Neutral Citation No. [2010] NICC 37 | *Ref:* **HAR7966**

Judgment: approved by the Court for handing down | *Delivered:* **18/10/2010**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

v

GARRY JAMES JOHN MEENAN & NADINE KELLY

HART J

[1] At the commencement of this non-jury trial an application was made on behalf of the defendant Meenan by Miss McDermott QC (who appears on behalf of the defendant with Mr Brolly) that I should recuse myself as the trial judge because of certain remarks made to me by the prosecution whilst I was conducting pre-trial reviews in this case. I refused the application and said that I would give my reasons later, which I now do.

[2] The basis for the application was that at a recent pre-trial review at a time when it was anticipated that I would not be the trial judge I was informed that Aaron Thornton, a witness whom the prosecution said they intended to call, had left Northern Ireland because he had been shot at and the prosecution anticipated that he may not be available to give evidence at the trial. At a later review I was informed that Aaron Thornton had now returned to Northern Ireland, and it was anticipated that he would be available to give evidence. Miss McDermott's submission, which was made with commendable brevity and precision, was that the information I had been given about Aaron Thornton meant that there could be a possible perception that I would be prejudiced against the accused as a result. She referred to the well-known authority of Porter v Magill [2002] 2 AC 357 where the test of bias was formulated by Lord Hope in the following terms:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"

[3] I should make it clear that I have no knowledge whatever of the evidence which it was anticipated that Aaron Thornton might give as I have not looked at his witness statement, nor was anything further said at either review about the circumstances surrounding the alleged shooting.

[4] Much of the relevant law in this area has recently been considered by McCloskey J in R v Gary Jones (McCl7936) and it is unnecessary for me to revisit the authorities which he has so comprehensively considered. In R v Jones, McCloskey J formulated the appropriate approach in the following passage at [17].

> "In every context, the test for apparent bias requires consideration of *a possibility*, applying the information known to and attributes of the hypothetical observer. Some reflection on the attributes of this spectator is appropriate. It is well established that the hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unduly sensitive and is of a sensible and realistic disposition. Such an observer would, in my view, readily discriminate between a once in a lifetime jury and a professional judge. The former lacks the training and experience of the latter and is conventionally acknowledged to be more susceptible to extraneous matters. Moreover, absent *actual* bias (a rare phenomenon), the proposition that a judge will, *presumptively*, decide every case dispassionately and solely in accordance with the evidence seems to me unexceptional and harmonious with policy of the common law."

[5] I respectfully agree with this formulation. This is a problem which has arisen from time to time in non jury trials in this jurisdiction. In R v Fletcher [1983] 1 NIJB 1 at page 8 Lord Lowry LCJ addressed the situation where the trial judge was told that the defendant had a criminal record.

> "A judge … is both trained and accustomed to think dispassionately and to separate the essential from the incidental and the probative from the merely prejudicial. He knows the difference between satisfaction beyond reasonable doubt in a most serious case and a mere feeling that the accused is guilty because he has committed a similar but less serious offence. Furthermore, the best antidote to subconscious influence is awareness of the danger and a conscious

> decision, by a trained mind, not to succumb to that influence."

[6] In R v Callaghan [1988] WLR 1 at 6 Lord Lane LCJ stated:

> "If a matter is seen by the court to be something which on examination should not be taken into account or is irrelevant, then the court, as it so often has to do, can and will dismiss the matter from its mind."

[7] These passages were referred to with approval by Hutton LCJ in R v McLernon [1992] NI at page 182. In that case the court rejected an application that the trial judge was wrong not to have discharged himself at the trial, having heard a Crown witness state that the defendant had written a letter from prison which suggested that the appellant had been convicted of a previous offence. The trial judge declined to discharge himself from the trial stating:

> "I do not feel any prejudice at all in this case. I can obliterate (sic) from my mind completely. I do not know why he was in prison or for what reason. If he was in prison for any good reason I don't know. I will obliterate it from my mind and I refuse to discharge myself."

[8] In the present case the reference to someone shooting at Mr Thornton has not been elaborated upon, and there has been no suggestion, whether expressly or implicitly, that whatever occurred relating to Mr Thornton had anything whatever to do with anybody connected with this trial, and certainly not with the defendant.

[9] I am satisfied that a fair-minded and informed observer, that is one properly informed of all material facts, who is of a balanced and fair mind, is not unduly sensitive, and is of a sensible and realistic disposition, would have no hesitation in recognising that the reference to Mr Thornton being shot at falls short of anything which could be regarded as being prejudicial to the defendant and as something requiring me as the trial judge to discharge myself from presiding over the trial. I considered that the asserted risk to the fairness of the trial was one which was flimsy and fanciful and I did not accept it. For these reasons I declined to discharge myself as the trial judge.