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Judgment: approved by the Court for handing down | *Delivered:* **11/10/10**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

Sitting at Belfast

_____

THE QUEEN

-v-

GARY JONES

_____

RULING NO. 3: ABUSE OF PROCESS

_____

McCLOSKEY J

I INTRODUCTION

[1] This ruling determines an application by the Defendant for an order staying his trial on the ground that it constitutes an abuse of the process of the court.

Background

[2] The Defendant is charged with one count of doing an act with intent to cause an explosion and a further count of possession of an explosive substance with intent to endanger life, contrary to Sections 3(1)(a) and 3(1)(b) respectively of the Explosive Substances Act 1883 ("*the 1883 Act*"). The history of this prosecution is as follows:

(a) On 27th October 2006, following a trial before Morgan J, the Defendant was acquitted of attempted murder (then the first count on the indictment) and convicted of causing an explosion, contrary to Section 2 of the 1883 Act [no longer alleged] . He was sentenced to 14 years imprisonment.

(b) In a reserved judgment delivered on 5th July 2007, the Court of Appeal allowed the Defendant's appeal and ordered a retrial.

(c) The Defendant's first re-trial was aborted, with no outcome. As a result, this is his second re-trial.

(d) On 28th May 2010, the court (Hart J) conducted a pre-trial review. On that occasion, it was represented that there were no outstanding applications and both prosecution and defence were ready for trial. A fresh trial date in June 2010 was allocated.

(e) The scheduled retrial of the Defendant did not proceed in the event and a new retrial date of 7th September 2010 was allocated.

[3] When the Defendant's retrial began (on 14th September 2010), this application was signalled. The parties subsequently exchanged skeleton arguments, duly augmented by oral submissions from counsel. While this application materialised and was presented, the trial continued. This application has been, to some extent, organic in nature, being linked to evolving requests on behalf of the Defendant for further disclosure. Given the unsatisfactory history of this trial, in particular delays, the factors in favour of continuing to hear the prosecution evidence pending completion and determination of this discrete application seemed to me compelling.

II THE PROSECUTION CASE

[4] The prosecution case revolves around the conduct of the Defendant and the activities of a white Ford Transit van on 21st July 1998 in the vicinity of Monaghan Street, Newry. It is alleged that after 4.30pm on this date the van was driven into a laneway which separates Nos. 25 and 27 Monaghan Street and provides access to a makeshift car park. Upon turning into this access the van had a minor collision with a parked vehicle. The van then adopted a parked position in the area of waste ground. A male person, whom the Crown say is the Defendant, was seen coming from the area of the van. He was challenged by another male, Mr. Lennon, who had observed the collision. When the Defendant refused to stop, Mr. Lennon attempted to restrain him physically. During the ensuing struggle, the Defendant wriggled out of his jumper and denim jacket and left the scene hastily.

[5] The minor vehicular collision was the impetus for a call to the police and certain officers attended the scene. A police vehicle drove into the waste ground and two officers disembarked, in close proximity to the parked van. One of them noticed something peculiar about its roof. At this stage, there was a bang akin to an explosion, emitting an object through the roof of the van which came to rest on the ground a short distance away. This object did not explode. There were no casualties.

[6] The prosecution say that the Defendant drove the van into the waste ground and parked it there, with a view to launching a mortar attack on the nearby police station, which is separated from the waste ground by a wall. The van was positioned accordingly. In the event, the attack failed. While the explosive device was duly launched from the van, it travelled a very short distance only and did not detonate. It is claimed that this was a viable device which, on detonation, was capable of endangering life or causing serious damage to property. It is suggested that both the van and its number plates had been stolen during previous days.

[7] The prosecution case also rests on forensic evidence the focus whereof is the aforementioned white jumper. It is alleged that on 13th December 2004 (over six years after the event), following arrest buccal swabs were obtained from the Defendant. These were matched against a blood stain found on the jumper, giving rise to the analysis that the chances that the DNA contained in both did not originate from the Defendant are less than one in a billion. It is further highlighted that the Defendant failed to make any response when questioned during interview and when confronted by material items of physical evidence, giving rise to an invitation to the court to make an inference adverse to him.

III THE EVIDENCE

[8] This chapter of the judgment is not designed as a verbatim rehearsal of all the evidence adduced. Rather, its purpose is to highlight and summarise the salient features thereof. Bearing in mind that this is a trial by judge alone, both prosecution and defence were given an opportunity to address the court on the question of whether the contents of this chapter have any material omissions or errors. A draft was provided to the parties to this purpose and the Chapter was finalised subsequently.

Civilian Witnesses

[9] **Finbar Lennon** gave evidence that in July 1998 he worked as an office manager in premises abutting both Monaghan Street (Newry) and an entry providing access to an area of waste ground, which he described as "*full of crap all the time*". During a meeting with a client inside the office premises, he was alerted by a noise from outside and went out to investigate. He encountered an irate man complaining about his car having been struck. Mr. Lennon wondered whether the gate positioned at the entrance to the entry (for which his firm was responsible) had been in some way involved. He confirmed that he did not see any other vehicle, nor did he recall seeing any vehicle either entering the waste ground or positioned therein.

[10] Some five to ten minutes later, Mr. Lennon and others were attempting to retrieve their cars from the waste ground. However, they were not permitted to do so, on account of a cream or white coloured parked van. He saw no one in the vicinity of the van. Continuing, he recounted that he spoke to "*a young lad*". He

described this person as "*a cub … a young fellow*", aged between seventeen and nineteen years, wearing a monkey hat and a hard hat. Mr. Lennon testified that *he* is now aged forty-two years (and was, hence, aged thirty at the material time). When asked whether this other male person was of the same age, he replied "*certainly not*". The other male person's height was five feet, six inches to five feet, eight inches and he was of slim build. He did not recognise this person. He "*supposed that he got a look at his face.*" The hard hat attire suggested to Mr. Lennon that he was one of the firm's workers, who frequented this area thus attired.

[11] Mr. Lennon testified that he confronted this young male person. Where did this encounter occur? Mr. Lennon testified that the "*young lad*" was "*coming through the entrance on to Monaghan Street*". He "*thought*" that he spoke to him "*just to the left hand side of the gate*". He was unable to say from where the other person had come. Mr. Lennon, upon confronting him, asked him whether he had "*hit the car on his way into the yard*". This elicited no reply. The other person did not stop and kept walking. Mr. Lennon "*thought*" that he repeated his question. Then, he "*thought*" he grabbed the other person and he "*thought*" that he was "*left with a coat*". This occurred in the vicinity of what he described as "*the amusement arcade*": with the assistance of Photograph No. 3, he appeared to indicate the brown coloured frontage to the left of the yard entrance. He testified that the coat was dropped to the ground, but did not specify precisely where this occurred. He did not recall being "*left*" with anything else.

[12] Mr. Lennon attested to his belief that the damaged parked car was positioned to the right hand side of the gate. Again, he was vague about its precise position. He was unaware of any other access to or egress from the waste ground. He mentioned a link fence situated on the left side of the waste ground (viewed from the street entrance). Later that evening, he made a statement in the police station. The possibility of an identification parade was at no time canvassed. He would have willingly participated in such an exercise.

[13] The witness statement of **Leo O'Neill (now deceased)** was read to the court, pursuant to a hearsay order made under the Criminal Evidence (Northern Ireland) Order 2004. This contains the following salient passages:

> "*It was about 17.00 hours when I was walking along Monaghan Street when at the entrance to Dunne's old car park I saw a van turning into the car park and heard a crunch. I realised the van had struck an Escort parked at the roadside. I saw the van drive up and turn into the right at the top. There was a big man with a mobile phone there but I am not sure if he saw the crash. Anyway I then noticed a man wearing a yellow hard hat, jeans and maybe a denim jacket with a light coloured jumper or something underneath came walking down from the back of the car park. The big man with the phone tackled this man when he came onto the street. I had told the man with the mobile phone that the van*

had hit the Escort car. The big man grabbed the fella wearing the hard hat and a struggle ensued …

During the struggle the man's jacket and jumper came off and his yellow hat fell off. This man then ran off down Monaghan Street…

A small man came out of the Post Office, Savages and I understand it was his Escort car that was hit."

[14] The evidence of **Kevin Matthews** was also read to the court. He recounts that on 21st July 1998, he was in the premises of Messrs. Lovell and McAlinden, Monaghan Street, Newry where he was talking to Mr. Lennon. Both went outside upon hearing a loud noise. This witness observed a damaged Ford Escort vehicle. He then recounts the following:

"*As I looked up into the car park I saw a man walking down towards us. I would not see a Transit van. As far as I could see he looked frightened. He was wearing a blue denim jacket, jeans and shoes. I could see he wore goggles and I believe some sort of scarf under a hard hat. Although this hat subsequently fell off him and is yellow I thought my first impression was that it was red. Anyway Finbar tackled him asking what was going on as he approached. The man then made to run off but was caught by Finbar. There was a brief struggle and the man wiggled out of his jacket, got free and ran off past Savages Post Office. I was standing inside the car park entrance at this time …*

Other than the clothes I have described I can only add that the man from the van wouldn't be very tall maybe five feet nine inches and skinny. Also I did not hear any bang from an explosion whilst at the car park".

[15] **Michael McAnulty** gave evidence that on 21st July 1998 he parked his Ford Escort on Monaghan Street, close to the "Dunne's Yard" entrance. [The Appellation "Dunne's Yard" clearly equates with the waste ground/makeshift car park in question]. Then he joined a queue inside the nearby Post Office. Next, he heard "*a bit of a thump*" and went out. He observed that the front driver's side of his vehicle had been damaged. A small crowd gathered and police drove into the yard, following which they began dispersing members of the public. There was a man on a mobile phone. Then he heard a small bang.

[16] **Thomas Conlon** gave evidence that on 20th July 1998 he made a report to police of the theft of a new Izuzu Trooper jeep and number plates from his premises at Loughbrook Industrial Estate, Newry, where he operated a commercial vehicle

hire business. He was uncertain about the purchase and provenance of this vehicle. It was recovered by the police in Craigavon some months later.

Police Witnesses

[17] Constable Rennie testified that at 17.05 hours on 21st July 1998 he entered the waste ground in question, accompanied by three other constables. The witness was positioned "*out towards the street entrance*". There he observed a white Transit van, parked in the bottom right corner a short distance from a wall separating the waste ground from Corrie Square RUC Station, towards which the vehicle was pointing. His view of the vehicle was unobstructed. Constables Hazlett and McAnespie were positioned closest to it. Very quickly after their arrival, there was a muffled explosion, the roof of the van opened and a gas canister was emitted. He believed that this was a mortar attack. In due course, he departed the scene at approximately 6.40pm. He saw no photographer or mapper arrive. He had no log keeping duties and could not say whether any log was compiled.

[18] Constable Hazlett testified (in common with Constable Rennie) that the advent of the police at the scene was precipitated by a "hit and run" accident report. This witness noted the presence of broken glass on the roadway, in line with the aforementioned entrance. He entered the waste ground and observed a white Transit van there. Something unusual about its roof caught his attention. He was standing about five feet from the van, positioned on the ledge of the police vehicle, where from he could see that the roof had been altered. He also observed a covering of tinfoil on each of the van's rear windows. Next, a "*tube*" came out of the roof, travelling in the direction of the adjacent police station car park. It traversed the separating wall and landed in the station car park. He entertained no doubt about this. He believed this to be a mortar bomb. The van was *not* in the position depicted in the album of photographs adduced in evidence [photographs 3 and 4 in particular].

[19] Constable McAnespie gave evidence that he and Constable Rennie attended the aforementioned scene on 21st July 1998, at around 4.55pm on 21st July 1998. A white Ford Transit van was parked at the rear of the waste ground, facing Corrie Square RUC Station. As he approached the van, there was a loud explosion and he observed a large mortar launch from its rear, landing unexploded a short distance away. He believed this to be a mortar bomb. In the aftermath, he seized and retained a yellow builder's helmet, a blue denim jacket and a white jumper [exhibit PMcA 3]. These items were positioned to the left hand side of the yard entrance, against the wall, viewed from the perspective of Monaghan Street. They were definitely inside (i.e. beyond) the gate, close to the white wall sign visible in one of the photographs [No. 3 - I interpose that this sign is plainly located some distance beyond the span of the entrance gate in its open position]. Upon returning to Ardmore RUC Station, he conveyed these items to a civilian scenes of crime officer, Mr. Wilkinson. On Mr. Wilkinson's instruction, the constable prepared a white control nylon bag [PMcA 6].

[20] The evidence of Robert Wilkinson, scenes of crime officer, was read to the court:

> "*On 21st July 1998 at 19.10 hours I received the following items from Constable P McAnespie, they were bagged and labelled as: PMcA 1 – one yellow builder's helmet, PMcA 2 – one blue denim jacket, PMcA 3 – one white jumper, PMcA 4 – pen removed from denim jacket, PMcA 5 – tissue removed from denim jacket, PMcA 6 – control nylon bag for items PMcA 1 – 5*".

As appears from the outline of the Crown case – paragraph [7], *supra* – exhibit **PMcA 3,** the white jumper, is the critical item.

[21] **Andrew Jones,** a civilian mapping officer, gave evidence that on 22nd July 1998 he prepared a map of the area in question [Reference No. 367/98]. This was duly proved in evidence. He could not recall the precise time of his attendance or whether anyone else was present. He was unable to say whether the white van was visible from outside the Monaghan Street entrance. He agreed that the position of the van depicted in photograph No. 1 differs from the depiction in his map. He did not fully inspect the perimeter of the waste ground. Thus he could not say whether it had any *further* means of access/egress. His map also depicts the position of a gas cylinder, adjacent to the white van. The album of photographs [exhibit GS1] was proved by Gordon Steele, who testified that they were taken by him on 22nd July 1998.

[22] Evidence was given by **Detective Inspector Forde** and **Detective Constable Young** about the arrest and ensuing police interviews of the Defendant, on 24th March 1999. [This was the first of three separate arrests of the Defendant, spanning a period of some six years]. The subject matter of this exercise was the Defendant's suspected involvement in a mortar attack on Corrie Square RUC Station, Newry. Mr. Forde had a supervisory role. He testified that the officer with overarching responsibility was Detective Chief Superintendent McBurney, with whom he liaised. Another male person, Eamon Magill, was arrested simultaneously. The "on the ground" responsibility for taking fingerprints and samples from the two arrested persons – or not doing so, as the case may be – rested with Mr. Forde.

[23] Evidence was also given about the **second** arrest of the Defendant almost six years later, on 13th December 2004. **Detective Chief Inspector Williamson** testified that this was precipitated by a review of the various outstanding terrorist cases initiated by him in his role of Newry and Mourne District Crime Manager, in October 2003. This particular incident was brought to his attention by Detective Superintendent Baxter, senior investigating officer in the Omagh Bomb case. Police gave consideration to the possibility of a link between the two incidents, concluding that no direct link existed. He suggested that there had been no earlier review of

this incident following the Defendant's initial arrest and release. He asserted that he had sought and obtained legal advice, due to some uncertainty about the legality of rearresting the Defendant. He recalled that a planned rearrest of the Defendant was cancelled for some operational reason. He agreed that on 2nd February 2004, the Defendant's residential premises were searched, but no arrest was effected. He did not challenge the suggestion that when the Defendant was rearrested on 13th December 2004, he underwent only one interview, of 25 minutes duration. Detective Sergeant McGregor had responsibility for operational matters pertaining to the Defendant's rearrest. This witness was transferred to another post in late 2004.

[24] During the Defendant's **second** arrest, on 13th December 2004, two buccal swabs were taken from him. On 22nd December 2004, these were delivered to the Forensic Science Agency ("FSA") by **Constable Robinson**. On 17th February 2005, the same officer collected exhibits PMcA 1 – 5 from FSA. On 23rd February 2005, this officer brought these exhibits to Antrim Serious Crime Suite. The exhibits were shown to the Defendant during interviews (following his third arrest).

[25] Evidence about the Defendant's **third** arrest was given by **Detective Constable McKee**, who interviewed the Defendant on 22nd February 2005. During interview, the Defendant provided his name, stated that he was not a member of any illegal organisation and said nothing else. The witness referred to the corresponding custody record, in this context. He confirmed that this contained a description of the Defendant as being five feet, ten inches tall with a date of birth of 14th April 1967. During interviews, a DNA profile match was put to the Defendant. The witness confirmed that the Defendant had no criminal record at that time.

Bomb Analysis and Forensic Evidence

[26] **Captain Saunders** attended the scene at around 6.55pm on 21st July 1998. When he arrived, the white van was not visible from the street. ["IED" denotes "Improvised Explosive Device"]. The IED Incident Report relating to his attendance and inspection was adopted as part of his evidence, without objection. The text of this report includes the following passages:

> "*EOD action recovered a MK15 improvised mortar system consisting of the following:*
>
> *(a) MK 19 timing and power unit …*
>
> *(b) Propulsion unit …*
>
> *(c) Mortar baseplate and launch tube …*
>
> *(d) Launch platform …*
>
> *(e) MK 15/3 type mortar bomb. The mortar bomb consisted of the following components:*

(i) Bomb body … constructed from two gas cylinders welded together.

(ii) Main filling. Approximately 79 kg of probable HME, possible ANS.

(iii) Booster charge. Consisted of a length of steel pipe … A length of approximately 1488 mn improvised cord detonating was secured to the body of the booster with adhesive tape. It was fed through the centre booster tube and was connected to the fuze.

(iv) Fuze. A standard MK 10/4 improvised percussion fuze was fitted. It contained a point 22 RF cartridge and a possible commercial CIL plain detonator. The detonator was taped to the improvised cord detonating. Approximately 2500 m of steel cable was attached between the pin of the fuze and the mortar baseplate."

[27] Elaborating, Captain Saunders explained that this was an unexploded mortar bomb. His task was to render it safe by removal of the fuse and contents. This included removing the home made explosive substances from inside the ejected gas cylinder. The explosive substance was possibly ammonium nitrate based and he placed this in plastic bags. He described this as "*a viable device*", adding that the "*explosive train*" was complete. The fuse was improvised and relatively simple in nature, designed to detonate the explosives. This type of fuse had been used in other bombing incidents. The timer power unit was also in common usage. The dismantling operation occupied some fifteen hours in total. He opined that the bomb had failed to explode due to a defect in the propulsion unit and/or the expenditure of energy required to pierce the roof of the vehicle and/or the angle of impact between the bomb and the ground.

[28] **Gordon McMillen**, a Principal Scientific Officer of the FSA, testified that on 22nd July 1998 the FSA received certain items from Constable Johnston and Mr. Wilkinson. These included exhibit PMcA 3, consisting of one white jumper. This item was to be examined for the purpose of ascertaining whether it exhibited any explosive residues. This particular examination did not involve this witness (see the evidence of Ms Boyce, *infra*). The two reports compiled by this officer concentrate mainly on the explosive device. His analysis of and commentary upon its various components largely mirror that of Captain Saunders. Both of Mr. McMillen's reports were adopted as his evidence in chief and read to the court. The second report contains the following passage:

"*The detonator … was of commercial origin …*

I have no reason to doubt its viability …

> *No detonating cord was received at this laboratory, however photographs show this to be present in the device. See Nos. 7, 8 and 33 in album RVH 1121-06 …*".

[29] Elaborating, Mr. McMillen testified that all of the components required for a viable, fully functioning explosive device were present. In particular, the explosive substance contained the requisite combination of ammonium nitrate (i.e. fertilizer), calcium carbonate and sugar. The three photographs highlighted in Mr. McMillen's second report (see the excerpt quoted above) were not proved by him or any other witness. During the presentation of the prosecution case, in the context of cross-examination, a defence exhibit was received. This is an album consisting of 40 photographs and bearing on its cover the inscription "RVH 1121-06". In cross-examination, this witness confirmed the following:

(a) The items received by FSA did not include a detonating cord.

(b) Absent a detonating cord this type of device is not viable.

(c) The van was not examined for explosive traces.

(d) The inside of the Fiat car was swabbed, with negative results.

[30] **Brian Irwin** a Registered Forensic Practitioner employed by FSA, gave evidence about the scientific examination and testing of exhibit PMcA 3 (the aforementioned white jumper) which, together with a buccal swab attributed to the Defendant, was received from Detective Constable Robinson on 22nd December 2004. Mr. Irwin's report was adopted in his evidence in the conventional manner viz. by uncontentious leading questioning in examination-in-chief and was read to the court. The purpose of his examination was "*… to seek evidence by way of DNA profiling which might help support or refute*" the Defendant's suspected involvement in the Monaghan Street bombing incident. His report concluded:

> "*A full* [SGM plus] *profile was obtained from the jumper sample. Full* [SGM plus] *profiles were obtained from the reference samples submitted and each could be distinguished from the others. The test results from the bloodstain on the jumper matched those obtained from the sample attributed to Jones. A calculation based on NI population survey data shows that the combination of characteristics observed in the staining on the jumper would be expected to arise in fewer than one in a billion males unrelated to him*".

Mr. Irwin completed his testing on 7th January 2005, informed police verbally of his findings and compiled his report on the same date.

[31] **Margaret Boyce**, a FSA Senior Scientific Officer and forensic biologist gave evidence of biological examinations of exhibits PMcA 1-5 inclusive. Her examination-in-chief was conducted in the same way as that of Mr. Irwin. According to her report, these items were "*received on 22 July, from R. Wilkinson*". Her evidence focussed particularly on the forensic examination of exhibit PMcA 3 (the white jumper). The purpose of the examination was framed in the following terms:

> "*Biological examinations were carried out to determine whether or not there was any scientific evidence to indicate the circumstances surrounding the mortar attack in Newry on 21st July 1998*".

Elaborating, Ms Boyce explained that the examination was designed in particular to establish the identity of any possible wearer of the items of clothing concerned. Her report describes the outcome of the examination of the white jumper in the following terms:

> "*One small spot of blood was found on the inside left back of the collar of the jumper. The blood was removed and submitted for DNA analysis. The blood was of male origin and a full profile was obtained. It was added to the Northern Ireland DNA database. No hits have been obtained to date.*"

Thus the blood could not be linked to any person at that time.

[32] Ms Boyce acknowledged that the vintage of the blood spot could not be determined. It would be extinguished by normal machine washing. Thus it must have materialised subsequent to the last washing of the garment. In cross-examination and in response to questions from the court, the following scenarios were either put to or identified by this witness as possible explanations for the blood spot on the collar of the garment:

(a) Primary contact between the wearer and the garment.

(b) Airborne transmission of blood, whether in the form of droplets or (insofar as different) a single drop, from a source external to the garment and making contact with same.

(c) Direct contact between the jumper and a bloodstained source, whether human or otherwise (in effect, two distinct scenarios).

(d) So-called "secondary contact" i.e. initial transmission of the blood from its original source to an intermediate point of contact, followed by further contact with the garment.

Ms Boyce described the last of these four scenarios as the *least likely*, given the very small amount of blood involved and the absence of any sign of smearing. She ranked the other three possible scenarios in terms of equal probability viz. she considered none of them to be more likely than the other.

IV THE DEFENCE STATEMENT

[33] Having rehearsed the prosecution case and having summarised the evidence on which it is based, it is appropriate to consider the defence statement served under Section 5(5) of the Criminal Procedure and Investigations Act 1996. By virtue of Section 6A, a statement of this kind must comply with the fourfold requirements of –

> "*(a) Setting out the nature of the accused's defence, including any particular defences on which he intends to rely,*
>
> *(b) Indicating the matters of fact on which he takes issue with the prosecution,*
>
> *(c) Setting out, in the case of each such matter, why he takes issue with the prosecution,*
>
> *[(ca) Setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence,] and*
>
> *(d) Indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take and any authority on which he intends to rely for that purpose*".

I have intentionally placed subparagraph (ca) in square brackets as it is of no effect in the present case, where the criminal investigation predates the operative date, 15th July 2005.

[34] The Defence Statement in the present case contains the following substantive passages:

> "*1. The Defendant denies all of the offences alleged in the Bill of Indictment.*
>
> *2. The Defendant states that he was not involved in the incident at Corry Square in Newry in July 1998.*
>
> *3. The Defendant states that if the DNA found on the jumper is his, it was transferred innocently thereto.*

4. The Defendant states that he has frequently donated clothing to charities and that this was his practice at or about the material time. These clothes were then sold by the charity shops to members of the public. He also worked for charities on occasion.

5. There are a number of innocent ways his blood could have been transferred to the jumper."

Thus, in summary, the Defendant denies his guilt and asserts that there are explanations for the presence of his DNA on the garment in question which are consistent with his innocence.

V THE STAY APPLICATION

[35] On behalf of the Defendant it is submitted by Miss MacDermott QC (appearing with Mr. Mulholland), that the court should take into account, firstly, information about the arrest and interviews of a particular lady within hours of the events in question. The person arrested was the registered owner of a vehicle which, according to other evidence, had been driven by the fleeing male from the scene. During interview, she claimed that the Defendant and another male person (Mr. Magill) had visited her at home, with a view to taking possession of her vehicle. It is asserted that, some eight months later, on 24th March 1999, the Defendant and Mr. Magill were arrested by police. During the intervening period, on 13th October 1998, a forensic report relating to the discarded jumper had been provided. When interviewed following his first arrest, no buccal swab was obtained from the Defendant for DNA comparison. The Defendant was released. He was rearrested over five years later, on 13th December 2004, when a buccal swab was taken for the first time. He was then released again. He was arrested for a third time on 22nd February 2005, when, following further interview, he was charged. At this stage, the case was made that his DNA (emanating from the buccal swab) matched the blood spot on the jumper. I pause to observe that the facts asserted in the defence submissions summarised immediately above are not disputed by the prosecution.

[36] The following specific assertions and contentions are advanced on behalf of the Defendant:

(a) The failure to arrest him between 21st July 1998 and 24th March 1999 is unexplained.

(b) There is no tenable or credible explanation for the failure to rearrest the Defendant between March 1999 and 13th December 2004.

(c) The failure to take a buccal swab from him when first arrested, on 24th March 1999, is not plausibly or satisfactorily explained.

(d) There was a similar unexplained failure to take a buccal swab from a co-suspect, Eamon Magill, when arrested in 1999. [A PPS assertion to the contrary has now been retracted].

(e) Neither the white van nor the suspected getaway vehicle was the subject of fingerprint tests, inexplicably.

(f) Neither of these vehicles was retained by the police

[37] The stay application also incorporates a complaint about other state agencies (identified in argument as the Royal Ulster Constabulary Special Branch and MI5). The gravamen of this aspect of the application is set forth in paragraphs 10 and 11 of counsel's skeleton argument, which I reproduce in full:

> "*10. As is notorious, a bomb exploded in Omagh, killing a large number of civilians, on 15th August 1998, three and a half weeks after the Newry incident. Responsibility was claimed by the same terrorist group. One Sean Hoey was charged with causing the Omagh explosion and also charged, inter alia, with the Newry incident.*
>
> *11.It is therefore clear that the Police had D's name as a suspect in the Newry incident (given rightly or wrongly by Mrs.Blair) from 23rd July 1998.It was known, at least by 13th October 1998 (and probably before that) that there was an unidentified full DNA profile on PMCA3.In those circumstances, and given the connection with the Omagh bomb, it is, we say, inexplicable that a sample of D's DNA was not taken when he was arrested in March 1999(or indeed why he was not arrested long before March 1999) and that he heard no more of the matter until December 2004.Absent a cogent and compelling explanation from the prosecution, we ask the Court to stay the indictment on the ground that it would not be fair to try the accused in circumstances where there appears to be an aspect of the case which, while it is known to one 'arm' of the Crown is apparently not known to the prosecuting authority. The Crown is indivisible and must be in a position to make full disclosure, at least to the Court. If it is not in such a position, for whatever reason, no further evidence should be offered. If the Crown is not prepared to take that step, the Court, we respectfully say, should intervene to stay the indictment.*"

[38] The initial response on behalf of the prosecution was contained in the written submission of Mrs. McKay (of counsel), was largely factual in nature and consisted of the following chronology:

(a) 21st July 1998 - Witnesses at the scene of the incident saw the male person who had discarded his clothing and hard hat in the struggle with Finbar Lennon run along Monaghan Street and get into a blue car BLZ 1721. Police went to the home of Margaret Blair, 12, Parkhead Crescent, Newry as she was the last registered owner of BLZ 1721. The vehicle was located parked a short distance from her home. Margaret Blair and her son, Barry, were arrested and conveyed to Castlereagh Holding Centre. Barry Blair was later released without charge. During interview Margaret Blair stated the IRA men had taken her vehicle by force and she named them as being Eamon Magill and Gary Jones. She was later prosecuted for allowing her vehicle to be used by terrorists. On 17th June 1999, at Belfast Crown Court, she received a sentence of 4 years imprisonment suspended for 5 years.

(b) In the aftermath of the incident, an anonymous person telephoned the "Irish News" claiming to represent Oglaigh Na Eireann. A recognised codeword was supplied. The caller claimed responsibility for the mortar attack in Newry and said it was part of the ongoing war.

(c) 22nd July 1998 - SOCO Bob Wilkinson submitted exhibits relating to the case to FSNI.

(d) 13th October 1998 - A Forensic Report was received from Margaret Boyce from FSNI. Forensic examination revealed traces of blood on the jumper marked exhibit "PMcA3" which had been seized by Constable McAnespie. An unidentified DNA profile had been obtained.

(e) 24th March 1999 - Police arrested the Defendant and Eamon Magill, based on the information provided by Margaret Blair during her interviews on 21st July 1998. Both were later released without charge. No intimate sample was taken from the Defendant, the assertion being that this was due to oversight.

(f) 12th April 2002 - Following a review into outstanding case of this type, the Defendant was circulated as what is known as "locate/trace". Instructions were given that, if he was arrested for any recordable offence, a sample of his DNA was to be taken. The rationale for this was the existence of the unidentified DNA profile from the blood found on the jumper. There would appear to have been a misunderstanding on the part of the police about their powers to arrest the Defendant, given that he had already been arrested and questioned about his role in relation to the mortar attack and the absence of new evidence.

(g) 22nd October 2003 - A Detective Chief Inspector made enquiries with a police legal expert as to the powers of arrest in the above

circumstances. He is advised that, unlike PACE, the Terrorism Act contains no requirement that new evidence is available before a re-arrest can take place. Although the legal advice cautions against potential difficulties in making such an arrest solely for the purpose of obtaining a DNA sample, police decide to arrest the Defendant.

(h) 4th November 2003 - For operational reasons a planned arrest of the Defendant was cancelled.

(i) 2nd December 2003 – An arrest operation was carried out at 15, Gullion View, Meigh, the Defendant's address at that time. He was not arrested as he had moved from that address.

(j) 2nd February 2004 - For operational reasons a planned arrest at the Defendant's new address at 71, Castlekeel, Newry was cancelled.

(k) 13th December 2004 - New information was received by the police as a result of which both Eamon Magill and the Defendant were arrested for the second time. DNA samples were obtained which were submitted to FSNI on the 22nd December 2004.

(l) 10th January 2005 - A Forensic Report established a positive comparison between the sample taken from the Defendant and exhibit "PMcA3".

(m) 2nd February 2005 - The Defendant was arrested for the third time.

(n) 26th April 2005 - A police file was submitted to the DPP.

[39] Counsel informed the court that the above chronology replicated substantially a predecessor, prepared in response to an earlier application by the Defendant to stay the indictment, prior to his first trial. Such application was dismissed by the court in May 2006. One of its main pillars, it is submitted, was the central complaint on which the present application is based viz. the failure of the police to obtain a buccal swab from the Defendant when arrested in March 1999 and the subsequent delay of over five years in rearresting the Defendant and procuring this intimate sample from him. Both the defence skeleton argument (dated 21st April 2006) and the ruling of Hart J (dated 19th May 2006) were provided to me, without objection. It is clear from the Defendant's skeleton argument that the earlier stay application was based on a single, central complaint that the prosecution was infected by a delay of almost seven years. This analysis is confirmed by the ruling of Hart J and the conclusion reached by him, expressed in the following terms:

> "*[10] I therefore conclude that the appropriate period for the purposes of Article 6(1) of the European Convention runs from the date upon which the accused was charged with these offences on 23rd February 2005. The period of time*

since then has not been such as to amount to a failure to bring the accused to trial within a reasonable period of time".

The learned judge's *alternative* conclusion was that if time had begun to run for Article 6 purposes since March 1999, the Defendant would still receive a fair trial. Specifically, the Defendant's ability to advance the defence enshrined in his defence statement was unimpaired.

[40] The prosecution response to this application was amplified by the sworn testimony of certain police officers: see paragraphs [22] – 25] above. The sworn evidence of these officers gave rise to the following attack on the written prosecution chronology on behalf of the Defendant:

(a) There is no evidence supporting the assertion that the failure to take an intimate sample from the Defendant when first arrested on 24th March 1999 was due to oversight.

(b) There is no evidence supporting the assertions regarding a review of the case, the "circulation" action, the arrest instructions or the alleged misunderstanding about arrest powers, around April 2002.

(c) The evidence establishes that the process of obtaining legal advice about the possible rearrest of the Defendant generated no appreciable delay.

(d) According to the evidence, the case was reviewed in October 2003, rather than April 2002.

(e) There is no evidence supporting the assertion of the cancellation of a planned arrest of the Defendant at his home on 2nd February 2004: on the contrary, the evidence establishes that his home was searched by the police on that date – and there is no assertion that he was actively evading arrest at any time.

(f) The claim that the Defendant's second arrest, on 13th December 2004, was precipitated by new information is now conceded by the prosecution to be erroneous. Furthermore, it is confirmed on behalf of the prosecution that there has never been any intelligence relating to the Defendant.

This critique culminates in the submission that the prosecution response consists of an edifice which is demonstrably inaccurate and unfounded. It is further submitted that the ruling dismissing the Defendant's earlier abuse of process application must be considered in this light. The submissions on behalf of the Defendant also highlight two further matters. The first is the absence of any evidence from Chief

Inspector McFarland (the officer superintending the investigation) to explain Detective Inspector Forde's alleged unawareness of what is characterised "*the core evidential link in the investigation*" viz. the blood spot on the white jumper and the forensic testing thereof. The second highlights the same apparent lack of awareness on the part of those police officers involved in the arrest and interview of the Defendant in March 1999, coupled with their evident failure to make enquiries in relation to the forensic testing of the white jumper and its outcome.

[41] The specific complaints of unfairness now advanced on behalf of the Defendant relate to:

(i) The lost opportunity of an identification procedure potentially favourable to him.

(ii) The deprivation of an opportunity to provide an alibi in respect of the date in question.

(iii) The lost opportunity to forensically examine either of the vehicles in question.

(iv) The lost opportunity to provide a contemporaneous explanation for the presence of the blood spot on the garment.

(v) The inability of the defence to directly challenge the evidence of Mr. O'Neill, who is characterised a pivotal prosecution witness, on account of his recent death (on 17th February 2009) and the consequential reception of his written statement as hearsay evidence, under Article 18 of the Criminal Justice (Evidence) (NI) Order 2004.

[42] The court has also received items of correspondence containing apparently erroneous, questionable and contradictory statements on behalf of the PPS. In particular, it was asserted by the PPS, wrongly, that an intimate sample was taken from the Defendant's co-suspect (Mr. Magill) when first arrested in 1999. Secondly, a PPS assertion that relevant CCTV recordings had been "*destroyed*" is demonstrably inaccurate. Thirdly, there has been no disclosure of any documentation supporting the lengthy prosecution chronology. Fourthly, the request for disclosure of records containing contemporaneous descriptions of the suspected bomber (whom the prosecution say is the Defendant) have elicited a response that none can be "*traced*". The Defendant also relies on the vagueness of the evidence about the identity of the senior investigating officer and the acknowledgement in the police officers' evidence to the court that there was and is no designated disclosure officer. Based on all of these considerations, it is submitted that the court can have no confidence in the purported discharge by the police and prosecution of their disclosure obligations.

[43] In summary, the first main pillar of the Defendant's application focuses on a series of acts and omissions pertaining to the police investigation spanning a period

of approximately six years following the explosion. An essential aspect of this complaint relates to a series of asserted failures by the police to fulfil their retention, preservation and disclosure obligations in accordance with the governing legal regime: this is constituted by a combination of the Criminal Procedure and Investigations Act 1996, the Code of Practice made thereunder and the related Attorney General's Guidelines: Disclosure of Information in Criminal Proceedings. Specifically, contraventions of paragraphs 4, 5 and 6 of the Code and paragraphs 3, 24 and 33 of the Attorney General's Guidelines are asserted. The second main pillar of the application, which is capable of being viewed as either freestanding or inter-related to the first, entails an attack on other state agencies whose conduct, it is suggested, is either unknown to or not appreciated by the police and PPS. This conduct, it is argued, makes it unfair to try the Defendant. I accept that this discrete complaint can also be viewed as an aspect of the Defendant's complaint of inadequate disclosure and should, therefore, be considered accordingly.

[44] As regards the second dimension of the stay application, the court's attention is directed to the disclosure ruling in ***The Queen –v- Hoey*** [2006] NICC 38 whereby the Police Ombudsman, who conducted a comprehensive investigation into the Omagh Bomb (of 15th August 1998), was required the apply the statutory test of materiality to all materials thereby generated, to include, per paragraph [1] of the judgment, those concerning "*any other terrorist incident considered at any stage as being possibly linked to the Omagh incident*". The defence highlight passages in the Police Ombudsman's report which record that a named police informant provided information to a CID officer about alleged dissident terrorist activities on five occasions, between June and August 1998; that this gave rise to "*contact sheets*" duly delivered to Special Branch; and that the contact sheets in respect of the two most important meetings – on 23rd July 1998 and 12th August 1998 – are no longer available. The Omagh Bomb occurred on 15th August 1998, less than four weeks following the Newry explosion and the latter is documented in the Ombudsman's report as one of eight explosions attributed to the organisation known as "RIRA" during the period January to August 1998. It is further submitted on behalf of the Defendant that there are clear indications of agencies other than the police – in particular Special Branch and MI5 – having some connection with events surrounding and/or the investigation of the subject explosion. The absence of any sensitive schedule in the context of the current prosecution is highlighted. It is further pointed out that there is no evidence of any proper review of all potentially disclosable materials following the aforementioned disclosure ruling in the ***Hoey*** trial and no evidence of a co-ordinated exercise amongst the various agencies concerned.

[45] My assessment of the Defendant's detailed submissions, summarised above, is that they resolve to two core contentions:

(a) The Defendant cannot receive a fair trial.

(b) It is unfair and unconscionable to try the Defendant in any event.

It is accepted on behalf of the prosecution that the court must either accede to the Defendant's application or reject it : no alternative course is available, in the circumstances. Thus one must contrast those cases where a demonstrated breach of the reasonable time guarantee enshrined in Article 6 ECHR can be reflected in, for example, a reduced sentence. Emphasis is placed on the potency of the forensic evidence relating to the blood spot on the white jumper. It is further submitted by Mrs. McKay that the various failings of which complaint is made do not give rise to any tangible unfairness in the enjoyment of the Defendant's fair trial rights. Finally, reliance is placed on the earlier adjudication by Hart J, dismissing the Defendant's first abuse of process application, allied with the submission that the only truly new post-dating event has been the death of the civilian witness, Mr. O'Neill, in 2009.

VI GOVERNING PRINCIPLES

[46] The principles to be applied by the court in its determination of this application are well established. The leading decision in this field is that of the House of Lords in ***The Queen –v- Horseferry Road Magistrates Court, ex parte Bennett*** [1994] 1 AC 42, where the Defendant's complaint of abuse of process was based on an allegation that he had been conveyed to England from South Africa by kidnapping and as a result of illicit collusion between the British and South African Police authorities, pursuant to a conscious decision not to initiate extradition procedures. Lord Griffiths distinguished between two types of case. In the first, by far the more typical, there were instances of prosecutions having been stayed where "*… the conduct of the prosecution has been such as to prevent a fair trial of the accused*". Referring to the second type of case, he continued:

> "*There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process …*".

(At p. 61).

Acknowledging that the appeal entailed an invitation to the House to extend the boundaries of the doctrine, Lord Griffiths continued (at pp. 61-62):

> "*In the present case there is no suggestion that the Appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law …*

> ***I have no doubt that the judiciary should accept this responsibility in the field of criminal law***".

[Emphasis added].

His Lordship described the touchstone for the exercise of this supervisory judicial power as "*a serious abuse of power*" on the part of "*police, prosecuting or other executive authorities*" (at p. 62). This jurisdiction, he enunciated, entails the exercise of "*a power to be most sparingly exercised (at p. 63).*

[47] The extreme nature of the misconduct in play in ***Bennett*** is highlighted in Lord Bridge's formulation of the question to be decided:

> "*Where a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing?*"

[At p. 64].

The reasoning underpinning Lord Bridge's conclusion appears in the following passage (at p. 67):

> "*There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognizance of that circumstance …*
>
> [At p. 68]. ***Since the prosecution could never have been brought if the Defendant had not been illegally abducted, the whole proceeding is tainted***",

[My emphasis].

The formulation in the dissenting speech of Lord Oliver (at p. 69) exposes clearly the nature of the extended jurisdiction declared by the majority:

> "*I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him*".

Lord Lowry, forming part of the majority, defined the term "*abuse of process*" as a misuse or improper manipulation of the process of the court of trial (at p. 73). His Lordship expressed his conclusion in the following passage (at p. 74):

> "*… I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore* ***that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons****. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct*".

[Emphasis added].

[48] While the outworkings of the principles to be distilled from the majority speeches in ***Bennett*** can be ascertained from the substantial number of reported cases in which they have been considered and applied subsequently, their essence must be faithfully applied by this court, having regard to the doctrine of *stare decisis*. They are summarised, for example, in the recent decision of the Court of Appeal in ***The Queen –v- McNally and McManus*** [2009] NICA 3, paragraphs [14] – [18]. I refer also to ***The Queen –v- Murray and Others*** [2006] NICA 33, paragraphs [20] – [29] especially; ***Re Molloy's Application*** [1998] NI 78, per Carswell LCJ, p. 84f – 85f; and ***Re DPP's Application*** [1999] NI 106, per Carswell LCJ, paragraphs [31] – [33] especially. The decisions in this series of cases are binding on me and it is not suggested that they are in any way incompatible with ***Bennett***.

[49] I would highlight in particular what Carswell LCJ stated in ***Re Molloy*** at p. 85e/f:

> "*In our opinion these authorities lead to the conclusion that the resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory*

> *jurisdiction may nevertheless be regarded as an abuse of the process of the court* ***if, but only if, it operates to affect adversely the fairness of the trial****. It is necessary in every case to look at the circumstances of the case and it lies within the discretion of the court to decide whether the procedure operates against the interests of the Defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in* ***Ex Parte Bennett*** *(at p. 63) that it is to be 'most sparingly exercised' and that of Viscount Dilhorne … that it should be exercised only 'in the most exceptional circumstances'".*

[Emphasis added].

In ***Re DPP's Application,*** Carswell LCJ formulated three basic propositions, at paragraph [33]:

> *"1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …*
>
> *2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.*
>
> *3. The element of possible prejudice may depend on the nature of the issues and the evidence against the Defendant. If it is a strong case and* ***a fortiori*** *if he has admitted the offences, there may be little or no prejudice …".*

[50] More recently, in ***The Queen –v- McNally and McManus,*** the Court of Appeal stated:

> "[17] *… A judge should* ***never*** *grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue. Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the Defendant is avoided …*
>
> [18] *It appears to us that this examination must be conducted at two levels. The first involves an inquiry into*

> *the individual defects in the prosecution case or the police investigation and the measures that might be taken to deal with each. The second entails the weighing of the impact of the various factors on a collective basis. It does not necessarily follow that, because some steps to mitigate each item of potential unfairness can be taken, the stay must be refused. A judgment can still be made that the overall level of unfairness that is likely to remain is of such significance that the proceedings should not be allowed to continue. It is to be remembered, of course, that the judge must be persuaded of this proposition by the defence, albeit only on a balance of probabilities*".

[Emphasis added].

I also take into account a passage from the judgment in ***The Queen (Ebrahim) –v- Feltham Magistrates Court*** [2001] EWHC (Admin) 130, paragraph [25]:

> "*(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the Defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.*
>
> *(ii)* ***The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded***".

[Emphasis added].

This passage was cited with approval by the Court of Appeal in ***McNally and McManus*** [*supra*], at paragraph [15], where it was described by the Lord Chief Justice as containing "*two important principles*".

[51] There has been some recent evolution in the jurisprudence in this field, mainly in relation to the question of onus of proof. I would highlight, firstly, the commentary provided by the late Sir John Smith in [2001] Criminal Law Review, pp. 655-656:

> "*[18] There is no room for the application of rules as to the onus of proof when, in the light of admitted circumstances, the court is considering the possibly adverse effect on the fairness of proceedings of the admission of certain evidence. This is not a question of fact but a matter for the judgment of the court and does not admit of requirement of proof any*

> *more than does the question of law. But where the circumstances are not admitted, it may surely be different. There may be two reasonable views as to whether relevant circumstances existed or not. If the Defendant alleges that there are circumstances, not so far appearing in evidence, which would render the proceedings unfair if certain evidence were admitted, presumably he must introduce some evidence of them. This may raise an issue of fact and, if it does, presumably the general rule in criminal cases applies: the onus would be on the prosecution to prove beyond reasonable doubt that the alleged circumstance did not exist*".

Very recently, in ***The Queen –v- Kearns and Others*** [2010] NICC 32, Hart J expressly concurred with this approach:

> "*[19] I agree that it is for the prosecution to prove beyond reasonable doubt that the alleged circumstance did not exist. As in any criminal case where the prosecution rely on any disputed fact they must prove that fact beyond reasonable doubt and Sir John Smith's comment is in accordance with principle*".

Thus, where there are disputed factual issues of a material kind, the traditional rules as to onus and standard of proof apply. It may be observed that this coincides with the approach adopted in certain kindred criminal trial contexts, such as an application by the prosecution to try the accused by judge alone on the ground of alleged jury tampering and applications by the prosecution for special measures or hearsay orders.

[52] There has also been a shift in focus, in abuse of process applications, from the Defendant bearing a persuasive burden to the court forming an overall evaluative judgment, based on all the information available. This trend is noted in Abuse of Process and Judicial Stays of Criminal Proceedings (Choo, 2nd Edition), pp. 166 – 167:

> "*Traditionally the defence was generally considered to bear the burden of persuading the court, on the balance of probabilities, that the proceedings should be stayed as an abuse of process. In* ***The Queen –v- S****, however, the Court of Appeal, speaking in the context of delay, considered the concept of burden and standard of proof to be an unsuitable one to be applied …*
>
> *It is unclear whether these observations are to be regarded as confined to applications for stays on account of delay, or whether they are to be regarded as relevant to applications for stays generally*".

The decision mentioned in this passage is ***The Queen –v- S(SP)*** [2006] 2 CR. App. R 23, where Rose LJ stated:

> *"**[20]** In our judgment, the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. It is, therefore, potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof, which is more apt to an evidence-based fact-finding process."*

In thus concluding, the court unequivocally concurred with the formulation of Clarke LJ in ***The Queen –v- EW*** [2004] EWCA. Crim 2901:

> *"22. It appears to us that ultimately the question for the judge on any application for a stay in a case of this kind is essentially whether in all the circumstances of the case a fair trial is possible notwithstanding the delay."*

The decision ***in The Queen –v-*** S was considered by the Northern Ireland Court of Appeal in ***The Queen –v- Fulton*** [2009] NICA 39, at paragraph [52], per Girvan LJ:

> "*[52] The normal rule is that he who asserts the abuse of process must prove it and do so on the balance of probabilities …*
>
> *This proposition must be read in the light of **S(SP) ...***
>
> ***the judicial balancing of competing interests is at the heart of all abuse claims***".

[Emphasis added].

[53] The impact of Article 6 ECHR in this sphere has been considered by both the House of Lords and the Privy Council. While the decision in ***Attorney General's Reference No. 2 of 2001*** [2004] 2 AC 72 was primarily concerned with the reasonable time guarantee, Lord Bingham's opinion formulates certain principles of wider import:

> *"24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and*

> *appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant.* ***The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances.*** *The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.".*

[My emphasis].

In the next succeeding paragraph, Lord Bingham addressed expressly the extended abuse of process doctrine declared by the House in ***Bennett***:

> *"[25] The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an*

> *example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (Martin v Tauranga District Court [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.*

Accordingly, through the prism of Article 6, the principles to be applied in both types of case (viz. "mere" delay and executive manipulation) are the same.

[54] In the same case, the House considered the majority decision of the Privy Council in ***Dyer –v- Watson*** [2004] 1 AC 379, Lord Bingham observing:

> *"It is a powerful argument that, if a public authority causes or permits such delay to occur that a criminal charge cannot be heard against a defendant within a reasonable time, so breaching his Convention right guaranteed by article 6(1), any further prosecution or trial of the charge must be unlawful within the meaning of section 6(1) of the 1998 Act. Not surprisingly, that argument has been accepted by highly respected courts around the world. But there are four reasons which, cumulatively, compel its rejection. First, the right of a criminal defendant is to a hearing. The article requires that hearing to have certain characteristics. If the hearing is shown not to have been fair, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If the hearing is shown to have been by a tribunal lacking independence or impartiality or legal authority, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If judgment was not given publicly, judgment can be given publicly. But time, once spent, cannot be recovered. If a breach of the reasonable time requirement is shown to have occurred it cannot be cured. It would however be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other article 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all."*

As Lord Bingham himself observed in ***Dyer***, the threshold of proving a breach of the reasonable time requirement enshrined in Article 6 is an elevated one: see paragraph [52]. The enquiry to be conducted by the court will focus predominantly on the complexity of the case, the conduct of the Defendant and the manner in which the

case has been handled by the relevant administrative and/or judicial authorities. While ***Dyer*** was concerned with the reasonable time requirement, I have highlighted the above passage in the opinion of Lord Bingham as it reaffirms the principle that the fairness of the Defendant's trial is the crucial touchstone by reference to which all abuse of process applications must be considered and determined.

[55] Since the ability of the Defendant to receive a fair trial lies at the heart of most abuse of process applications, it is appropriate to reflect on the concept of fairness in the context of the modern criminal trial, as expounded by Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584, in a celebrated passage which bears repetition:

> "*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.***"

[Emphasis added].

Moreover, fairness will always entail a contextualised evaluation, tailored to the specific features and circumstances of the individual trial. Equally, an evaluative judgment on the part of the trial judge is required. This judgment must be formed at the stage when a complaint of abuse of process is canvassed. Furthermore, given these considerations, there is obvious scope for differing opinions. This truism is noted in the commentary in the Criminal Law Review, following the digest of the decision in ***Regina –v- JAK*** [1992] CLR 30, 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 different opinions*".

VII <u>THE DISCLOSURE REGIME IN CRIMINAL TRIALS</u>

[56] The prosecutor's disclosure obligations are contained, firstly, in the Criminal Procedure and Investigation Act 1996 ("*the 1996 Act*"). Section 2(4) defines "*material*" as "*material of all kinds and in particular … (information) and (b) objects of all descriptions*". The prosecutor has an initial duty to disclose, per Section 3 and a continuing duty of disclosure, per Section 7A. Notably, this latter duty endures to the stage of acquittal or conviction. Both the initial duty and the continuing duty relate to material –

> "*… which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused*".

The prosecutor "**must**" disclose any material embraced by this description. By virtue of Section 23, the Code of Practice is designed to secure, *inter alia*, that all reasonable steps are taken for the purposes of every criminal investigation and all reasonable lines of enquiry are pursued; that information thereby obtained is recorded; that such records are retained; and that other materials are similarly retained.

[57] The general scheme of the statutory Code of Practice is to impose specific and separate responsibilities on the investigator, the officer in charge of an investigation and the disclosure officer. The latter is defined as:

> "*The person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor*".

Paragraph 3.4 of the Code provides:

> *"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide how many files on the computer it is reasonable to inquire into, and in what manner. "*

The basic duty to record information is framed in these terms:

> *"4.1 If material which may be relevant to the investigation consists of information which is not recorded in any form, the officer in charge of an investigation must ensure that it is recorded in a durable, retrievable or readable form (whether in writing, on video or audio tape, or on computer disk).*
>
> *4.2 Where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, its contents should be transferred as a true record to a durable and more easily-stored form before that happens.*"

The duty to retain material is formulated thus:

> *"5.1 The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, if the original is perishable; the original was supplied to the investigator rather than generated by him and is to be returned to its owner; or the retention of a copy rather than the original is reasonable in all the circumstances …*
>
> *5,4A The duty to retain material where it may be relevant to the investigation also includes in particular the duty to retain material which may satisfy the test for prosecution disclosure in the Act, such as:*
> *- information provided by an accused person which indicates an explanation for the offence with which he has been charged;*
> *- any material casting doubt on the reliability of a confession;*
> *- any material casting doubt on the reliability of a prosecution witness. …*
>
> *5.6 All material which may be relevant to the investigation must be retained until a decision is taken whether to institute proceedings against a person for an offence.*
>
> *5.7 If a criminal investigation results in proceedings being instituted, all material which may be relevant must be retained at least until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case."*

[58] Section 6 of the Code of Practice regulates the interaction and relationship between the investigating police and the prosecutor. It is appropriate to highlight the first four provisions:

> *"6.1 The officer in charge of the investigation, the disclosure officer or an investigator may seek advice from the prosecutor about whether any particular item of material may be relevant to the investigation.*
>
> *6.2 Material which may be relevant to an investigation, which has been retained in accordance with this code and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule.*

6.3 Material which the disclosure officer does not believe is sensitive must be listed on a schedule of non-sensitive material. The schedule must include a statement that the disclosure officer does not believe the material is sensitive.

6.4 Any material which is believed to be sensitive must be either listed on a schedule of sensitive material or, in exceptional circumstances, revealed to the prosecutor separately. If there is no sensitive material, the disclosure officer must record this fact on a schedule of sensitive material."

The Code also regulates the circumstances in which a disclosure schedule must be prepared and the format of the schedule. All such schedules are to be provided to the prosecutor, per paragraph 7.1 and there must be appropriate certification by the disclosure officer, in accordance with paragraph 9.1.

[59] The primary legislation and the Code made thereunder are supplemented by the Attorney General's Guidelines, which are non-statutory in character. While these do not expressly extend to Northern Ireland, it is considered appropriate to have regard to them, as the 1996 Act applies in this jurisdiction: ***The Queen –v- McCrory and Others*** [2006] NIJB 219, paragraph [4]. The Guidelines enshrine a series of general precepts and principles, including these :

"12. Examples of disclosable material are material which casts doubt upon the accuracy of prosecution evidence, may point to another person, whether charged or not (including a co- accused) having involvement in the offence, may cast doubt upon the reliability of a confession, might go to the credibility of a prosecution witness, might support a defence raised by the defence or apparent from the prosecution papers, or which may affect the admissibility of prosecution evidence.

13. Material not disclosable when viewed in isolation but several items together can have that effect…

15. The trial process is not well served if the defence make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. The more detail a defence statement contains the more likely it is that the prosecutor will make an informed decision about further disclosure or further enquiries. It also helps in narrowing down the issues in dispute.

> *16. A defence statement will be deemed to be given with the authority of the solicitor's client."*

Paragraphs 23-29 govern the duties of investigators and disclosure officers, paragraph 28 providing:

> *"28. Investigators must retain material that may be relevant to the investigation. If potentially relevant, is in fact incapable of impact, it need not be retained, although the investigator should err on the side of caution and seek the advice of the prosecutor as appropriate."*

[60] The court's jurisdiction to stay a prosecution on the ground of abuse of process is inherent in nature and, in my view, is in no way inhibited by the primary legislation, Code or Guidelines considered above. The impact of the disclosure regime in the realm of such applications has been the subject of judicial consideration. In ***R(Ebrahim) –v- Feltham Magistrates Court*** [2001] 1 WLR 1293 there was an issue of destruction of videotape evidence. The Divisional Court adopted a two-stage inquiry to be conducted by the court of trial. The first stage of the court's inquiry is to determine whether the prosecutors had been under a duty to obtain and/or to retain the material the disappearance or destruction whereof complaint is made. If there was no such duty then there can be no question of abuse of process. However, if there has been a breach of this duty the court must consider the exceptional course of ordering a stay of proceedings. The second-stage involves consideration of the two categories of cases in which the power to stay proceedings for abuse of process may be invoked : see ***Re DPP's Application*** [*supra*].

[61] In ***R v Sadler*** (unreported, 20 June 2002) the Appellant was convicted of wounding with intent to do grievous bodily harm arising out of events occurring at a nightclub. The abuse of process application arose because of the destruction by the police of certain exhibits, being a broken bottle neck found at the club, the Defendant's shoes and socks and the victim's clothing. The trial judge rejected an allegation that the police had been acting in bad faith. Keene LJ stated:

> *"It is true that there are dicta in the authorities to the effect that even in the absence of bad faith, serious failings on the part of the police or prosecution may make it unfair to try an accused person. Where there may be instances of such, it will in our judgment be rare for such cases to arise where there has not been serious misbehaviour… That means the question is whether what happened prejudiced the defendant in such a way that he could not receive a fair trial."*

The Court of Appeal concluded that there had been no material prejudice to the Defendant.

[62] There are two relevant decisions of the Canadian Supreme Court in this sphere. These were considered in ***Re Glenn's Application*** [2002] NIQB 61, where, referring to the first, ***R –v- Carosella*** [1997] 1 SCR 80, Weatherup J observed:

> *"However it is apparent from the majority judgment in* ***R v Carosella*** *that the central feature of the case was the deliberate destruction of evidence. The Supreme Court stated (para 56)– The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make. Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the court. It is this feature of the appeal in particular that distinguishes this case from lost evidence cases generally".*

The learned judge continued:

> *"[20] The approach of the Canadian courts' to lost evidence cases generally appears from* ***R v La*** *(1997) 2 SCR at 860. The defendant was charged with sexual assault of a thirteen-year-old girl. The complainant's conversations were taped in preparation for a secure treatment application and not for any criminal proceedings. The police misplaced the tape. The Supreme Court of Canada refused a stay of proceedings. The approach of the Supreme Court was that where the prosecution lose evidence that ought to have been disclosed there arose a duty to explain the loss. If the trial judge was satisfied that the evidence has not been destroyed or lost owing to unacceptable negligence the duty to disclose would not have been breached. However if the trial judge was not so satisfied the right to present full answer and defence would be impaired and Section 7 of the Charter would have been breached. Further the loss of evidence may also amount to an abuse of process where there was deliberate destruction of material or other serious breach of the duty to preserve evidence and "in some cases an unacceptable degree of negligence conduct may suffice". In addition there may be "extraordinary circumstances" where the loss of a document may be so prejudicial that it would impair the right of an accused to receive a fair trial."*

[63] In ***R –v- Haddock and Others*** [2005] NICC 15, the essence of one of the Defendant's abuse of process application and the ground on which it succeeded are encapsulated in the following passage of the judgment of Hart J:

> *"[18] Not only am I satisfied that this was a serious fault on the part of the police, I am also satisfied that the absence of the tape seriously prejudices his ability to defend himself. Whilst he can still point to the evidence that he conducted a transaction that afternoon, he cannot now obtain evidence that would have established exactly when he was there. I am therefore satisfied that the defendant Millar has discharged the burden placed upon him of showing that "he will suffer serious prejudice to the extent that no fair trial can be held", in the words of Lord Lane CJ in A G's Reference (No 1 of 1990). I consider that it would be an abuse of process to allow the prosecution against him to continue in those circumstances and I order that the charges be stayed against Millar."*

The decision of the European Court of Human Rights in ***Sofri –v- Italy*** [Application No. 37235/97, 27th May 2003] suggests that Article 6 ECHR adds little of substance to a Defendant's common law right to a fair trial in this field, while highlighting also the intensely fact-sensitive nature of this kind of complaint. While the Applicants in that case complained about the unavailability and destruction of certain items of physical evidence, in the context of a murder trial, his application was ruled inadmissible, as he was unable to establish the relevance of an item of missing clothing, had access to forensic reports and photographs of certain articles compiled contemporaneously, was able to conduct computer analysis of the photographs and was uninhibited in his ability to challenge the main prosecution evidence. The court, through the equality of arms prism, reasoned that both prosecution and defence were similarly afflicted by the unavailable evidence.

VIII CONCLUSIONS

[64] The first limb of this application is based on a complaint of unfair trial. I consider that where the court is invited to exercise its jurisdiction to stay a prosecution on this ground, it is essential to identify unfairness of a specific, concrete variety. Vague or speculative assertions of unfairness to the Defendant will not suffice. This is the clear theme of a recent pronouncement of some substance by the Northern Ireland Court of Appeal in ***R –v- Fulton*** [2009] NICA 39, where Girvan LJ stated:

> *"[56] Having regard to the fact that a stay for abuse of process must be fully exceptional and relate to some fundamental disregard of the rights of the defendant or some disregard of elementary principles of fairness properly established by the defendant, and having regard to the law's strong preference to allow a trial to proceed if a remedy short of a stay is just and proportionate, it is not surprising that the trial judge was extremely reluctant to*

grant a stay which would have had the effect of bringing the entirety of the proceedings to a conclusion, even in relation to the counts on which there was clear evidence of guilt apart from any surveillance evidence. The gravamen of the appellant's argument is that because the court concluded that the evidence of the police witnesses should be excluded from consideration on behalf of the Crown the court could repose no confidence in the integrity of the disclosure system in the trial and thus the defendant ran the risk of unfairness in the trial process. As ***R v Martin*** *makes clear it is necessary for this court to stand back and review the safety of the appellant's convictions and consider whether in the light of the conduct of the whole trial the appellant has shown that the trial process was an abuse of process in fact. A theoretical possibility that the prosecution may have withheld some disclosable material which might possibly have assisted the appellant to defend the charges would be insufficient to show that the trial process was an abuse of process if on the evidence adduced proof of guilt was established beyond reasonable doubt."*

[65] Duly summarised, the Defendant complains of a series of lost evidential and other opportunities, to his detriment. I consider that there have indeed been investigative and disclosure deficiencies and infringements of the kind asserted by the Defendant. I accept in particular the Defendant's critique relating to the absence of fingerprint tests of the two relevant vehicles and the failure to retain these vehicles. The explanation for these failures is unsatisfactory. Furthermore, there is no compelling explanation for the related failures asserted by the Defendant – in particular, the failure to take an intimate sample from him when first arrested, the apparent absence of any initial questioning of him based on the extant forensic report, the intervening inertia of the police and the delay of over five years in rearresting him .

[66] While I have acknowledged the unsatisfactory nature of the explanations advanced for the failings noted above, I remind myself that this is not the touchstone by which the first limb of the Defendant's application is to be determined. Rather, I must consider whether the Defendant is unable to have a fair trial in consequence. In my view, the fundamental frailty in the Defendant's complaints, whether viewed individually or collectively, is their lack of substance. They are made in a vacuum. At their zenith, they resolve to the contention that, if available to him, such opportunities *might* have been seized by the Defendant and might have undermined the prosecution case and/or promoted the Defendant's innocence. This, in my estimation, is insufficient. It fails to overcome the necessary threshold. It also overlooks that the Defendant was first arrested and interviewed within six months of the explosion. Furthermore, the contents of the Defence Statement are not suggestive of any tangible handicap or disadvantage afflicting the Defendant and there is no reason for believing that the defence enshrined therein cannot be

efficaciously advanced. I conclude that the fairness of the Defendant's trial is unimpaired by the acts and omissions of which he complains.

[67] Next, addressing the second limb of the Defendant's application, I must consider whether there is material before the court impelling to the conclusion that the present case belongs to the narrow category of rare and extreme cases, such as ***Bennett,*** where the rule of law would be undermined and public conscience would be affronted by the maintenance of the prosecution of the Defendant. In my view, this self-evidently elevated threshold is not overcome. The court has already ruled that the prosecution case is of sufficient strength to withstand an application for a direction of no case to answer. The court has no reservations about the purity of the evidence adduced and it is not claimed by the Defendant that this is polluted or contaminated in any way. There is no suggestion of fabrication or invention or any like impropriety. Furthermore, there is no concrete basis for concluding that, whether through the conduct of other state agencies or otherwise, properly disclosable materials are not available in this trial. While I have found that there were investigative shortcomings on the part of the police, these, in my view, are measurably short of the kind of extreme misconduct contemplated in ***Bennett***.

[68] In the words of Lord Lowry in ***Bennett*** (paragraph 47, *supra*) the jurisdiction to stay a prosecution must be exercised carefully and sparingly and only for very compelling reasons. The court must weigh all of the interests in play, as emphasized by Lord Steyn (***Attorney General's Reference No. 2 of 2002,*** paragraph 53, *supra*). The potency of the public interest in the final determination of criminal charges has been repeatedly recognised, at the highest judicial levels. This is the main rationale of the exceptionality principle . For the reasons elaborated, I conclude that the exercise of this exceptional jurisdiction is not warranted.