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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

TERENCE GERARD McGEOUGH

Defendant/Appellant.

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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MORGAN LCJ (giving the judgment of the Court)

[1] The appellant was convicted by Mr Justice Stephens on 18 February 2011 of attempted murder, possession of firearms with intent to commit an indictable offence, and two counts of membership of the IRA covering the period from 1 January 1975 until 14 June 1981. The grounds of the appeal are that the learned trial judge erred in refusing to stay the proceedings as an abuse of the Court's process and also erred in law in admitting the evidence characterised as the Swedish asylum application.

Background

[2] Samuel Joseph Brush was a part-time member of the Ulster Defence Regiment and a postman in 1981. His postal round included the home of Mrs Mary McGarvey, approximately 4½ miles from Aughnacloy, County Tyrone, in the townland of Cravenny Irish, which was approached by a narrow laneway off the Armalughey Road. At around 6.00 am on 13 June 1981 two men claiming to be from the IRA and

carrying handguns came into the house. At approximately 10.30 am William Hall, a neighbour, came to Mrs McGarvey's house and shortly after that Michael Russell also arrived in a green VW motor vehicle. Both Mr Hall and Mr Russell were let into the house and detained by the gunmen.

[3] Mr Brush, who was carrying his personal protection weapon and wearing light body armour, had a letter to deliver to Mrs McGarvey's home and he arrived there in his van for that purpose at about 1.00pm. He stopped the van, applied the handbrake, left the engine running, and got out leaving the door open and posted the letter through the letterbox. As he was turning to get back into the van a gunman appeared from a lean-to and from a distance of 10-12 feet started to fire at him with a revolver. Having been hit by the gunfire he turned and ran from the parking area onto the laneway turning right in a direction further up the laneway away from the main road. Shots were still being fired at him and he was hit twice in the back above his waist.

[4] He managed to draw his revolver with his left hand. He turned around to go back to his Post Office van. As he did so he saw the second gunman pointing a revolver at him holding the revolver with two hands. Mr Brush fired two shots at this gunman who then moved onto the parking area out of the line of sight of Mr Brush. Mr Brush then heard rustling in a hedge and believing that the other gunman had tried to get around behind him he fired two shots into the hedge. Having expended 4 out of his 5 rounds he reloaded his revolver and was able to get back to his Post Office van and drive to Ballygawley Police Station. From there he was taken to hospital in Dungannon.

[5] The two gunmen returned to the house and one of them informed Mrs. McGarvey that he had been shot. The uninjured gunman told Michael Russell to take the injured gunman to hospital. Michael Russell then left with both of the gunmen in his motor vehicle. The learned judge found that during the shooting incident one of the two gunmen was shot in self defence by Samuel Joseph Brush with a .38 round of ammunition fired from his personal protection weapon, a Smith and Wesson revolver.

[6] The shooting incident occurred at 1.00 pm on 13 June 1981. A patient was admitted to Monaghan General Hospital at approximately 3.30 pm on the same day. The shooting occurred approximately 4 ½ miles from Aughnacloy and Monaghan General Hospital is in close geographic proximity. The name of the patient who was admitted to the hospital was given as 'Gerard McGeough' and his age as 22. The appellant is known as Gerard McGeough and he was then 22 years of age. The patient had been shot and a bullet had lodged in his left chest area. Operative treatment was required to remove the bullet. The patient was flown by helicopter to

Dublin. The bullet removed from the patient was consistent with bullets fired from the personal protection weapon of Mr. Brush. The appellant has scars of precisely the shape and dimensions to be expected from the operation performed on 13 June 1981 to extract the bullet from the patient's chest. The patient had a large eagle tattoo on his arm as does the appellant. The appellant failed to account for the scarring to his torso. The learned trial judge drew an adverse inference from that failure and from the failure of the appellant to give evidence at his trial. He concluded that the appellant was one of the gunmen who attacked Mr Brush with intent to kill him and convicted the appellant of attempted murder and possession of firearms.

[7] On 27 June 1981 the patient named McGeough escaped from Monaghan General Hospital by disguising himself to evade Garda officers who were there to guard him. Terence Gerard McGeough made an asylum application in Sweden on 22 August 1983. The name, the date of birth, the place of birth and the next of kin were all the same as the appellant's details. The application was accompanied by the appellant's Irish passport. There is strong support from a handwriting expert for the proposition that the handwritten letters and the signatures are those of the appellant. The learned trial judge was satisfied beyond reasonable doubt that it was the appellant who made the asylum application.

[8] In a handwritten letter submitted in support of the asylum application the appellant admitted shooting "a British Army officer" in the chest using a 1912 .45 calibre revolver in an ambush in Ballygawley. He described how he was wounded by gunfire, making his escape to hospital in Monaghan and being flown by helicopter to Dublin for an emergency operation. He described how the bullet was deep inside him and that he lost his spleen and part of his left lung. Those details corresponded with the treatment the patient received in hospital in Dublin. He said that he escaped from hospital in Monaghan. In a further typewritten summary submitted on his behalf by his lawyer there is a description of a decision of the IRA to assassinate a local unionist who was an officer in the UDR, a country (sic) council member and a postman. The submission describes the circumstances of the event and its consequences in detail. The asylum application also records that the appellant became an operational member of the IRA in early 1976 and that thereafter he was given increasing levels of responsibility resulting in his involvement in this incident. On the basis of this material the learned trial judge was satisfied beyond reasonable doubt that he was guilty of membership of the Irish Republican Army as alleged.

The issues in the appeal

[9] The appeal was not concerned with the background facts of the offence. The appellant submitted that it had been an abuse of process to proceed with the charges

against him on two grounds. Firstly, the appellant contended that by reason of the passage of time and the failure of the prosecution authorities to progress the case against him it was unfair to try him even if a fair trial was still possible. Secondly, the appellant submitted that he had received an assurance in 2000 from Mr Gerry Kelly, now an MLA and junior minister in the Northern Ireland Executive, that he would not be liable to be prosecuted if he returned to Northern Ireland. He submitted that the assurance was an unequivocal promise on behalf of the executive which was binding.

[10] In addition the appellant submitted that the learned trial judge should not have admitted the Swedish asylum materials. It was argued that assertions in such an application were inherently unreliable since applicants for asylum were liable to exaggerate the basis for their claims. Secondly, it was contended that these were admissions made without caution and the approach to their admission should correspond with the admission of statements made to police in similar circumstances. Thirdly, it was submitted that since it was necessary to set out the background to the appellant's asylum claim in this documentation these statements ought to be treated as statements made under compulsion. Lastly, the appellant argued that reliance on such statements would undermine the purpose of the Refugee Convention by creating a chill factor which would prevent deserving claimants disclosing valid circumstances for fear of subsequent victimisation in their home territory if the application failed. For all of these reasons the appellant contended that these materials should be excluded by virtue of Article 76 of PACE.

Delay

[11] In order to deal with the issue of delay it is necessary to set out something of the circumstances leading to the arrest and charging of the appellant on 8 March 2007. After his departure from Northern Ireland on the day of the shooting the appellant escaped from hospital on 27 June 1981 while under guard. He next appeared on 19 August 1983 in Sweden where he claimed political asylum in order to prevent his return to the United Kingdom. His application was refused and his appeal was dismissed. He was next detected on 30 August 1988 when he was arrested crossing the Dutch/German border in a car. He was detained for trial in relation to offences allegedly committed in Germany. On 27 August 1988 the asylum application together with the alleged admissions referred to earlier were recovered from a flat in Sweden. In March 1989 those documents were sought by the United Kingdom authorities from the Swedish authorities. On 16 August 1990 the appellant's trial in Germany began and he was remanded in custody. On 22 November 1990 the file containing the Swedish asylum material was forwarded to the British authorities.

[12] On 4 September 1991 District Inspector Cowen of the RUC visited the appellant in prison in Germany and told him that he was being investigated for the attempted murder of Mr Brush. On 4 February 1992 a prosecution handwriting expert stated that the handwriting on the Swedish asylum application could be attributed to the appellant. On 11 February 1992 his extradition from Germany to the USA was approved. He was not convicted in relation to the allegations in Germany. On 9 March 1992 the DPP considered the evidential test for extradition to be met and actively considered attempting to extradite him to the United Kingdom. On 28 May 1992 he was extradited from Germany to the United States on foot of a 1982 warrant for weapons offences. He pleaded guilty in the United States to moving weapons between states without a licence and served a two-year sentence.

[13] In March 1996 he was released from custody and returned to Ireland. He studied in Dublin and qualified as a teacher. Police in Northern Ireland became aware that he was resident in the Republic of Ireland in May 1996. In July 2000 the appellant said that he had a conversation with Mr Gerry Kelly of Sinn Fein about the liability of "on the runs" to arrest in relation to past crimes. He was aware that this issue was being discussed in the context of the peace process. He said that Mr Kelly suggested that he provide him with his name and address to be included in a list of such persons to be submitted on behalf of Sinn Fein. The appellant gave evidence that as a consequence of his conversation with Mr Kelly he understood that he would not be arrested or charged when taking part in a proposed selection competition for election to political office in Northern Ireland. He accepts that if he had been detected in Northern Ireland in the period between May 1996 and July 2000 he would have expected to have been arrested.

[14] The appellant states that he inherited property in Northern Ireland in 1999 and thereafter regularly lived openly in Northern Ireland. His children attended a school in County Tyrone and his name was on utility bills for the property. He applied for planning permission in his own name and was summoned to serve on a jury. It is, however, of some significance that when he was spoken to by police on Gosford Road Markethill on 29 January 2007 for urinating by the side of the road he gave his name as Terence McGeough even though he is universally known as Gerry McGeough, he gave his address as 112 Oliverstown House Dublin, he claimed that his car was registered at that address and that his family claimed benefits from the relevant agency in the Republic of Ireland. All of that is irreconcilable with his assertion that he was living openly in Northern Ireland.

[15] On 14 February 2007 the current investigation was reopened. The appellant was at that time preparing to stand as an independent Republican against Sinn Fein for an assembly seat in Fermanagh and South Tyrone. He was unsuccessful in the

election and was arrested on 8 March 2007 leaving the election count and charged with these offences.

[16] It was submitted on behalf of the appellant that for the purposes of Article 6 of the Convention time began to run from the date of the interview with police in Germany on 4 September 1991 when he was advised that he was being investigated for the attempted murder of Mr Brush. The Strasbourg jurisprudence indicates that time begins to run from the point of "charge" but the term "charge" has an autonomous meaning in this context which approximates to whether the suspect has been officially notified of the allegation or the situation of the suspect has been substantially affected (see Eckle v Germany (1982) 5 EHRR 1). This issue has been considered by the House of Lords in Attorney General's Reference (No 2 of 2001) [2003] UKHL 68. In a speech with which all the other members of the House agreed Lord Bingham held that time usually begins to run from the point at which a person is charged or summoned. He stated that arrest would not ordinarily mark the beginning of that period but, recognising the European jurisprudence, indicated that an official indication that a person will be reported with a view to prosecution may, depending on circumstances, do so. Howarth v UK (2001) 31 EHRR 861 supports the proposition that time can begin to run from the date of interview. In that case the appellant was charged with conspiracy to defraud and the court held that time began to run from the date when he was first interviewed by the Serious Fraud Squad.

[17] We do not accept that time began to run as a result of the interview on 4 September 1991. The police officers conducting the interview had no legal power in Germany in respect of the prosecution of the appellant at the relevant time. There was no indication to the appellant that the authorities intended to apply to extradite him. Indeed it is clear that consideration in relation to that course did not occur until many months later. There was no indication to him that there was an intention to report him with a view to prosecution. The investigation was clearly at an early stage as is demonstrated by the fact that the handwriting expert had not yet produced his opinion at the time of the interview. In those circumstances we do not accept that the appellant had been officially notified or that his situation had been substantially affected by the interview.

[18] In any event we are entirely satisfied on the basis of the history set out above that the learned disclosure judge was entirely right in concluding that the appellant had substantially contributed to the delay by leaving the jurisdiction almost immediately after the attack on Mr Brush and remaining outside the jurisdiction until the late 1990s. It was submitted that the authorities were in some way at fault in not pursuing extradition proceedings at an earlier stage. We do not accept that submission. Where a person chooses to evade their responsibilities by absconding

from the jurisdiction any delay caused as a result will generally be of that person's own choice and making. The only exceptions are where there is evidence that there has been a deliberate decision communicated to the accused not to pursue the case against him or some other circumstance has occurred which would justify a sense of security for the accused despite his flight from justice (see Gomes v Trinidad and Tobago [2009] 1 WLR 1038).

[19] The only apparent encounter between the appellant and the police prior to the reopening of the investigation in February 2007 was the incident on 29 January 2007 dealt with at paragraph 14 above. The circumstances of that encounter could not have given rise to any suggestion that the appellant should feel secure that he would not be prosecuted. Similarly there was no correspondence with the PPS to support any such suggestion. Where a person absconds from the jurisdiction the police may often not be aware of the person's return. Any delay before the person comes to the attention of the police or prosecutors in those circumstances will generally be the responsibility of the accused.

[20] For the reasons set out we conclude that any delay in the coming to trial of this case was the responsibility of the appellant and did not give rise to any unfairness in conducting the trial.

Assurances

[21] As set out in paragraph 13 above the appellant stated that he had a meeting with Mr Gerry Kelly in July 2000 as a result of which he understood that he would not be charged or prosecuted in respect of past offences. Evidence was also called before the disclosure judge from Mr William Smith who is an experienced community worker and was the chairman of the Progressive Unionist Party. He stated that during the negotiations leading to the 1998 Agreement he attended a meeting in March/April 1998 with the Secretary Of State when she confirmed that those who had been involved in carrying out criminal offences during the terrorist campaign but had not been convicted would not be subject to any further legal process. He went on, however, to indicate that those who came forward to admit their guilt in connection with serious offences would serve a period of two years in custody whereas those who did not accept their guilt would apparently not face any punishment. Such an outcome would be absurd. The learned disclosure judge concluded, in our view inevitably, that Mr Smith's evidence that the issue of on the runs was "done and dusted" was difficult to accept.

[22] In the course of the disclosure hearing correspondence from the Northern Ireland Office to Mr Kelly dated 22 January 2003 was introduced. The letter referred to six individuals in respect of whom the necessary checks had been completed and

it was indicated that those six persons would face arrest and questioning if they return to Northern Ireland. The appellant was one of those six individuals. The appellant stated that he was unaware of the letter and by 2003 he had left Sinn Fein because of disagreements on social policy.

[23] It was contended on behalf of the appellant that Mr Kelly held a status effectively as a government representative. The basis for the submission was that Mr Kelly was heavily involved in the discussion about those who had committed past terrorist acts and the punishment if any to which they should be subject if prosecuted and convicted. Some emphasis was also placed on the fact that Mr Kelly was actively involved in politics on behalf of Sinn Fein at the relevant time and subsequently took on responsible positions in the Assembly and Executive.

[24] There was no issue about the test which should be applied in relation to the submission. The learned disclosure judge dealt with the issue at paragraph 16 of his judgement.

"In *R v Abu Hamza [2007] QB 659* Lord Phillips emphasised that it is only in rare circumstances that it would be offensive to justice to give effect to the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. After a review of the relevant authorities he went on to say, at paragraph 54:

> "54 These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless; (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Event then, if facts come to light which were not known when the representation was made, these may justify proceedings with the prosecution despite the representation.""

[25] Like the disclosure judge we do not consider that the evidence indicates any basis for the conclusion that Mr Kelly was a representative of those responsible for the conduct of investigations or prosecutions. We further agree that in any event the statement attributed to Mr Kelly, who did not give evidence, did not contain any representation, never mind one which could be said to be unequivocal for the purpose of this test.

[26] In light of those conclusions we consider that the grounds of appeal based on abuse of process must fail.

Admission of the Swedish asylum material

[27] The learned trial judge heard evidence in relation to this material from Helene Hedebris who is a legal expert in the Migration Board of Sweden. She explained that the asylum application had been made to Swedish police on 22 August 1983. At that time the appellant had access to a lawyer. She stated that he was under no compulsion to make his application or to advance any of the documents submitted on his behalf. She stated that on 22 November 1990 the file was sent to the Office of the Public Prosecutor in Malmo in order that it would be sent through the Swedish Foreign Ministry to the British Embassy and the United Kingdom authorities.

[28] She was asked about the confidentiality attaching to asylum records in Sweden. She stated that Sweden had a long record over hundreds of years of public access to documents. In relation to asylum documents where the application was successful the documents generally were not made available but otherwise the documents generally were made available. She stated that this approach was well-known and she would have expected any lawyer employed to advise the appellant to have been aware of that background. She stated that she was unaware of any evidence of a chill effect as a result of that policy.

[29] The appellant sought assistance in relation to this submission from Council Directive 2005/85/EC on minimum standards and procedures in Member States for granting and withdrawing refugee status. Member states were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 1 December 2007. It is clear, therefore, that the terms of the directive did not govern the disclosure of the file to the British authorities in 1990 but the appellant drew attention to 2 articles which he claimed assisted in his application to exclude the evidence under Article 76 of PACE.

"Article 22

Collection of information on individual cases

For the purposes of examining individual cases, Member States shall not:

(a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;

(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical

integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin…

Article 41

Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."

[30] In considering whether the fairness of the trial would be so adversely affected that the evidence of the Swedish asylum application should be excluded the learned trial judge took into account that the evidence was lawfully obtained in Sweden and in the United Kingdom in accordance with the international conventions applicable at the time. There was no element of compulsion on the appellant. This was a voluntary procedure. The appellant had legal advice in Sweden as to Swedish law and under Swedish law the asylum documents could properly be revealed to the authorities in another jurisdiction if the asylum application was unsuccessful. There was no evidence that the appellant was under any pressure in relation to the completion of the application. There is no evidence that the appellant would have declined to answer questions put if he had been cautioned. It was open to the appellant to give evidence at trial in relation to the contents of the application. There was no evidence that there was any fabrication or distortion within the documents.

[31] The learned trial judge noted that the present rules governing asylum applications within the United Kingdom provide confidentiality to foreign nationals applying for asylum. The learned trial judge noted, however, Article 22 of the Directive was intended to provide a safeguard by way of ensuring that those examining individual cases did not make disclosure to the alleged persecutor. In this instance the asylum application has been considered and rejected. Article 22 does not in those circumstances prevent the use of the material for the purpose of proper criminal investigation. The disclosure of the information was in accordance with the confidentiality law applicable in Sweden and accordingly Article 41 was not in play.

[32] We are satisfied that the learned trial judge took into account all material considerations and that in the circumstances his conclusion was undoubtedly correct. The Court of Appeal will generally only interfere with the decision of the trial judge in this area where it is satisfied that he could not have reached the conclusion that he did (see Thompson v R [1998] AC 811 PC).

Conclusion

[33] For the reasons given we do not consider that any of the grounds of appeal have been made out and we do not consider the convictions are unsafe. Accordingly we dismiss the appeal.