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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JOHN HAMILTON GRACE

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Mr Kelly QC and Mr Barlow (instructed by Reavey Solicitors) for the appellant
Mr Simpson QC with Mr Steer (instructed by the PPS) for the respondent

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Before: Morgan LCJ, Treacy LJ and Sir Donnell Deeny

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MORGAN LCJ (delivering the judgment of the court)

[1] On 18 February 1993, the appellant was the driver of a minibus stopped by an RUC patrol on Ballygomartin Road, Belfast. In the rear of the minibus, police found a holdall containing firearms and ammunition. Alan Freeburn was the front seat passenger. On 1 December 1993, the appellant pleaded guilty to possession of firearms and ammunition with intent by means thereof to endanger life or cause serious injury to property or to enable some other person by means thereof to endanger life or cause serious injury to property contrary to Article 17 of the Firearms (Northern Ireland) Order 1981.

[2] He lodged an appeal against sentence which he abandoned on 24 June 1994. His co-accused Freeburn was re-arraigned on 5 December 1994 and pleaded guilty to the same count. He was sentenced to 7 years' imprisonment. On 30 January 1995, the applicant purported to lodge a further appeal based on disparity of sentence but this was dismissed on 26 May 1995 on the basis that he had previously abandoned his appeal.

[3] On 23 March 2017, he lodged an appeal against conviction on the basis that his conviction was unsafe as a result of the undisclosed involvement of a state agent, Colin Craig, who was alleged to have been employed at the material time as a covert

human intelligence source. It was contended that the appellant had been deprived of the opportunity to pursue an application to stay the proceedings as an abuse of process on the basis of entrapment and that no trial should have taken place.

[4] The case made on behalf of the appellant in his skeleton argument was as follows:

(i) On 18 February 1993, at about 7pm the appellant was arrested at an RUC checkpoint on the Ballygomartin Road, Belfast, while he was driving a community minibus. Alan Freeburn accompanied him. At that time the applicant was employed by the Farsey Youth and Community Development, Springfield Road, Belfast. Earlier, Alan Freeburn had asked to be driven from Highburn Gardens to Glencash Estate, telling his friend that he had a message to deliver and to collect something. At that stage, the appellant had no suspicions that his friend was embarking on a criminal enterprise. His friend was a joiner by trade but could not drive. The request was not in itself suspicious.

(ii) The appellant drove to the estate and Alan Freeburn alighted from the vehicle and knocked on the door of a house. Colin Craig opened the door and handed a holdall over to Alan, who then returned to the vehicle and placed the holdall in the rear of the vehicle. The appellant was then told by Alan to drive back to Highfield. The appellant drove down the Glencash Road and turned right onto the Ballygomartin Road. A short distance later an RUC police vehicle pulled out from a side street causing the vehicles in front to stop. The appellant stopped his vehicle. The officers then immediately approached the appellant asking for his driving licence and ID from Alan Freeburn. The RUC then opened the rear doors finding the holdall. Within seconds other officers attended the scene. Contained within the holdall were firearms and ammunition. Both men were then arrested. The appellant had no knowledge of the contents of that holdall. Further he was not a member of any paramilitary organisation. He also had no previous criminal convictions.

(iii) He was arrested and taken to Castlereagh Police station where he was interviewed. He recalls that during his police interviews one of the interviewing officers remarked to him "Do you think this was an accident? It wasn't, we followed you all the way from Glencairn."

(iv) Colin Craig was a well-known and feared paramilitary commander in the area. This appellant was terrified of mentioning the name to the RUC, fearing for his safety and that of his young family. He initially pleaded not guilty but then changed his plea to guilty.

(v) When he had embarked on that journey he was not aware that Alan Freeburn was meeting Colin Craig. At his Diplock trial, his counsel went into

Chambers with the judge. He was told that if he fought the case he will get 20 years. His fear of Colin Craig's reputation ensured that he did not disclose the true state of affairs and his knowledge at the time of his arrest. The true state of affairs was that this appellant did not have the necessary knowledge to be guilty of the criminal offence of possession of a firearm. The appellant was released from custody on 16 September 1998. He spent his time in custody within the paramilitary wings at HMP Maze. That was for his own security.

(vi) Colin Craig was shot dead in 1994. It has subsequently emerged from press reports that it is believed that Colin Craig was a paid informer/state agent for the RUC Special Branch/Military Intelligence. The appellant believes that Alan Freeburn, who may have been a member of the UVF, was set up by Colin Craig and that he was simply used by Alan to pick up illegal weapons because he was the driver of the community bus. That was the perfect cover for an illegal operation. However, in light of the later press reporting about Colin Craig and these particular circumstances, it is suspected that Craig was acting as a state agent and set up the arrest of Freeburn and the appellant.

[5] In earlier case management hearings, it had been indicated that the appellant did not wish to give evidence and no application under section 25 of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act") was made. On the morning of the hearing, a statement from the appellant was provided and it was indicated that he wished to give evidence. It appears that there was some confusion as a result of which an application under section 25 had not been lodged and the statement had not been forwarded earlier. The statement broadly was consistent with the account contained in the skeleton argument. It added that the appellant had heard that Freeburn had received a prison sentence for robbery and that "the penny dropped" when he saw Colin Craig who had a reputation for involvement in paramilitary activities hand the holdall over to Freeburn.

[6] In considering whether to receive any evidence on appeal the court is required by section 25 (2) of the 1980 Act to have regard in particular to –

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial.

[7] In light of the allegations made in the skeleton argument the PPS conducted a review of disclosure as a result of which the following material was disclosed:

> "Information in late 1994 indicated that the UVF believed Colin Craig had been a security forces informer and that it was rumoured within UVF circles that Craig had set up Loyalist 1. Other information indicated that Craig was suspected of having set up John Grace, arrested by the RUC on 18 February 1993.
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> Information in late 1994 suggested that Craig was an RUC informant who had been responsible for the arrest of John Grace found in possession of a number of firearms bound for the UVF in Belfast."

[8] Shortly before the appeal hearing, it had been possible to locate the depositions and some of the trial papers. The depositions indicated that when the appellant was stopped by the RUC he informed police that he had just come from the Glencairn Community Centre and was going to the Highfield Estate to pick up kids to take them to the swimmers.

[9] The police officer then asked the appellant to open the rear of the minibus. The officers shone a torch on a red holdall and asked the appellant who owned the bag. He replied, "It's my kids swimming gear." The officer lifted the bag and shone his torch inside. It contained one Uzi type machine-gun with a suitable loaded magazine, one pistol with a suitable type loaded magazine and a blue box containing rounds of ammunition. When asked to account for those weapons and ammunition the appellant replied, "Nothing to say."

[10] Shortly afterwards the appellant then turned towards Freeburn in the presence of police and said loudly to him, "I've just picked him up and he knows nothing about it, it's my responsibility." When asked by police where he met Freeburn the appellant said, "I picked him up at Glencairn/Ballygomartin Road just before you stopped us."

[11] He was then asked about the weapons and the following exchange occurred:

> "Q. How did the bag and weapons get into the van?
>
> A. I don't know.
>
> Q. You told me it was your kids' swimming gear and now you are denying knowledge of it, why is that?
>
> A. I'm saying nothing more until I see the detectives.

Q. Why do you have these guns? What's the point?

A. Tell that to the RIR man that was killed in our estate last week."

That was a reference to the murder of a near neighbour of the appellant by Republican terrorists a few days earlier.

[12] The papers also contained the sentencing remarks by His Honour Judge Burgess. He referred to the plea made by Mr Grant and accepted that the appellant had no intention of using the firearms either to kill or to maim any other person but had been prevailed upon to move these particular weapons. The judge noted that what had led to the agreement to move the weapons in this particular case was the appellant's emotion over the killing of a soldier in the community near to him. The judge went on to accept that this was not a course of action but a one-off reaction as a result of his emotional imbalance.

[13] There are numerous difficulties with the account contained in the appellant's proposed statement. In his statement, he states that "the penny dropped" when Craig provided the holdall to Freeburn. At the very least, he suspected that the holdall was connected to paramilitaries and that Freeburn was, therefore, also connected to paramilitaries. There is simply no innocent explanation for his statement at the scene that the holdall contained his kids' swimming gear. The purpose of that statement was to prevent the hold-all from being opened.

[14] Secondly, he sought to persuade the police that he had just picked Freeburn up. On his own case, that statement was made in circumstances where he had at least a suspicion that Freeburn was involved in paramilitary activity but perhaps more importantly was then aware that the holdall contained weapons and ammunition. The purpose of that statement could only have been to attempt to exonerate Freeburn, the suspected paramilitary. He has never suggested that this statement was induced by fear.

[15] Thirdly, there is a very strong implication in his answers to police at the scene that he sought to link the find of the guns to the murder of his neighbour. Clearly that was the case that he made at the time of his plea. He has offered no explanation as to why he would have made such a case up at the time of the detection.

[16] Fourthly, he had every opportunity both at the scene and in the course of his interviews to make the case that he had nothing to do with the find. Instead his strategy was to draw attention to himself as the person responsible. He offered no explanation for taking that course.

[17] Fifthly, he had the advantage of experienced counsel and solicitors. He had every opportunity to explain to them any dilemma which he faced. His instructions to them were to enter a plea on the basis that this was something that he had become

involved in because of a misplaced desire for retribution as a result of the murder of his neighbour.

[18] The evidence which the appellant proposed to give did not go directly to the issue of entrapment. This is not a case where the appellant claims that he was inveigled into participating in some crime by the actions of any person connected to a public authority. It appears that Freeburn may have been an instigator but there is nothing to suggest that Freeburn had been entrapped into committing this crime.

[19] Insofar as the appellant contends that he was unable to make his case because of his fear of Craig it is relevant to note that Craig himself was murdered in 1994. After that date, there was certainly no reason connected to Craig for him to refrain from making any case he wished.

[20] We do not consider, therefore, that this account which he proposed to give approximately 24 years later was capable of belief. We also consider that he had every opportunity to explore this account with his counsel and solicitors prior to his decision to enter a plea of guilty. This was a voluntary plea which should not lightly be set aside.

[21] The test for the admission of fresh evidence under section 25 of the 1980 Act is whether it is expedient or in the interests of justice to admit the evidence. The matters set out in section 25(2) are relevant considerations in that exercise but are not decisive. The analysis of the evidence indicates, however, that the appellant wants to argue that he should not be convicted of this offence because he did not have sufficient knowledge and control of the items to constitute possession of law. That is a case which it was plainly open to him to make a trial and in light of the discrepancies that we have identified above we do not consider that it is either expedient or in the interests of justice to permit him to raise that case now.

Disclosure

[22] The essence of the ground of appeal in this case is that there was a failure of disclosure at the original trial by reason of the involvement of Colin Craig in the provision of information to the police. That led to a number of *ex parte* hearings which resulted in the disclosure made at paragraph [7] above and a further disclosure indicating that the UVF and Loyalist paramilitaries believed that Craig was a "tout" and set up Loyalist 2.

[23] The obligation of disclosure in this case is governed by the common law. The essential principles were set out by the House of Lords in R v H [2004] UKHL 3 where Lord Bingham observed the prosecution disclosure was a requirement of basic fairness. He continued at [14]:

> "Fairness ordinarily requires that any material held by the prosecution which weakens their case or strengthens that

> of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."

[24] There was nothing disclosed, however, as a result of this review of the material which suggested that Craig was the instigator of the arrangement to collect the weapons or that there was any involvement by police in instigating, inducing or inciting the commission of the offence.

Entrapment

[25] The appellant's case was based on the proposition that if proper disclosure had been made that would have enabled the appellant to pursue an argument for a stay of the proceedings on the grounds of abuse of process. We have recently reviewed the case law in state actor entrapment in R v Hill [2020] NICA 30 at [16]-[18]:

> "[16] R v Latif [1996] 1 WLR 104 was a case in which the defendants submitted that it was an abuse of process to try him as he would probably not have committed the offence of attempting drug importation were it not for the conduct of a paid informer and a customs officer who illegally imported the drugs. Lord Steyn gave the judgment of the House of Lords indicating that entrapment was not a defence under English law. He approached the issue in the following passage:
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> > 'In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42* . *Ex parte Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Ex parte Bennett conclusively establish that

proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.'

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

"26. *The nature of the offence*. The use of pro-active techniques is more needed and, hence, more appropriate, in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.

27. *The reason for the particular police operation*. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random

testing may be the only practicable way of policing a particular trading activity.

28. *The nature and extent of police participation in the crime*. The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the defendant's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.

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

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

> state should not instigate the commission of criminal offences in order to punish them."

[26] In our view, there was no evidential base for a finding of entrapment in this case. We are satisfied that a thorough disclosure process was undertaken to ascertain whether there was any material that could have been helpful to the appellant but no such material was available.

Conclusion

[27] For the reasons given we are satisfied that there was no failure of disclosure in this case and no basis for an argument of abuse of process based upon entrapment. The conviction is safe and the appeal is dismissed.