern any longer.

JUROR: No.

MR JUSTICE McCLOSKEY: Because the lady didn't come back to court.

JUROR: I hadn't seen her, no.

MR JUSTICE McCLOSKEY: Very good. Just arising out of what you said this morning, could you please tell me your son-in-law's name and address?

JUROR: My son-in-law's name and address is [SL]. I am not quite sure of the door number, he lives in [an address given].

MR JUSTICE McCLOSKEY: [An address given] And how long has he been married to your daughter?

JUROR: He has been married four years.

MR JUSTICE McCLOSKEY: And do you have fairly frequent contact with your daughter and [SL]?

JUROR: Yes.

MR JUSTICE McCLOSKEY: Thank you. Can you tell me the name of the cousin who made the phone call to your son-in-law?

JUROR: Yes, it is [C].

MR JUSTICE McCLOSKEY: Do you know his address?

JUROR: I am sorry my Lord, I don't.

MR JUSTICE McCLOSKEY: Do you know anything more about him?

JUROR: I don't except that he knows where I live.

MR JUSTICE McCLOSKEY: Yes.

JUROR: Because he used to deliver [X] to my house years back.

MR JUSTICE McCLOSKEY: Do you know, for example, what his work or his business is now?

JUROR: I know he is unemployed. Well, from what I gather he was unemployed, my Lord. I am not sure whether he is working know because I don't know much about him.

MR JUSTICE McCLOSKEY: That's all right. When was the last time you had contact with [C]?

JUROR: I have never had contact with him in over two years, my Lord.

MR JUSTICE McCLOSKEY: And what was your last contact with him?

JUROR: I can't -- well he wasn't at my daughter's wedding, that was because there was a fall out with him and my son-in-law so he didn't attend the wedding. I have never spoke to him or anything.

MR JUSTICE McCLOSKEY: As far as you are concerned did this phone call come out of the blue?

JUROR: Yes.

MR JUSTICE McCLOSKEY: And no doubt you have been worried about it ever since?

JUROR: Yes.

MR JUSTICE McCLOSKEY: Now, is there anything you would like to add?

JUROR: Yes, it is just that my son-in-law who had nothing to do with this and didn't know that he was going to ring him and ask him, I am worried in case now that he is involved in it, would he be in trouble or -- it us just for my daughter's sake as well, you know. If because [C] contacted him is he going to be at threat as well or is there going to be a threat made to him, I don't know, because he let me know that he had contacted him.

MR JUSTICE McCLOSKEY: Yes. Would it be correct to say that this [C] has succeeded in frightening you --

JUROR: Well, it was a worry.

MR JUSTICE McCLOSKEY: -- over this?

JUROR: At the weekend it was a worry.

MR JUSTICE McCLOSKEY: Yes.

JUROR: It was a worry because I am on the jury and jury foreman, and I hadn't said nothing and he had been there that he would try to get to me again.

MR JUSTICE McCLOSKEY: And what do you mean by that?

JUROR: Trying to get maybe phoning my son-in-law again and saying she is on and --

MR JUSTICE McCLOSKEY: Yes.

JUROR: -- pestering him.

MR JUSTICE McCLOSKEY: Well, do you interpret his phone call as an attempt by him to get to you?

JUROR: It was, I think it was to let him, to let me know that he knows I am on the jury and that he has seen me in court.

MR JUSTICE McCLOSKEY: Had you seen [C] in court?

JUROR: No I didn't, I didn't know. I didn't even know he was a friend of the accused.

MR JUSTICE McCLOSKEY: Well when he said that he and others would be coming to court on Monday --

JUROR: Uh-huh.

MR JUSTICE McCLOSKEY: -- did you interpret that as a --

JUROR: Yeah.

THE JUDGE: -- threat of some kind to you?

JUROR: Right. "*We will all be going to court on Monday anyway.*" So I take it that maybe they were looking a response from him for something or that 'we'll all be down' and it was going to sort of frighten me from giving, you know --

MR JUSTICE McCLOSKEY: Yes.

JUROR: -- frightening me away from the jury.

MR JUSTICE McCLOSKEY: Yes, very good, very good. Then finally, can you confirm that you haven't discussed any of these matters or any of the contents of the two notes with any of the other jurors?

JUROR: I haven't, my Lord, no.

MR JUSTICE McCLOSKEY: Now the time in my clock is now 11.20 and that is the end of this session.

JUROR: Thank you.

APPENDIX 2

THE CROWN COURT IN NORTHERN IRELAND

SITTING AT BELFAST

REGINA

-V-

STEPHEN P McSTRAVICK AND MICHAEL P CLARKE

HEARD BEFORE

THE HONOURABLE MR JUSTICE McCLOSKEY

ON WEDNESDAY, 27TH JANUARY 2010

RULING RE DISCHARGE OF JURY

Transcript produced from FTR digital recording by:
J Harper
Official Court Stenographer

At 11.08:

MR JUSTICE McCLOSKEY:

[1] The issue to be determined at this stage how to proceed, the Court having discharged a juror yesterday, on the 11th day of the trial. As I have indicated to the parties, it seems to me that the provisions of Part 7 of the Criminal Justice Act 2003 are engaged, in particular Section 46(1). This Section applies where two conditions are satisfied. The first is that the judge is minded during a trial on indictment to discharge the jury. The second is that he is so minded because jury tampering appears to have taken place. I pause at this juncture to observe that, in my view, there is here a fusion of well established common law powers and principles, on the one hand, and, on the other, a new statutory regime which applies in the specific case of jury tampering - as opposed to other contaminants or improprieties which could give rise to the discharge of a jury.

[2] I am of the opinion that we are, as I said to counsel, quite clearly in Section 46 territory. I note the absence of any statutory definition of "*jury tampering*" which, on reflection, is unsurprising. I highlight also the absence of any attempt in the leading texts to proffer any kind of exhaustive definition, which is equally unsurprising. These are normal, regular words of the English language, to be accorded their natural and ordinary meaning In my view, jury tampering, in the sense in which it is used in Part 7 of the 2003 Act, includes any conduct which is designed to frighten, intimidate, influence, control or suborn a member of the jury , or any conduct which may have any of those consequences: in short anything interfering with the conscientious and unhindered discharge of each juror's oath. I do not intend this formulation to be exhaustive .I consider further that the words "jury tampering" invite an expansive, rather than narrow, interpretation.

[3] I am quite satisfied that conduct of the aforementioned species appears to have occurred in the present case vis-à-vis the discharged juror. There are three elements of the equation which impel me to that conclusion. The first is the content of the transcript which is comprehensive of the hearing which took place in open court on 26th of January and the short supplementary hearing in chambers which was fully transcribed. The second factor is the information provided to the court about events on Monday morning, 25th of January, the tenth day of trial when, quite out of harmony with the pattern during the previous days of the trial, I am informed that a not insignificant number of persons occupied the public gallery. I contrast that with sessions of the trial during the latter stages of last week on days 6, 7, 8 and 9 when, in my sight, the public gallery was either entirely unoccupied or virtually deserted for long periods.

The third element in this equation is the assessment that I have made of the juror concerned. I have been able to make an assessment of this juror in the same way as any tribunal of fact scrutinises any witness. I have done so at close quarters during a period of reasonable dimensions, not once but twice. This has enabled me to make a confident evaluation of the demeanour and presentation of the juror. Having done so, I have concluded that the juror is in a state of fear and I attribute this to what I have found is an *apparent* act of jury tampering. There is no competing cause, to the knowledge of the court.

[4] In these circumstances, it is necessary for me to consider the other material provisions of Section 46. As regards Section 46(1)(b), it appears to me that jury tampering has taken place for the reasons which I have given. Next, I have complied with Section 46(2): the parties were informed that I was minded to discharge the remaining eleven jurors because of an apparent act of jury tampering and were given an opportunity to make representations, of which they duly availed. The ensuing question to be addressed is whether any course other than discharging the jury is

realistically open to the court. I accept that to discharge the entire jury is a measure of last resort, a reluctant step to be taken only after the court has given consideration to all realistic and viable options that are available. In this respect I have noted in particular what was said by Hart J. in the case of R-v-Mackle and I quote from him:

> *"I think in those circumstances there is really no alternative but to discharge the jury because one does not know whether there have been similar approaches to other jurors and a mere reference to that or any inquiry I think would lead to a situation where one would have prejudiced the jury against the accused."*

If the court were to explore the option of continuing with a reduced jury I would have to formulate a series of very specific questions to all of the jurors - possibly collectively, possibly individually (another difficult issue which would have to be confronted) - in order to ascertain whether any similar acts of tampering had occurred vis-à-vis them *or* whether there was anything about their individual states of mind suggestive of prejudice against the Defendants or either of them. It would in my view be impossible to formulate questions of that kind without generating a risk of prejudice against either one of the Defendants or both. I cannot conceive of any way of devising appropriate questions designed to allay the Court's concerns which would not have that consequence, whether in the context of asking them about themselves individually or in the context of exposing what they would, in my view, probably conclude is the complication which has affected the juror concerned.

[5] I must also take into account that while the juror concerned has informed the court that no disclosure of the contents of either note was made to other members of the jury, the “appearance of bias” rule is the one which the court is obliged to apply, and robustly. This must entail recognition of the reality that the juror concerned would probably have appeared unusually apprehensive to other members of the jury at more than one stage of this trial, given an earlier note to the court emanating from this juror [on day one], disclosing some anxiety about the presence of a female

person in the public gallery. What I have got to confront is the risk that the other jurors either know of the problem or suspect it. And once I form the view those are real, as opposed to fanciful, risks, coupled with the view that I cannot efficaciously question them in such a way that a risk of bias (as that term is properly understood) would not materialise, I am impelled to the conclusion that the only course available to the Court is to discharge the remainder of the jury.

[6] I would add that where the Court makes an order to this effect, it is then incumbent upon the judge to consider whether the judge alone should continue the trial under Section 46(3). That I will treat as a new phase of these proceedings and all parties will have an opportunity to give further consideration to that important question, unprecedented in this jurisdiction, and to make representations. Appropriate facilities will be afforded for that purpose. At this point, unless either prosecution or defence wish to raise any issue with me on this first question, I propose to discharge the jury without more.