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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/01/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ALEX CARLIN, BERNARD ROONEY AND MARK McKEAVENEY

HIGGINS LJ (giving the judgment of the court)

[1] This is an application by the prosecution for leave to appeal under Article 17 of the Criminal Justice (Northern Ireland) Order 2004 against a ruling of His Honour Judge Burgess, the Recorder of Belfast, given on 14 March 2012 whereby he refused to vary a Witness Anonymity Order made on 7 December 2011. The three respondents to the appeal (hereafter referred to as the accused) were committed for trial in April 2010 along with two other accused persons namely M J McCullough and D McFarlane. On 8 July 2010 the Recorder ruled under Section 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 that there was insufficient evidence disclosed in the committal papers to justify putting McFarlane on trial and entered a "No Bill" in respect of him. Following this ruling the remaining accused were arraigned on 8 July 2010. The indictment contained three counts. Count 1 alleged conspiracy to rob on 18 September 2009 against all of the acccused. Count 2 alleged attempted robbery on the same date against all of the accused. Count 3 alleged possession of an offensive weapon (a knife) against McCullough alone. At arraignment Carlin, Rooney and McKearney (the accused) pleaded not guilty to both counts against them. McCullough, who was detained at the scene in possession of a knife, pleaded guilty to Counts 2 and 3 and was put back for sentence. No evidence was offered against him in respect of Count 1, conspiracy to rob. McCullough was represented by Mr B McGrory QC. Mr McFarlane was represented by Mr O'Donoghue QC and Mr Greene. The remaining three accused were represented by Mr O'Rourke QC, Mr Magee SC and Mr Irvine QC respectively. All three men were remanded on bail.

[2] The prosecution case was that the incident which led to the arrests was a joint enterprise in which each played a part. Much of the evidence against the accused consisted of observations by surveillance officers of the PSNI together

with evidence of recent telephonic communications. In May 2011 the prosecution applied under Part III of the Coroners and Justice Act 2009 (2009 Act), inter alia, for anonymity and screening orders in respect of eight surveillance officers who were intended witnesses on behalf of the prosecution in the case. The application sought orders to the following effect:

(1) That the officers be referred to by a pseudonym rather than by name.

(2) That their names and other identifying details be withheld from disclosable material.

(3) That no question of any specified description which might lead to their identification be asked.

(4) That the eight officers be screened from all persons in court (including the accused) except the judge, the prosecution and the defendants legally qualified representatives.

[3] The conditions necessary for making an Anonymity Order are set out in Section 88 of the 2009 Act. Section 88 provides –

> "Section 88
>
> (1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.
>
> (2) The court may make such an order only if it is satisfied that Conditions A to C below are met.
>
> (3) Condition A is that the proposed order is necessary—
>
> (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or
>
> (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).

(4) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial.

(5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and—

(a) the witness would not testify if the proposed order were not made, or

(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(6) In determining whether the proposed order is necessary for the purpose mentioned in subsection (3)(a), the court must have regard (in particular) to any reasonable fear on the part of the witness—

(a) that the witness or another person would suffer death or injury, or

(b) that there would be serious damage to property,

if the witness were to be identified."

[4] Section 89 sets out certain considerations which are deemed to be relevant and to which the court, when considering an application; must have regard. Section 89 provides:

"Section 89

(1) When deciding whether Conditions A to C in section 88 are met in the case of an application for a witness anonymity order, the court must have regard to—

(a) the considerations mentioned in subsection (2) below, and

(b) such other matters as the court considers relevant.

(2) The considerations are—

(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;

(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;

(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;

(e) whether there is any reason to believe that the witness—

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case,

having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;

(f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court."

[5] The application for an Anonymity Order was heard in November 2011 and on 7 December 2011 the Recorder gave his ruling. It was submitted that the officers were concerned for their own safety and that of their families by reason of the fact that as undercover officers they are in an exposed position and would be amenable to attack from serious criminals and/or from terrorists. The recorder was satisfied that the evidence of the undercover officers was essential to the prosecution case and that the first element of Condition C was satisfied.

The Recorder was, rightly, mindful of the fact that there are sound operational reasons why the anonymity of undercover officers should be maintained. Once their identity is revealed then their future usefulness is compromised. However he stated this was a general guideline only (thereby reducing its significance in the context of this specific case). He noted that there was no specific threat to any of the officers and that there was no evidence of any terrorist or paramilitary involvement and that there was no evidence that the public interest required the officers to be screened from the defendants. He then went on to consider whether the officers had reasonable grounds for believing that their safety or that of their families would be at risk if they were not screened from the defendants (but their names withheld) and whether their effectiveness in future would be prejudiced and whether there was a public interest in the officers being screened from the defendants. He concluded that he was not satisfied beyond a reasonable doubt on any of these issues. He was however satisfied that the officers should be screened from the public in order to ensure their effectiveness in future operations. He was therefore satisfied that Condition C was met. He then considered Condition A and was satisfied that there was a risk to the safety of the officers due to undercover duties and that their future effectiveness would be compromised if they were not screened from the public and was satisfied Condition A was met. He then considered condition B and was satisfied that screening the officers from the public and withholding their names would not prevent the defendants from receiving a fair trial.

[6] The Recorder concluded that withholding the names of surveillance officers and screening them from the public; (but not the defendants) was necessary to protect the officers and in the public interests and in the interests of justice and made orders to that effect. The Recorder went on to say that if he had been satisfied that screening from the defendants was necessary under Condition A and C he would have had grave reservations about Condition B on the basis that a person is entitled to confront a person who is accusing them, particularly in a case of identification. The distinction between a protracted surveillance operation by undercover officers over time and an ordinary identification case does not appear to have been considered.

[7] The trial of these defendants was fixed for early February 2012. A suggestion that the officers be permitted to give evidence having altered their natural appearance was rejected by the Recorder. Another trial before the Recorder over-ran its estimated time and the trial of the three accused was put back to commence on 7 March 2012. On the evening of 6 March 2012 senior counsel was instructed in the trial on behalf of the prosecution. It had become clear that there was grave difficulty about the surveillance officers giving evidence if they were not screened from the view of the defendants or permitted to alter their appearance. On 7 March 2012 following consultation senior prosecuting counsel directed that an application be made to vary the order of 7 December and applied successfully for the trial to be adjourned for 24 hours to

enable that the application to be made. On 7 March 2012 the prosecution applied under Section 91 of the Coroners and Justice Act 2009 that the order of 7 December 2009 be varied to include screening from the three defendants. The application was made on two bases –

(1) the exposure of surveillance officers to the accused in the course of the trial would jeopardise or undermine the work of the surveillance team to which they belonged; and

(2) since the making of the original order there was a material increase in the risk to the lives of the surveillance officers if they were made recognisable to the accused.

[8] This application to vary was grounded in an affidavit by a Detective Inspector of the Crime Operation Branch of the PSNI. The affidavit set out certain information which was not before the Recorder in December 2011. This information related to all three accused and referred to certain events alleged to have occurred in February 2012 involving two of the accused and an associate of theirs and the same surveillance team.

[9] Section 91(2) of the 2009 Act provides that a party to proceedings may apply to the Court to vary (or discharge) a witness anonymity order if there has been a change of circumstance since the order was made. The Recorder, in a reserved ruling, delivered on 14 March 2012, determined that some of the information had been available to the prosecution at the time of the original application but not used in that application and that the remainder did not persuade him to alter the ruling made on 7 December 2011.

[10] Following the ruling delivered on 14 March 2012 senior prosecuting counsel then instructed, advised the Director of the Public Prosecution Service in writing on the merits of an appeal and the Director on the basis of senior counsel's opinion determined that the ruling should be appealed. An application to the trial judge for leave to appeal was refused by the trial judge. Subsequently an application to the Court of Appeal for leave to appeal was lodged in the office of the Court of Appeal. This application was brought under Article 17(2) of the Criminal Justice (Northern Ireland) Order 2004 (the 2004 Order). The grounds of appeal relied on were that the trial Judge erred in law in determining the Anonymity Application in the manner in which he did and in holding that Conditions B and C were not met. Issues arose as to the nature of the rulings made by the Recorder but it is not necessary to refer to those in view of later developments in the appeal.

[11] Article 17 of the 2004 Order appears in part of Part IV of the Order which Part provides for prosecution appeals. It is preceded by an Introduction and Article 16. Article 16 and 17 are in these terms.

"Introduction

16. - (1) In relation to a trial on indictment, the prosecution is to have the rights of appeal for which provision is made by this Part.

(2) But the prosecution is to have no right of appeal under this Part in respect of-

(a) a ruling that a jury be discharged; or

(b) a ruling from which an appeal lies to the Court of Appeal by virtue of any other statutory provision.

(3) An appeal under this Part is to lie to the Court of Appeal.

(4) Such an appeal may be brought only with the leave of the judge or the Court of Appeal.

General right of appeal in respect of rulings

17. - (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.

(3) The ruling is to have no effect whilst the prosecution is able to take any steps under paragraph (4).

(4) The prosecution may not appeal in respect of the ruling unless, following the making of the ruling-

(a) it informs the court that it intends to appeal; or

(b) it requests an adjournment to consider whether to appeal and if such an adjournment is granted, it informs the

court following the adjournment that it intends to appeal.

(5) If the prosecution requests an adjournment under paragraph (4)(b), the judge may grant such an adjournment.

(6) Where the ruling relates to two or more offences-

(a) any one or more of those offences may be the subject of the appeal; and

(b) if the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.

(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 paragraph (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 paragraph (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 paragraph (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.

(10) If the prosecution informs the court in accordance with paragraph (4) that it intends to appeal, the ruling mentioned in paragraph (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.

(11) If and to the extent that a ruling has no effect in accordance with this Article-

(a) any consequences of the ruling are also to have no effect;

(b) the judge may not take any steps in consequence of the ruling; and

(c) if he does so, any such steps are also to have no effect.

(12) Where the prosecution has informed the court of its agreement under paragraph (8) and either of the conditions mentioned in paragraph (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.

(13) In this Article "applicable time", in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the time when the judge starts his summing-up to the jury.

(14) The reference in paragraph (13) to the time when the judge starts his summing-up to the jury includes the time when the judge would start his summing-up if there were a jury."

[12] The appeal came on for hearing late on Friday 15 June 2012. Submissions were made on the substantive issues raised in the application for leave to appeal. There was insufficient time to conclude the application on that date and it was adjourned to the following Tuesday 19 June 2012. On this occasion counsel on behalf of the accused raised a new matter relating to the appearance of senior counsel on behalf of the prosecution which necessitated an adjournment to 27 June 2012 to enable enquiries to be made. On 27 June short submissions were made during which it became clear that the new matter gave rise to a novel yet difficult issue which would require further research by all parties and the provision of skeleton arguments and authorities to the Court. The application was adjourned to enable this to be carried out. Following receipt of the skeleton arguments and authorities the application was resumed. Further submissions on the new matters were made following which the Court announced that leave to appeal was refused and that the Court would give its reasons later, which we now do. The Court is grateful to all counsel for their researches and additional skeleton arguments.

[13] The new matter which gave rise to the adjournments and the subsequent refusal of leave related to the engagement of senior prosecuting counsel and to the appointment of the new Director of Public Prosecutions. On 7 November 2011 Mr B McGrory QC was appointed Director of Public Prosecutions for Northern Ireland (DPP). Following his pleas of guilty to Counts 2 and 3 on the indictment Mr McGrory QC was briefed to appear on behalf of Mr McCullough. Sentence in his case had been adjourned pending the trial of his co-accused. On his appointment as DPP in November 2011 Mr McGrory QC returned the brief relating to McCullough to his instructing solicitor. This was before Mr McCullough's case came back before the trial judge. Thus Mr McGrory never appeared before the trial judge in this case.

[14] Mr O'Donoghue QC and Mr R Greene were briefed to appear on behalf of the co-accused McFarlane. Mr Greene made the submissions relating to the issue under the Grand Jury (Abolition) Act which led to the Recorder entering a "No Bill" on Count 1 against McFarlane on 8 July 2010. On 15 July 2010 the prosecution indicated, subject to confirmation, that the case against McFarlane on Count 2 would not be pursued and on that date McFarlane was released from custody. Mr O'Donoghue QC was present at the Court hearings on both 8 July 2010 and 15 July 2010. Thereafter he was discharged from his duties relating to the defence of Mr McFarlane and had no involvement with the anonymity applications made in November 2011 relating to the remaining accused.

[15] On the evening of 6 March 2012 Mr O'Donoghue was telephoned at home and instructed to appear on behalf of the prosecution in relation to the application to the Recorder to vary his original anonymity order made on 7 December 2011. This application was based on events which were alleged to have occurred in February 2012 (see paragraph 8 above). Mr O'Donoghue

received papers on the morning of 7 March 2012 on which date he moved a written application to the Recorder to vary the terms of the original ruling made on 7 December 2011. That application to vary was refused on 8 March 2012 and on 14 March 2012 the Recorder provided written reasons for so doing. The ruling refusing the variation was brought to the attention of the DPP who consulted Mr O'Donoghue QC by telephone. The DPP considered that the ruling might be wrong in law. Mr O'Donoghue QC prepared a written opinion for the DPP on the legal issue arising from the Recorder's ruling and furnished this to the DPP. After reading the opinion the DPP consulted Mr O'Donoghue QC by telephone and then determined that the ruling should be appealed. The only document which informed this decision was the written opinion of Mr O'Donoghue QC on the legal issue arising under Sections 88 and 89 of the 2009 Act. At the time of making the decision to appeal the ruling of the Recorder the Director was aware that he had represented the co-accused Mr McCullough but did not consider this an impediment to him, as Director, making the decision to appeal the legal correctness of the ruling made by the Recorder. At the time of accepting instructions to act on behalf of the prosecution in the application to the Recorder to vary his earlier ruling and to advise on and to appear at any appeal against that ruling Mr O'Donoghue QC had no recollection that he had one year and eight months earlier appeared on behalf of McFarlane then a co-accused, albeit allowing Mr Greene to make oral submissions to the Recorder in relation to whether the evidence was sufficient to justify trial of that accused on Count 1. The revelation of these background matters gave rise to detailed submissions by counsel on behalf of all three accused that leave to appeal should not be granted. None of these matters were raised in the hearings before the Recorder in March 2012 nor before this Court until the second day of the hearing of the application for leave to appeal.

[16] Counsel on behalf of the three remaining accused were united in their submissions to this court that leave should not be granted as neither the DPP nor senior prosecuting counsel should have been involved in the decision to apply for leave to appeal before this court. I hope I do no disservice to counsel, or the depth of their research and the preparation of their skeleton arguments, if I summarise their submissions in brief form. Counsel drew attention to the fact that Count 1 in the indictment alleged a conspiracy between all five accused and that both the DPP and senior prosecuting counsel would have been instructed in relation to that allegation and may have consulted their clients about it. In those circumstances there was a real risk that confidential if not privileged information may have been imparted which could have a bearing on the application before this court. The basic premise put forward was that for the DPP to determine that the ruling should be appealed and for counsel, earlier briefed on behalf of a co-accused, to be instructed, amounted to an abuse of process such that the application should not be permitted to proceed. In addition it was submitted that the involvement of the DPP gave rise to an appearance of bias of similar character to that which would lead a judge to recuse himself from a case.

Reliance was placed on the well-known passage in the speech of Lord Steyn in the case of Porter v Magill about the views of the well informed observer and reference was made to the Code for Prosecutors as well as the Bar Code. It was submitted that counsel could not appear for both the prosecution and the defence in the same case and it was no answer that the application gave rise to issues of pure law.

[17] On behalf of the prosecution it was noted that the issue of the earlier involvement of counsel was not raised until Mr O'Donoghue had completed his substantive submissions on the application for leave. These submissions and his written opinion provided to the DPP clearly revealed that the issue involved in the application was one of pure law and that the determination by the DPP that the ruling of the Recorder should be appealed was made for identifiable legal reasons alone based on that opinion. It was in those circumstances that the DPP believed there was no impediment to him making the decision to appeal the ruling of the Recorder. The involvement of the DPP and counsel was not such as gave rise to any abuse of the process of the court. Based on counsel's opinion about the legal issues whoever made the decision, an appeal was likely in any event. The prosecution had a statutory right of appeal and a fair hearing of the application for leave to do so was inevitable as it gave rise to matters of law alone. Therefore no abuse of process could arise. Drawing on public law authorities it was submitted that any review of a prosecutorial decision (in this case to appeal) was a highly exceptional remedy. It was submitted that something more than mere inadvertence or error of judgment was required before the court should intervene. In the absence of evidence of bias, bad faith or dishonesty the well-informed observer would recognise that the DPP was simply exercising his statutory function in appealing a ruling of the Recorder which he considered, based on counsel's opinion on a matter of law, was incorrect. Therefore no issue of bias, unfairness or abuse of process could be said to arise.

[18] The Public Prosecution Service was established by Section 29(1) of the Justice Act 2002. The Service consists of the Director of Public Prosecutions, the Deputy Director Public Prosecutions and appointed members of staff (Section 29(2)). The Director may designate any member of staff who is a member of the Bar of Northern Ireland or a solicitor to be known as a Public Prosecutor. Section 31 provides that the Director must take over conduct of all criminal proceedings instituted in Northern Ireland on behalf of any police force and that he may institute and have conduct of criminal proceedings in any other case where it appears appropriate for him to do so. Section 36 empowers the Director to delegate any of his powers and to appoint independent counsel to conduct criminal proceedings on behalf of the Public Prosecution Service. Section 36 provides –

> "36. Exercise of functions by and on behalf of Service

(1) The Director may delegate any of his powers (to such extent as he determines) to—

(a) any Public Prosecutor, or

(b) any other member of staff of the Public Prosecution Service for Northern Ireland.

(2) The Director may at any time appoint a person who is not a member of staff of the Service but who is a barrister or solicitor in Northern Ireland to institute or take over the conduct of criminal proceedings or extradition proceedings assigned to him by the Director.

(3) A person conducting proceedings assigned to him under subsection (2) has all the powers of a Public Prosecutor but must exercise them subject to any instructions given to him by a Public Prosecutor."

[19] Senior prosecuting counsel and the DPP waived their legal privilege in respect of counsel's opinion on the merits of an appeal against the ruling of the Recorder. It is clear from that document that the appeal raises issues of law alone. The challenge to the involvement of the DPP and counsel does not in our view give rise to problems of abuse of process as that principle has developed over recent years. Equally it does not give rise to the kind of questions posed in matters relating to allegations of judicial bias, whether perceived or actual and whether a judge should recuse himself. It is not a judicial matter. It does however raise an issue fundamental to the criminal justice system. This is the strict dichotomy between the prosecution and the defence in any criminal trial. The simple question is whether counsel, previously engaged on behalf of a co-accused in a criminal trial who pleads guilty, should at a later date and when performing a different public function, act on behalf of the prosecution by deciding to appeal a ruling by the same judge in a case in which he had been briefed as defence counsel, albeit in a very limited role, when the criminal trial, of which he was temporarily a part, is still on-going. Posed in this way it can be seen that the question could have the effect of clouding the sharp distinction between the roles of the prosecution and the defence in the criminal trial process. This court has an obligation to ensure that the integrity of that system is rigorously maintained. Prosecution appeals are strictly controlled as the wording of Article 17, set out above, amply demonstrates. They can only proceed with leave, either of the trial judge or the court of appeal. Part IV of the 2004 Order gives no indication as to the criteria to be taken into account in deciding whether to grant leave to the prosecution to appeal or not to grant leave. No limit has been placed on the discretion of the court in deciding whether to grant leave. In deciding whether to grant leave or not the court should apply a broader interests of justice approach (see R v A [2009] 1 Cr App R 21). This court has a wider

responsibility in respect of the integrity of the administration of criminal justice, particularly where an error of judgment has occurred. Article 20(5) of the 2004 Order provides that where this court allows an appeal it may not make an order for a fresh trial or for the resumption of proceedings in the Crown court unless it is in the interests of justice to do so. Thus a consideration whether to grant leave to appeal under Part IV of the 2004 Order is not simply a matter of asking whether there is an arguable case. Accepting as we do that no question of bias or bad faith arises, nonetheless we concluded that this was not an appropriate case in which to grant leave for the reasons given above.