

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

Delivered: 08/09/11

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PAUL ANTHONY McCAUGHERTY
DERMOT DECLAN GREGORY
(aka Michael Dermot)

Defendants/Appellants

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] Both appellants appeal against their convictions for terrorist related offences. McCaugherty was convicted of seven counts including conspiracy to possess explosives and firearms with intent (counts 1 and 2), belonging to a proscribed organisation (count 3), using money for the purposes of terrorism (counts 4, 5 and 6) and making property available for terrorism (count 7) and was sentenced to a total of 20 years imprisonment. Gregory was convicted of one count of making property available for terrorism (count 8) and was sentenced to 4 years imprisonment. The offences arose from a sting operation mounted by the Security Services against dissident Republicans.

Background

[2] The operation spanned a period in excess of two years from early 2004 until June 2006. Security Services engaged role playing agents employed as covert human intelligence sources (CHIS) to gain the trust of Desmond Paul Kearns and subsequently the appellant, Paul McCaugherty, and to obtain evidence of their terrorist related activities. Kearns was charged jointly with McCaugherty on counts 1 and 2 but the proceedings against him were stayed at the close of the prosecution case on the basis that they were an abuse of process. The judge refused to stay the proceedings against McCaugherty. The appellants did not give evidence.

[3] The investigation was dependent upon two main agents, Amir and Ali, both of whom acted as CHIS for the Security Services. Other Security Service employees were referred to by 4 digit personal identification numbers. Amir played the role of a cheap cigarette trader and he was central to the investigation against Kearns. Ali posed as an arms dealer and he was involved in the part of the operation which engaged McCaugherty and Gregory. The operation was referred to as Operation Nare at the outset during the investigation of Kearns. A second code name, Operation Laburna, was used when McCaugherty and Gregory became involved although there was some evidence of an overlap in time between the uses of both code names. The operation was properly authorised under RIPA.

[4] Kearns was not initially suspected of being involved in terrorist activity. Attention was directed at him because he was believed to be associated with those who were involved in terrorist activities. One of the controlling officers for Operation Nare, agent 3522, stated that the Security Services believed as a result of intelligence reports that McCaugherty was central to procurement activity for the Real IRA. There was an established link between republican related cigarette smuggling and weapons procurement. Kearns was making visits to Europe on what looked like cigarette smuggling activity. 3522 decided that an attempt should be made to cultivate Kearns and to engage him in a relationship so as to find out what he was up to and what could be learned about the activities of McCaugherty or his associates.

[5] On 6 August 2004 Amir approached Kearns outside a retail outlet in Luxembourg where Kearns had been buying cigarettes to smuggle into Northern Ireland. Two days later a meeting was manufactured in Brussels. This led to a series of meetings in Belgium and the Netherlands from 20 April 2005 to 7 June 2006. Amir presented himself as someone who could sell cheaper cigarettes and other items to Kearns. Amir did supply cigarettes to Kearns at a very low price. The subject of weapons was raised during their meetings. The learned trial judge found that Kearns discussed arms with Amir in a hotel in Brussels on 24 May 2005 and 1 July 2005. On 27 September 2005 Kearns said that he had been trying to get "them" to try and organise something and he made it clear that he was prepared to approach his friend. On 4 December 2005 Kearns met Ali, who posed as an arms dealer, in Amsterdam and confirmed that his friends were serious about a deal. Kearns then took Ali to meet McCaugherty in a bar.

[6] The learned trial judge found that there was no evidence to show that the provision of cheap cigarettes influenced Kearns to approach McCaugherty but the readiness of Amir to supply them increased Amir's trustworthiness in Kearns' eyes. There was no evidence demonstrating that Kearns was incited to commit the offences. The judge noted that Amir accepted that Kearns made

it clear he did not want to become involved in whatever others might do and that was clearly a reference to possible arms trading.

[7] The judge was satisfied that McCaugherty was one of the principal targets of the two operations and eventually became the principal target. The case against him was based upon the recordings of the conversations between McCaugherty, who referred to himself as Tim, and Ali. The prosecution case was that between 4 December 2005 and 13 June 2006 Ali and McCaugherty met each other on six occasions at various locations in Amsterdam, Istanbul and Bruges and also engaged in short telephone calls. The meetings were tape recorded and some were recorded on video. The judge was satisfied that the person recorded on the tapes and video was McCaugherty.

[8] At the first meeting on 4 December 2005 McCaugherty was recorded as saying that “we” need more high tech stuff. At a meeting on 28 January he referred to having obtained armaments from Slovakia a few years ago and moving some stuff from America. He and Ali discussed methods of delivery and went through a shopping list of arms and explosives to which McCaugherty agreed saying that it was more than enough. Ali’s recollection was that they discussed and agreed the supply of 100 kg of plastic explosive, 20 AK47 assault rifles, 20 RPGs, 10 sniper rifles and 20 pistols for a total of €104,000. The judge was satisfied that Ali’s evidence on this issue was correct. They discussed the supply of two further pistols with silencers, delivery from the continent and payment. At the fourth meeting on 27 February 2006 in Bruges, Ali stated that McCaugherty gave him a bag which was later found to contain €18,000 (count 4). At the fifth meeting on 3 May 2006 discussions included the arrangements Ali would make to transport the arms and explosives to a destination near Cherbourg. McCaugherty indicated he wanted to add further weapons to the order, specifically Armburst launchers. McCaugherty paid a further €10,050 (count 5). At the sixth meeting on 13 June 2006 Ali received another payment from McCaugherty of €17,920 (count 6). The amounts paid totalled €45,970. McCaugherty recounted the contrast between the actions of his associates and those of another group that shared their objectives.

[9] The judge noted a discussion of 3 May 2006 during which McCaugherty referred to a property in Bulgaria and then remarked that nothing had changed and that no undue attention was being paid to “our members”. He talked about his immediate superior knowing of his activities. From these comments the judge inferred that McCaugherty was a senior member of what he referred to as “my organisation”.

[10] The prosecution case was that a property in Portugal had been purchased by Teresa Murphy (formerly Connell) and her then boyfriend Owen McNamee in their names, although all the money was provided by the second appellant, Dermot Gregory. Gregory wished to conceal the ownership of the

property from a girlfriend. The property was run as a restaurant by Murphy and McNamee until 2006 when the IRA sought to gain control of it and obtained the deeds. Murphy described how two men came to her house and said that they were from the IRA. They said that a property in Portugal belonged to the IRA and showed her a photocopy of the deeds. The judge found that this occurred in June 2006. She described one of the men as very overweight, tall and baldy. The judge noted that this matched the appearance of McCaugherty very well.

[11] Ali gave evidence that McCaugherty showed him some deeds of a property in Portugal on 13 June 2006. McCaugherty described to Ali how he approached Murphy about the deeds. He told Ali that another person had given her money to buy the property but that person had now given the property to 'us' and McCaugherty was one of the people tasked to recover it. He said that Murphy had gone to Portugal to recover the contracts related to the property. McCaugherty's remark that a gun was put to her head was supported by the evidence of Murphy that they had threatened to shoot her. A document found in McCaugherty's home on 19 June 2006 consisted of details of a personal nature about Murphy written by Gregory. McCaugherty's thumb prints were also found on documents relating to the transfer of funds by Gregory to Murphy to buy the Portuguese property.

[12] During their second last meeting, McCaugherty asked Ali whether he would help in the disposal of a property in Bulgaria. McCaugherty made it clear that his organisation intended to acquire the property and then sell it. Ali stated he was willing to help for a commission. At their meeting on 13 June 2006 it emerged that the property was in Portugal and McCaugherty produced the deeds. The judge was satisfied that the deeds were obtained to enable the IRA to gain control of the property so that it could be sold and the proceeds used for terrorist purposes.

[13] It was Gregory's defence that he was acting under duress when he gave the men who came to his home the information they required to trace Murphy and take the deeds from her. In her evidence Murphy said that Gregory asked her for the deeds of the property but she gave him photocopies which she put through his door. The judge found that the photocopy of deeds shown to her by the men who told her they were from the IRA, one of which was McCaugherty, was the copy which she had given to Gregory. In Gregory's account to police he described handing over the deeds to men who told him they were the IRA. He said the men knew he had a place in Portugal and that he had a child. The men said that they had been approached by McNamee but that they needed Gregory to give them information as they wanted to get the place back. Gregory claimed that they gave him the impression that they had a gun.

[14] The judge was satisfied beyond reasonable doubt that Gregory was involved in a joint enterprise to pass the deeds to the IRA. He gave the men from the IRA details of Murphy and her family. She had given him photocopies of the deeds rather than the originals. He knew the IRA would receive money for helping him to regain control of his property. The issue for the court was whether Gregory had acted as he did because he genuinely and reasonably believed that if he did not do so he or his young child would there and then or in the future be killed or seriously injured.

[15] The learned trial judge considered it highly unlikely that Gregory had purchased the property with IRA money. In addition, McCaugherty had informed Ali on two occasions that the IRA had been given the property by its owner. The judge noted that Gregory had given extensive personal information relating to Murphy to the IRA including the names and telephone numbers of members of her family. The fact that he knew such detail supported the evidence of Murphy that she and Gregory had been on good terms. It also left unexplained why Gregory would give such detail to the IRA to enable them to approach Murphy unless it was to distance himself from the recovery of the property by the IRA. The easier alternative would have been to require Murphy to provide the deeds to him. It was also the case that Gregory's fingerprints were found on one of €100 notes that were part of the Euro notes given by McCaugherty to Ali on 13 June 2006. The Judge was satisfied beyond reasonable doubt that Gregory did not act under duress in his dealings with the IRA.

The appeal of McCaugherty

[16] The judge considered an application on behalf of Kearns and McCaugherty at the close of the prosecution case that the proceedings should be stayed on the basis that each had been entrapped by the state into performing the actions that constituted the offences charged. The application on behalf of Kearns was based upon Amir's evidence as to what was said at meetings on 24 May 05 and 1 July 05. The judge concluded that Amir's evidence was deliberately untruthful in a number of respects. He was emphatic that he had received no bonus for this operation whatever. It emerged that in fact he had received three payments each of €1,000 in respect of his part in the operation. Secondly although he denied that he made or authorised a demand conveyed by his solicitor for €30,000 in return for giving evidence in the case the terms of his solicitor's letter were irreconcilable with that assertion. Thirdly Amir denied ever having seen a statement attributed to him in Operation Nare which was inconsistent with some of his evidence. The learned trial judge accepted the evidence of 3583 that he had seen it and was satisfied that Amir tried to disavow this statement because a number of details in it that must have come from him were at variance with parts of his evidence.

[17] The judge also had regard to several critical assessments of Amir prepared by his superiors which created the strong impression that Amir was prepared to act as he thought best. Those assessments were made by security service personnel who had listened to some of the exchanges between Amir and Kearns. They considered that Amir's conduct may have constituted entrapment. The judge found that this, coupled with the financial incentive of receiving bonuses, created an obvious and substantial risk that he was prepared to go beyond what he had been told to do and to step across the boundary of entrapment. In addition, there was no verifiable account of everything that was said during meetings when arms were discussed on 24 May 2005, attended by Kearns, his wife and Amir in O'Reilly's Bar in Brussels, and on 1 July 2005.

[18] The learned trial judge concluded that he could not be satisfied that Amir's account of the crucial meetings on 24 May 2005 and 1 July 2005 was reliable. There were contradictions and inconsistencies between his evidence and the contemporary records surrounding the introduction of the topic of arms procurement. In light of the financial incentive to earn bonus payments there was a real risk of exaggeration or distortion. There was no record of most of what was said on 24 May 2005 and all of what was said on 1 July 2005. The judge was satisfied that Kearns' conduct was brought about by the misconduct of Amir during his meetings and stayed the proceedings against him.

[19] The core submission advanced on behalf of McCaugherty below and in this court was that the integrity of the proceedings against him was so fundamentally compromised by the actions of state agents in procuring the commission of offences that the learned trial judge ought to have stayed the proceedings against him also. The operation which led to the arrest of McCaugherty depended upon the role played by Amir. Kearns' conduct in introducing McCaugherty to Ali was brought about by Amir and the offences would not have occurred but for that conduct. It was accepted that Amir and Ali had liaised closely to ensure that their cover stories did not give rise to any suspicions on the part of Kearns or McCaugherty.

[20] The learned trial judge accepted that Amir persuaded Kearns that he was a person through whom McCaugherty could be put in touch with an arms dealer. He considered, however, that Amir's role was preliminary and subsidiary in relation to the offences with which McCaugherty was charged. The operation was properly authorised under RIPA. McCaugherty was the target and there were reasonable grounds to suspect that he was involved with the Real IRA. Ali's presentation as an arms dealer required elaborate steps to be taken and this was appropriate in the context of the case. There was evidence that McCaugherty wanted to purchase arms and explosives before he came into contact with Ali and he made comments to the effect that

he had been involved in such activity previously. There was evidence that Ali paid for hotel accommodation, meals and spending money in Istanbul but the sums were modest and there was no evidence to suggest that this expenditure influenced McCaugherty's behaviour. Although Ali also received a bonus, the recordings, transcripts and some video footage enabled the Court to form a view of what Ali and McCaugherty did and said at all material times. The Judge concluded that there were no grounds to justify ordering a stay of proceedings in McCaugherty's case.

[21] There is no dispute that the appropriate principles to apply in a case such as this were set out by the House of Lords in R v Loosely and others [2001] UKHL 53 which dealt with two cases. In the first case an undercover police officer in an authorised operation based on intelligence made a number of sample purchases of drugs from the defendant. The House held that the undercover officer did no more than present himself as a customer to an active drug dealer and there was nothing in the officer's conduct which constituted incitement. In the second appeal two undercover officers offered contraband cigarettes to the accused and asked him to pay them in heroin. The accused said that he could not get heroin at short notice but some days later took the officers to a heroin dealer from whom he obtained the drug and provided it to the officers. When arrested he said that he had never been involved with heroin before this and had only become involved because of the conduct of the officers. The House held that the trial judge had been entitled to stay the proceedings as an abuse because the officers had instigated the offence by offering inducements which would not ordinarily be associated with the commission of the offence.

[22] It appears to us that a number of propositions relevant to this case can be derived from Loosely.

- (i) It is an abuse of state power to lure citizens into committing acts forbidden by the law and then to prosecute them.
- (ii) Such conduct constitutes entrapment and normally leads to a stay of the proceedings as an abuse of the process of the court.
- (iii) The investigating authority seeking evidence of criminal offences through undercover officers must act in good faith. Such good faith may be established by demonstrating reasonable grounds for suspicion, authorisation of the operation and continuing supervision.
- (iv) The use of proactive techniques is more needed and therefore more appropriate in some circumstances. The secrecy and difficulty of detection and the manner in which the particular criminal activity is carried on are relevant considerations. The

infiltration of a conspiracy is an example of a case where such techniques may be necessary.

- (v) Where undercover officers infiltrate conspiracies to commit terrorist offences they may have to show some enthusiasm for the conduct if they are to remain concealed. A good deal of active behaviour in the course of an authorised operation may, therefore, be acceptable in these circumstances.
- (vi) The greater the inducement held out by undercover officers the greater the danger that the court may conclude that they have overstepped the boundary.
- (vii) Whether the officer merely provides an opportunity for the accused to commit the offence rather than causing the commission of the offence is likely to be highly important in determining whether the police have overstepped the line.
- (viii) The relative weight and importance of these factors will depend upon the particular facts of the case.

[23] Although the focus of the criticism on behalf of McCaugherty was the conduct of Amir it is accepted that this appellant never met Amir in the course of the operation. At most it can be said that Amir's conduct induced Kearns to introduce McCaugherty to Ali, whom Kearns believed to be an arms dealer. By this stage McCaugherty was the focus of the operation based on intelligence material giving rise to a reasonable suspicion that he wished to purchase arms. The operation was both authorised and supervised. The extent of the supervision can be seen in the careful analysis of Amir's conduct by his supervisors. The activity being investigated was one which inevitably is conducted in secret and which Loosely recognised as one of those where proactive techniques may be required.

[24] All of the meetings between Ali and McCaugherty were recorded so that the court had a full account of what transpired between them. The learned trial judge was satisfied that the appellant was not induced, incited or lured into the offence. The appellant disclosed that he had previously been involved in such criminal activity. The payment of hotel bills and expenses in Turkey was typical of the colour which might be required of an operative in this area. The offer to demonstrate the effectiveness of the weaponry in Georgia was similarly something that might have been expected of someone in this situation. None of this suggests that Ali did more than offer the appellant the sort of opportunity that he would have taken if introduced to anyone he believed to be an arms dealer.

[25] The appellant did not take issue with the principles to be applied in this case. The argument concerned the application of those principles. We accept the analysis of the learned trial judge that the conduct of Amir was preliminary to the engagement of Ali with the appellant. It did not cause the commission of the offences but rather led to circumstances where the opportunity for the appellant to commit the offences arose. We see no reason to depart from the conclusions reached by the learned trial judge. We do not consider that the convictions are unsafe and accordingly we dismiss the appeal.

The appeal of Gregory

[26] This appellant appealed on the basis that the learned trial judge erred in holding that the prosecution had defeated the appellant's case of duress beyond reasonable doubt and that he erred in the circumstances in drawing an adverse inference from the appellant's failure to testify.

[27] The principal evidence against him was that of Murphy. She and McNamee were the paper owners of the Portuguese restaurant and Murphy rented it out for £700 per month. Gregory indicated to her that he intended to sell the property and requested the deeds. She provided him with photocopies. Some short time later she was approached by two men as set out at paragraph 10 above. She handed the deeds of the property to them. She told them that the rental contract was in Portugal and they told her to give it to Gregory by the following weekend. She claimed that a person purporting to be from the IRA contacted her in Portugal and told her to get back a few days later. She returned and put the contract through Gregory's letterbox. She subsequently identified the deeds, copy deeds and documents relating to the transfer of funds which McCaugherty had given Ali on 13 June 2006. She also identified the rental contract and the paperwork found at McCaugherty's home with details of her and her family.

[28] Murphy claimed that she was naturally upset about the way in which she had been approached and contacted Gregory to ask why he had sent the men to her door. He suggested that it was all McNamee's fault. There is no reason why he should have replied in that manner if his account of providing the information only because he was put in fear was correct.

[29] The learned trial judge properly acknowledged that Gregory was a person of previous good character. He recognised that he had to take that into account when examining his exculpatory statements at interview and that he was also less likely to have committed the offence. Although the prosecution did not press a submission that an adverse inference should be drawn as a result of the failure of the appellant to give evidence the judge considered that the prosecution case called for an answer from him and accordingly took his

failure into account against him. That related in particular to those aspects of Murphy's evidence which he disputed.

[30] Before this court Mr Magee QC disclosed that Gregory had been the subject of a threat to his life at the commencement of the trial although it does not appear that it was connected with the conduct of the trial. The threat was conveyed to the appellant and his counsel but neither party sought to bring it to the attention of the judge. Mr Magee does not criticise the decision not to raise this with the trial judge but submits that the threat is material to whether the judge ought to have drawn an adverse inference.

[31] The appellant had already made his duress case at interview. There was no obvious difficulty in him giving evidence in accordance with his interviews. It was suggested that he was inhibited by the presence of his co-accused but in his interviews the appellant expressly disavowed any participation by McCaugherty. The threat to his life did not relate to any evidence he might give. The fact that he was of previous good character did not answer the point that there were matters that required explanation in the prosecution case. These include the reasons why he had not simply asked Murphy in person for the deeds if he needed them. Although she said that she had put photocopies of the deeds through his door he denied that. It was common case that the photocopies ended up with McCaugherty. Murphy alleged that Gregory had indicated his intention to sell the property shortly before this incident.

[32] We consider that the learned trial judge was entitled to rely on the passage approved by Lord Bingham from R v Hasan [2005] 4 All ER at 685 in taking into account the appellant's failure to give evidence as some additional support for the prosecution case. There was ample evidence from Murphy in particular to defeat the duress case and the judge was also entitled to take into account the fingerprint of the appellant on one of the notes passed by McCaugherty to Ali as well as the failure to give evidence. In all the circumstances we do not consider that this conviction was unsafe. The appeal must be dismissed.