

Neutral Citation No. [2010] NICC 27

Ref:

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

Delivered: 10/06/10

THE CROWN COURT IN NORTHERN IRELAND

SITTING AT BELFAST

REGINA

-V-

ADIAN QUINN

HEARD BEFORE

HIS HONOUR JUDGE GRANT

ON 3RD JUNE 2010

RULING

RULING

The defendant in this case faces one count of: Managing a Meeting in support of a prescribed organisation, contrary to Section 12 (2) of the Terrorism Act 2000. The case made by the prosecution is that on the 23rd of March 2008 at Edendork Cemetery in County Tyrone, a meeting took place which included members of the

Continuity IRA, an organisation prescribed under the Terrorism Act 2000 and that in the course of this shots were fired.

It is alleged that the defendant assisted in the management of this meeting by standing with the firing party and holding the microphone for the uniformed individual who made a speech on behalf of this organisation whilst another armed individual stood beside him and then fired two rounds into the air as a purported salute, as part of this meeting.

It has been indicated to me that the principal evidence to be relied upon by the prosecution comprises a DVD compiled by Sergeant Bleakley on Tuesday the 16th of December 2008. Onto this he downloaded material from an American based website commonly known as "You Tube". This site carries many photos and video clips posted there by the public and other organisations. This site carries many millions of such clips, it is accessible by all and does not require any registration or password to gain access to the material there presented.

The prosecution assert that this material clearly shows the conduct of the defendant which they say makes out the charge against him. They contend that this should be admitted in evidence before this court. The defence contend that I should rule the material inadmissible on the grounds that it is material that has not been authenticated by the Crown.

The defence accept that the material is relevant in terms of what it purports to show.

I have had an opportunity, at the invitation of and with the agreement of both counsel, to view the material stored on the DVD. It is clear from this viewing that the DVD has recorded upon it two separate pieces of film. The first is a quite a sophisticated production with captions and music added and seems on the face of

it to be a propaganda film promoting the Continuity IRA. It has clearly been edited and pieced together. The second piece of film appears less sophisticated and comprises a short piece of film of the events within the cemetery. I did not at this stage hear any identification evidence nor did I hear any of the defence case but if the person shown in these pieces of film is the defendant then the film raises a strong prima facie case against the defendant. I have been asked by the prosecution and defence to rule on the admissibility of this DVD evidence as a preliminary issue.

I have been referred to the decision of the Northern Ireland Court of Appeal in R.v.Murphy & Another 1990 Northern Ireland 306. The copy before me has been printed and therefore starts at page 1 and concludes at page 34. To that extent the references in this ruling are to those page numbers, rather than to the pagination in the official report. In the case of Murphy and Another, this issue was considered in some detail, first by the trial judge and then by the Court of Appeal. In that case the prosecution produced and sought to admit video evidence taken by a number of different sources but in particular two principal pieces of film were relied upon as identifying the defendants as being involved in the murder of two soldiers at Casement Park, Belfast on the 19th of March 1988. The first piece of film was a continuous "Heli-Tele", as it was described, film which was captured by a helicopter flying overhead. It captured the whole of the incident, and as I have said, this was taken from overhead. The second film was described by the trial judge as the "European" film. It was taken by a European film cameraman at ground level. The learned trial judge admitted the "European" film notwithstanding that this film was not the original and the original cameraman was not called to prove that he was the maker of that film. The Court of Appeal endorsed the trial judge's ruling as to the admissibility of the film.

The principle that emerges from this aspect of the judgment of the Court of

Appeal, in relation to this issue, is that relevant video evidence will be admissible if it is shown to be prima facie authentic. The burden of proving its authenticity rests with the prosecution. That is accepted on behalf of the prosecution by Mr Murphy QC.

It is appropriate to refer to the portion of the Court of Appeal's judgment which appears at page 31 in the printed copy where they said as follows:

Authenticity, in our view, like most facts may be proved circumstantially. In the case of a video film, the direct way is to call the cameraman who took it and the court will normally expect him to be called. But if he is not available, he need not be called; other evidence will suffice if it is logically probative that the video was authentic. That evidence may be adduced in other ways and from other sources. The film may be proved authentic by comparing it with films taken by others of the same event, taken at the same time or even at a different time. Or, as in the instant case of the heli-tele film, by comparing it with a film of the same events, that is authentic beyond doubt.....

I consider it appropriate to emphasise that passage: "Authentic beyond doubt"

..... In the case of a tape recording the evidence of its authenticity will, in almost all cases, be that it is the original recording made at the time. In the context of tape recordings, the word 'original' will invariably be a synonym for 'authentic' as we consider it was in the context of the three cases relied upon by Mr Treacy and not 'original' in contrast to 'secondary'. If the original tape is not available, then the "provenance and history" of the copy will be a necessary requirement to prove authenticity. In all these three cases the essential contest was the authenticity of the tape recordings, and we repeat that no such issue was raised in the instant case.

So, in our opinion, in the case of video recordings, the issue for the judge is, is it relevant? If it is, is it prima facie authentic? (my underlining) If it is, then it is admissible and it is left then to the

jury or the Diplock judge to decide whether its authenticity is beyond doubt and if its contents prove or add to the proof of guilt beyond reasonable doubt.

We think that the foregoing accords with these passages from current text-books. Cross on Evidence at 43 states:

“At a trial by jury the party relying on a recording or a film must satisfy the judge that there is a prima facie case that it is authentic, and it must be sufficiently intelligible to be placed before the jury. The evidence must define and describe the provenance and history of the recording up to the moment of its production in court. There is no need to account for the absence of the original if the copy is shown to be authentic.”

And Murphy in A Practical Approach to Evidence at 92, 93 writes:

“Questions of admissibility properly so called are those cases in which the judge has to decide whether a professed piece of evidence is admissible as a matter of law, having regard to the rules of evidence. In order to decide this, the judge may have to receive evidence of secondary facts . . .

Questions of authenticity and originality, on the other hand, are those cases in which there is no question that the evidence tendered is admissible from a legal standpoint, but there is a question whether the piece of evidence tendered is what it purports to be, that it is an original piece of evidence and that it has not been tampered with. These cases concern tangible exhibits, such as photographs and tape recordings. There is no doubt that such evidence may be admitted, but there must be some foundational showing that the actual exhibit proffered is what it is represented to be.”

That authenticity completes the requirements of proof of the admissibility of a relevant tape recording and that authenticity may be proved in a number of ways, are sufficient grounds, in our opinion, for upholding the trial judge's ruling that the European film was admissible”

It is interesting then to consider in the context of authenticity the approach that was adopted by the trial judge, as is described by the Court of Appeal at page 27 of the printed copy judgment:

In introducing this evidence, counsel stated that the original clip of film was not in the possession of the prosecution and that the cameraman who took the clip of film would not be called as a witness, but that other evidence would be relied on in its proof. They called Detective Inspector Jammet of the Paris police. He said he went to a television studio in Paris on 16 July 1988 pursuant to an order of a French judge and saw a clip of film there. He was given a video copy of the clip at the studio on 11 July 1988. He produced that video tape at the trial. He had seen it on the evening before he gave evidence. The video copy showed the taxi journey in question. His evidence was supported by Inspector Michael of the Paris police. Counsel went on to state that the prosecution intended to call further evidence, the nature of which had been given to the defence in the form of additional statements of evidence. It was to the following effect and it was subsequently proved in court by the following witnesses:

- (1) A BBC television producer referred to at the trial as M1, who oversaw in Belfast the production of that part the BBC television 9 pm News Report which showed the funeral cortege and the subsequent attack on the soldiers' car. He said that film report was compiled from film clips from a number of sources, including the European film consisting of two clips. The European film had been beamed by a European cameraman from Belfast to European Headquarters. Then by arrangement with the BBC it was beamed to London and from there back to him at the local BBC Belfast newsroom. The video tape of the News Report was played to the judge.
- (2) Woman Police Constable Wilson of the RUC recorded the BBC television 9 pm News at RUC Headquarters as it went out that evening. She produced the video tape she recorded and it was played to the judge.
- (3) Mr Glenn Delmedico, a solicitor employed by the BBC, produced the original transmitted tape of the BBC television 9 pm News which he had handed over to Inspector McGregor of the RUC on the 17 March 1989. This was played to the judge.
- (4) Detective Inspector Sproule of the RUC produced a video tape which he had received on the 20 March 1988 from a person who did not wish to have his identity revealed. It, too, was played over to the judge.

All of these tapes showed an identical piece of film. They showed the same taxi taking the same journey along the same route. It was not suggested in cross-examination to those who produced

them that they were fabricated or had been tampered with. Nor did the defence call any evidence to suggest this. The trial judge observed in his ruling:

“ . . . looking at the matter from the viewpoint of common sense and practical reality and having regard, in particular, to the consideration that the clip of film was shown in the BBC 9 pm news on the day of the funeral, it seems highly unlikely that the clip of film was a fabrication or had been altered or tampered with so that it ceased to be an accurate record of what the cameraman who took the film had seen through the view finder of his camera, and it appears that the strong probability is that the BBC 9 pm news transmitted a true and authentic moving picture of what the cameraman had seen . . . ”

It can be observed from this account that there was a clear line of continuity in relation to the original material which really excluded any possibility or realistic possibility that anyone had tampered with the film, that it had been changed, modified or edited in any way whatsoever.

Continuity is clearly a matter which was of significance as far as, not only the trial judge but the Court of Appeal were concerned.

There was a very important additional aspect to the authentication of the “European” film. The learned trial judge took the opportunity to compare the recorded events shown on the “European” film, with that provided from the heli-tele camera which had recorded all that had occurred on a continuous basis throughout whole incident. He was therefore in a position, as he described, to view simultaneously both pieces of film on a split screen and compare them one with the other. He was in a position to observe the synchronicity between those two pieces of film. They were absolutely the same, step for step along the same route in terms of the same recorded incidents as they occurred. The only difference being that one was shot from the air, whilst the “European” film was shot from the ground. They showed exactly the same matters. To that extent it can be well appreciated that very strong support was given by that comparison to the

authenticity of the “European” film. This process of comparing the “European” film with a fully authenticated and independent piece of film was a matter which the learned trial judge considered an important proof of authenticity, a view endorsed by the Court of Appeal.

In this case the evidence concerning this DVD was given by Constable Bleakley. He prepared a statement dated the 12th of January 2009. In his statement he describes how he was directed as a result of information received from Detective Constable McKee to use his computer and search the web and particularly “You Tube” for relevant material concerning this incident. In his statement he describes downloading one video, but it is clear from his evidence, and indeed the observation of the film, that there were two quite separate and distinct pieces of film which he downloaded and copied.

In my view it is of significance that neither cameraman nor any of the sources of this material has been identified, despite the fact that there were quite clearly two cameramen. Little effort has been made to identify who made the films. It is accepted, by Sergeant Bleakley, and by the Crown that there are two quite separate and distinct pieces of film and two quite separate and distinct cameramen recorded these films. There is no evidence before this court of continuity from the point at which each film was made to it being downloaded from the site by Sergeant Bleakley.

Following cross-examination, and some enquiries by me, it became clear that the system that is operated by “You Tube” is that members of the public can download any material they wish without any requirement for a password or any requirement to register with “You Tube”. That is not the situation when one seeks to upload material on to the site for publication on the Internet. Before uploading material one is required to register and provide a user-name. Whilst I can clearly understand that there is scope to use false identities and other ways of concealing

one's true identity in relation to the registration process, nevertheless there is a system established and in place which registers and records to some extent the identity of those who upload. No inquiry was made in relation to any individual who uploaded this material onto the site. No enquiry was made and no attempt was made to identify the source of the material that has been downloaded for use against the defendant in this trial.

I have been told and that the person who uploaded the more sophisticated or first of these films has been identified to the extent that his user-name is known. He has in the past uploaded some 22 pieces of film of a similar character, supportive of the Continuity IRA. Beyond establishing that fact no other investigation or enquiry has been made to determine his/her true identity.

It was accepted that material on "You Tube" could be either digital or analogue but Sergeant Bleakley could not say whether this material was either digital or analogue when it was first filmed or uploaded. He accepted that material on "You Tube" could be accessed by anyone and that it was open to anyone to download the material. Once downloaded digital material, in particular, but all material, can be altered, edited and changed in many respects and having been altered, can be uploaded once more in its new altered form. It can be manipulated or altered and there is no way of knowing whether or when this occurred unless one has available the original unedited material with which to compare it.

Sergeant Bleakley accepted that there is no way of knowing whether this has occurred in relation to these particular pieces of film. It is quite clear that the first more sophisticated piece of film is not a continuous piece. This film has been edited, music has been added to it, it has been cut in various places and has been pieced together either from one original source or a number of sources. It is not clear whether it was one piece of film shot by one cameraman or whether it has come from a number of sources. The second piece of film has at least the

appearance of being filmed continuously on the one occasion but in relation to the second short film it is not clear whether there was additional material filmed recorded at the time, which might alter the context of what is portrayed on the film and in particular the actions or involvement of the defendant.

In this case I consider that it is a matter of real concern that there is no comparative standard, no authenticated piece of film with which to compare either of the two pieces which the prosecution seek to admit in evidence before this court. Unlike the Murphy case I do not have the "heli-tele", authenticated film against which this court could compare either of the two pieces of film. To that extent there is no opportunity to compare and by that process authenticate the material.

Mr Murphy QC argued that I should regard the fact that there are two videos as significant. That these two videos effectively show the same piece of film, they show the same scenes but from different angles taken by two cameramen.

Mr Murphy Q C, contends that they should be regarded as authenticating each other. That by taking one piece of film and comparing it with the other I would be carrying out, effectively, the same process of authentication as the trial judge in Murphy when he compared the "European" against the authenticated Heli-Tele film.

I reject Mr Murphy's submission. In my view it would be quite inappropriate to take two unauthenticated pieces of material and use either of them to authenticate the other. I would have no reliable proven standard upon which to base my comparative assessment. If there were deficiencies in the authenticity, accuracy or reliability of either or both films their use as standards would serve to introduce and possibly increase the unreliability of the other one or both. In addition I would be faced with the hopeless dilemma of deciding which of the unauthenticated films I should choose as the standard.

The Court of Appeal indicated in clear terms that material such as this could only be admitted if prima facie authentic. That requires more than the mere production of a piece of film. It requires that the provenance of the film is established by the prosecution, by evidence, in a way that permits the defence to investigate and examine the provenance and reliability of the material. This process further requires the prosecution to establish that the material is reliable in the sense that it has not been manipulated or altered. The evidence before me does not include any evidence as to the provenance of the material other than that it was posted on the "You Tube" site. The mere posting of such material on such a site does not invest it with any authenticity, rather the evidence that I have heard concerning the way in which this can be done raises very real concerns that material on this site can be altered and manipulated easily and freely and that the defence would have little if any opportunity of investigating and determining the authenticity and reliability of such films.

The defendant was interviewed at some length and there were references to the video in the course of the interviews but it is notable that at no time in the course of ~~the~~these interviews does the defendant acknowledge or accept that he is the person shown in the videos. Neither does he say anything that indicates acceptance of the authenticity of the films.

In these circumstances for the reasons which I have given I am not satisfied that the Crown have established the authenticity of this film. I can see a great many ways in which this material could have been manipulated and to that extent I am not prepared to admit the film in evidence in this trial.

At the end of this ruling Mr Murphy applied to me under the provisions of Article 17(4) of the Criminal Justice (Northern Ireland) Order 2004 for an adjournment of the trial to allow the prosecution the opportunity to consider whether they wished to appeal my ruling in accordance with the provisions of Article 16 of the Order.

There being no objection from the defence I granted an adjournment and the court reconvened on Friday 4th June 2010. Mr Murphy QC informed me that the prosecution intended to appeal, nominated this ruling and complied with the requirements of Articles 16 (8) and (9) of the Order.

Mr Murphy applied for leave to appeal.

Both the prosecution and defence agreed that an expedited appeal was not required. As no further evidence has been given and the defendant has all times been released on bail and has abided by his bail terms I am satisfied that an expedited appeal is not required.

The provisions of Articles 16 and 17 appear on the face of it to be very wide and capable of including a ruling which is confined to determining the admissibility of any prosecution evidence which is ought to be admitted in relation to any count on the indictment.

Article 17 provides:

"(1) This Article applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.

(2) The prosecution may appeal in respect of the ruling in accordance with this Article.....

(7) Where -

(a) the ruling is a ruling that there is no case to answer, and

(b) the prosecution, at the same time that it informs the court in accordance with sub article (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal,

that other ruling, or those other rulings, are also to be treated as the subject of the appeal.

(8) The prosecution may not inform the court in accordance with sub article (4) that it intends to appeal unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in sub article (9) is fulfilled.

(9) Those conditions are -

- (a) that leave to appeal to the Court of Appeal is not obtained, and
- (b) that the appeal is abandoned before it is determined by the Court of Appeal."

Articles 21-25, which are not yet in force, provide a right of appeal in respect of evidentiary rulings

Section 21 provides:

"(1) The prosecution may, in accordance with this article and article 22, appeal in respect of -

- (a) a single qualifying evidentiary ruling, or
- (b) two or more qualifying evidentiary rulings.

(2) A qualifying evidentiary ruling is an evidentiary ruling of a judge in relation to a trial on indictment which is made at any time (whether before or after the commencement of the trial) before the opening of the case for the defence.....

(9) In this Article -

'evidentiary ruling' means a ruling which relates to the admissibility or exclusion of any prosecution evidence,

(11) Nothing in this Article affects the right of the prosecution to appeal in respect of an evidentiary ruling under Article 17."

At the outset of the application for leave to appeal I raised the issue, whether this ruling fell within the provisions of Article 17 and whether an appeal lies from my ruling to the Court of Appeal. In the very limited time available I was concerned that Parliament having given a right of appeal in relation to evidentiary rulings in Articles 21-25, whether an evidentiary ruling could be appealed under the provisions of Article 17. The submissions made were very short. Although Mr Murphy QC expressed confidence that Article 17 was sufficiently wide to permit such an appeal no authority was drawn to my attention. At first flush I was doubtful and had difficulty understanding why Parliament would legislate separately under Articles 21-25 for appeals in relation to evidentiary rulings if they were capable of appeal under Article 17. In such circumstances, Articles 21-25

seemed superfluous accordingly I refused leave, leaving this to be considered by the Court of Appeal.

Since that time I have had an opportunity to research matters further and in particular have considered the decision of the English Court of Appeal in R-v- Y 2008 EWCA Crim 10. This judgement makes it clear that the prosecution are entitled to appeal under both the provisions of Article 17 and Article 22-~~f~~. (should article 22 be brought into force).

I consider that that this ruling raises an important issue concerning the admissibility of recorded material, which, given the continuing developments in technology and the Internet is likely to come into play more frequently in the future. If my attention had been drawn to R-v- Y, then subject to further argument, I would have granted leave to appeal.

Piers Grant

10th June 2010