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Judgment: approved by the Court for handing down
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THE QUEEN

-v-

ANDREW McBRIDE

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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Coghlin LJ (delivering the judgment of the court)

[1] This is an appeal by Andrew McBride ("the appellant") from his conviction of blackmail contrary to section 20 of the Theft Act (Northern Ireland) 1969 ("the 1969 Act") by Her Honour Judge Philpott QC, Deputy Recorder of Belfast, sitting at Belfast Crown Court on 14 June 2013. Mr Frank O'Donoghue QC and Mr Farrell appeared on behalf of the appellant while Mr Philip Mateer QC and Mr Tannahill appeared on behalf of the DPP. The court is grateful to both sets of counsel for their carefully prepared and succinctly delivered written and oral submissions.

The factual background

[2] The appellant was tried together with a number of co-accused also charged with blackmail, namely, Glen Benson, David Walsh and Richard Barry. A fifth individual, Martin Fleming, was charged with a separate count of blackmail. Both counts related to threats made to a witness known as witness A in an attempt to exhort £10,000.

[3] Witness A and witness B were cohabiting partners and in or about 2006 witness A met and became friendly with Mr Fleming in the course of a mutual interest in buying and selling motorcycles. Witness A sustained an accident at work as a result of which he suffered serious back injuries. He gave evidence that he took cannabis for pain relief. He said that, upon some occasions, he gave cannabis to

Mr Fleming and another individual and Mr Fleming agreed that, on occasions, he had bought cannabis from witness A.

[4] It seems that Mr Fleming and witness A had a disagreement relating to the inability of witness A to afford to purchase a car from Mr Fleming and, as a result, neither saw each other for a period of time. At about 7.00 pm one night in September 2009 Mr Fleming appeared outside witness A's house persistently demanding a cannabis cigarette, which witness A eventually provided. On the following day Mr Fleming returned and told witness A that he had been sent by the Glenburn UDA, that there was another person in the car with him who was a UDA scout, that he knew that witness A was growing cannabis, that he was there to collect the cannabis and that if it was not provided witness A would be fined £10,000. In addition, he indicated that witness A's cars, motorbikes and house would be burned if he did not pay.

[5] It appears that witness A subsequently contacted some individuals whom he believed to have connections with the UDA for assistance but that he was told that this matter had "gone all the way to the top" and that nothing could be done about the threats. Witness A decided that he would have to pay the money and he arranged to hand over a sealed envelope containing £2,900 at an agreed pick up in the McDonald's car park in Newtownards. That evening, after making the transfer, witness A received a phone call from someone indicating that the money had not been received. On 16 September three further individuals claiming to be from west Belfast UDA called at witness A's house and demanded the £10,000. They were aggressive and threatened witness A. Witness A was told that he would have to make the payments in accordance with an agreed schedule and he was given a telephone number to contact. The Crown's case was that the appellant collected four envelopes containing money from witness A, twice in the McDonald's car park in Newtownards and twice at witness A's home. Upon each occasion, the password "lemonade" was used by the appellant.

[6] The appellant was arrested at the Ivy Bar in Newtownards on 22 October 2009 and, on the following day, he was interviewed by the police, in the company of his solicitor, between 12.09 and 16.16. The appellant initially claimed that he had walked to the Ivy Bar for the purpose of watching a football match between Benfica and Everton. When he was told that he was being arrested for suspected involvement in the offence of blackmail his response was "no comment". He made a similar response to a series of allegations that were put to him by the police indicating his involvement in the alleged offence as being the person who received the envelopes containing money from witness A.

[7] The appellant was then shown CCTV film of him collecting envelopes from witness A and, at that point, he asked for an opportunity to consult in private with his solicitor. That was granted. He then asked to speak to the police again and commenced by saying:

> "Right let's see I'll start at the start. I did pick up envelopes on behalf of Dicky Barry, is that his second name yeah Dicky Barry, Dicky even. He had asked me to do it and I done it for him. He's never, he's never threatened me in any way but I feel a bit awkward, that's probably not even the right words but anyway I agreed to pick them up, I was told when, I did not know what was in the envelopes, I basically just picked them up, dropping them off and then away I went. Twice at McDonalds there I did pick up envelopes for him maybe once at the house but I don't know the address of that house cause what you call it I know, I know where it is but I'm not very good with names or addresses but I sort know where it is. Picked one up there under, at no time did I threaten your man or anything like there, I did not know what was in the envelopes I was just asked to pick them up, I never opened them or nothing cause they were sealed. Your man would tell you that. As I say I passed on the envelopes and away I went. I do not know that the envelopes or anything are for, I just delivered them and away I went and that's basically all I know. But I never once did I ever threaten your man, never once. I don't even honestly know his name, I know what he looks like but never once did I threaten in any way, shape or form."

[8] As the interview progressed the appellant admitted handing over a piece of paper which he had been told to give to witness A. He agreed that he had used the password "lemonade" when he received the envelopes and that he had been told to use that word by the accused Barry. He denied that he had ever been threatened by Mr Barry and continued to maintain that he did not know what was in the envelope. When asked why he carried out this activity on behalf of Mr Barry he said "He's the type of guy that you wouldn't sort of like to say no to". He denied that he himself had ever been a member of or associated with the UDA but agreed that he was sure that witness A must be "worried out of his mind". When asked later in the interview as to why he had not been forthcoming at an earlier stage he said:

> "Well what do, what do you say eh, you're telling me you says I, I work for him and accusations about the UDA and things like there. That's not, that's nowhere near true, you know I might have been silly and maybe done his dirty work for him if you like, but I am in no organisation whatsoever. As far as what was going on I, I didn't know what was in them envelopes or nothing like that there whatsoever. I

> mean what do you say, this is all new to me. I've never had all this here done before, the only thing I was ever done for is driving without a licence once before and that was years ago. I'm never in trouble with the police."

The grounds of appeal

[9] The court granted Mr O'Donoghue leave to amend his notice of appeal the grounds of which, as amended, were as follows:

> "(*a*) The Learned Trial Judge, in the course of her reasoning as expressed in her judgment, failed to demonstrate that she had taken into account the need to make a finding that the Appellant had acquired the requisite knowledge of his co-accused's criminality by the time that he collected any of the monies from witness A. Nor did she make any such finding. It was essential that she did so in order to convict the appellant.
>
> (*b*) The Learned Trial Judge, in drawing an inference that the lies told by the Appellant during the course of his first interview were supportive of the Appellant's guilt (as opposed to a mere demonstration of his lack of reliability or credibility), failed to consider the issue of the Appellant's lies in accordance with the direction in R v Lucas. Had she done so, it was reasonably possible that she would have drawn no inference adverse to the appellant.
>
> (*c*) The Learned Trial Judge, convicting the Appellant, took into account the failure of the Appellant to give evidence. In doing so, she failed to identify the inference that she was drawing supportive of the appellant's guilt from the fact that he failed to give evidence. She was required to do so if, as appears to be the case, she did draw an inference adverse to the Appellant from the fact that he failed to give evidence in his own defence."

The parties' submissions

[10] Mr O'Donoghue submitted that the learned trial judge erred in reaching a conclusion that there was any, or alternatively any adequate, evidence to support the finding made at paragraph [103] of her judgment that the appellant knew that the co-accused were involved in some sort of criminal activity in arranging for the money to be collected from witness A and that it must have been within his contemplation that blackmail was the offence that was being committed. He further argued that it was incumbent on the learned trial judge to set out in the course of her judgment the reasons why she concluded that the appellant's lies were supportive of his guilt. Mr O'Donoghue submitted that the learned trial judge had failed to comply with the threefold test set out in R v Lucas [1981] QB 720 by asking herself:

(*a*) Was the lie deliberate?

(*b*) Did it relate to a material issue?

(*c*) Was there no innocent explanation for it?

He submitted that, properly analysed, it was open to the learned trial judge to conclude that the appellant's lies were merely a reflection of his lack of reliability and should not be treated as evidence supportive of guilt. Finally, Mr O'Donoghue submitted that the learned trial judge had failed to adequately explain the inference that she had drawn from the appellant's failure to give evidence and/or she had failed to identify any or adequate reasons for reaching the conclusion that such an inference should be drawn.

[11] By way of response Mr Mateer submitted that the evidence supported a finding that the appellant had been acting as part of a joint enterprise and that the learned trial judge was entitled to conclude, in accordance with the test set out by Lowry LCJ in R v Maxwell [1978] 1 WLR 1363, that it was within the contemplation of the appellant that blackmail was one of the possible offences being committed. Mr Mateer further argued that it was not the mere act of lying in interview but the nature of the lies told and the changing pattern of the appellant's account which fell to be considered by the trial judge coupled with the very significant admission late in the appellant's interviews that:

> "Alls I was told was just turn around and say to your
> fella lemonade then he'll give you the money."

In response to the third argument advanced by Mr O'Donoghue Mr Mateer submitted that the common sense inference to be drawn from the failure of the appellant to give evidence was that there was no reasonable possibility of an innocent explanation and that, in such circumstances, the learned trial judge was entitled to conclude that the guilt of the appellant had been established citing, in

support, R v McClernon [1992] NI 180; R v Murray [1993] NI 105, subsequently affirmed on appeal to the House of Lords in Murray v DPP [1994] 1 WLR 1.

The judgment

[12] The learned trial judge summed up the relevant evidence against the appellant between paragraphs [64] and [71] of her judgment in the following terms:

> "[64] The evidence in respect of McBride includes the assertion by witness A in evidence that although he did not identify McBride he said that the lad who collected the money from him at McDonald's car park while under police surveillance on 14 October 2009 was the same person who had previously collected his money at a his house and on one other occasion from the same car park. Witness A was not challenged about this evidence.
>
> [65] The use of the password 'lemonade' shows, the prosecution say, that he was collecting the money on behalf of Barry. The prosecution also rely on the fact that when first interviewed by the police he denied going to the bar to meet anyone else but said he was going to watch the Everton v Benfica match. He further stated that he had simply got a lift to the Halifax Building Society from Mr Walsh and that their meeting had not been pre-arranged.
>
> [66] When the allegation was put to him that he had gone to the car park to collect money from witness A he denied that he had done so. However when he had been advised that he had been under police surveillance and was seen taking an envelope from witness A at McDonald's car park he accepted that he had picked up envelopes on behalf of Dicky Barry. However he went on to say that he did not know what was in the envelopes.
>
> [67] He told police he was never cheeky with your man, meaning witness A.
>
> [68] This answer raises the question as to why he felt the need to say that. Was it to let the police know he was not putting pressure or acting in a threating way towards witness A because if that is the case it is

> clear in the view of this court that he knew someone was.
>
> [69] When asked by police did Walsh ever discuss code words with him he replied 'Alls I was told was just turn round and say to your fella lemonade then he'll give you the money'. That rather belies his earlier answer that he did not know what was in the envelopes.
>
> [70] Mr McBride clearly lied in interview about what he knew about the collection of this money and he did not give any evidence to explain his answers so I have no explanation from him dealing with the reason he lied.
>
> [71] The prosecution say it is an inescapable conclusion applying the test set out by Lowry LCJ in R v Maxwell [1978] 1 WLR 1363 at 1375B that blackmail must have been in McBride's contemplation when he went to collect the money from witness A and take it to Barry at the Ivy Bar."

[13] The learned trial judge set out her findings with regard to the evidence against the appellant at paragraphs [100] to [104] as follows:

> "[100] In relation to Mr McBride Mr O'Donoghue has argued that there is not a sufficient factual basis on which to be satisfied beyond reasonable doubt that Mr McBride had knowledge that the money he collected from witness A was given to him as a result of threats and menaces.
>
> [101] The Crown evidence referred to herein when examined indicates a greater knowledge by Mr McBride of what was going on. Why otherwise would he have lied to the police and only accepted that he had collected the money when he was told of the police surveillance. He knew he was giving the money to Mr Barry and he also knew that it was money that he was collecting because he had told the police that Walsh had not told him about any password but that 'all's he told me (referring to Walsh) was that the money would be in the envelope'.

> [102] He did not give evidence and the court can see no reason other than that he wanted to avoid the possibility of further incriminating himself during the cross-examination. It would have undoubtedly have been put to him that he had said in interview about Mr Walsh telling him that all he had to do was collect the money. This of course then would have been evidence against Mr Walsh.
>
> [103] This court is satisfied beyond reasonable doubt that unwarranted demands were being made from witness A. Even if he was not aware of the exact threats he knew that Walsh and Barry and Benson were all involved in some sort of criminal activity in relation to collecting money from witness A and it must have been within his contemplation that blackmail was the offence that was being committed.
>
> [104] He may not have been the instigator but he must have known what was going on or why else would he have distanced himself from Walsh in his police interviews. I am satisfied beyond reasonable doubt that Mr McBride is guilty of count 1."

The relevant authorities

[14] The appellant was convicted on the basis that he was a secondary party. Secondary parties are those who aid and abet, counsel or procure the commission of a crime. The leading authority in this jurisdiction on the mental element necessary to establish liability as a secondary party for a crime is DPP v Maxwell (1978) 1 WLR 1350. In the course of delivering his judgment in that case Lord Scarman referred to the principle articulated by Lowry LCJ in the Court of Criminal Appeal in this jurisdiction that the guilt of an accessory springs from the fact that he contemplates the commission of one (or more) of a number of crimes by the principal and that he intentionally lends his assistance in order to enable such a crime to be committed (R v Maxwell [1978] N.I.42 at p.58). Lord Scarman went on to observe, at page:

> "The principle thus formulated has great merit. It directs attention to the state of mind of the accused – not what he ought to have in contemplation, but what he did have: it avoids definition and classification, while ensuring the a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation. He may have in contemplation only one offence, or several: and the several which he

> contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made. Although the court's formulation of the principle goes further than the earlier cases, it is a sound development of the law and in no way inconsistent with them. I accept it as good judge-made law in a field where there is no statute to offer guidance."

[15] At paragraph 71 of R v Bryce [2004] EWCA Crim. 1231 the Court of Appeal in England and Wales helpfully set out what must be proved to establish the liability of a secondary party who assists another who commits a crime in the following terms:

(*a*) An act done by D which in fact assisted the later commission of the offence,

(*b*) That D did the act deliberately realising that it was capable of assisting the offence,

(*c*) That D at the time of doing the act contemplated the commission of the offence by A, ie. he foresaw it as a 'real or substantial risk' or 'real possibility' and,

(*d*) That D on doing the act intended to assist A in what he was doing.

The inferences to be drawn from lies

[16] Proved lying is not itself evidence of guilt: a person may lie for many reasons, for example to bolster a true defence, to protect someone else, to conceal some other disgraceful conduct or out of panic or confusion – see R v Duffy and Chivers [2012] JBNIL at paragraph [89]. In R v Lucas [1981] QB 720 the court held that, in order to rely upon lies on a part of the accused as supporting evidence of guilt, as opposed merely reflecting on his credibility, a threefold direction should generally be given to a jury in the following terms:

(*a*) The lies must be deliberate and must relate to a material issue.

(*b*) They must be satisfied that there was no innocent motive for the lie, reminding them that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or a wish to conceal disgraceful behaviour.

(*c*) The lie must be established by evidence other than that of the witness who is to be corroborated.

The inferences to be drawn from failure to give evidence

[17] Mr O'Donoghue has conceded that the prosecution established a prima facie case against the appellant at first instance. Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 ("the 1988 Order") permits the trial judge to draw an adverse inference from failure on the part of an accused to give evidence, provided that the prosecution has established a prima facie case. In R v Gamble and Others [1989] NI 268 Carswell J sitting in the Crown Court in a case concerning, inter alia, the extent of knowledge on the part of accessories, observed:

> "For present purposes I think it sufficient to say that where the extent of the knowledge of an accused may be ambiguous or uncertain on the wording of the admissions made by him, the court may be entitled to draw an adverse inference about the true extent of that knowledge in consequence of his refusal to give evidence."

[18] While this court will give careful consideration and considerable weight to inferences drawn by the learned trial judge, it is important to bear in mind the observations of Gibson LJ in R v Gibney and Others [1986] 4 NIJB at page 8:

> "The Court of Appeal is not at liberty to review the evidence and form its own conclusions as to its effect contrary to that of the trial judge except within the limits already indicated; but it does have a duty to reverse a conviction if it considers that the verdict is unsafe and unsatisfactory, that is to say, if having regard to the strictness of proof required in a criminal case, the evidence is such that it is left at the end of the appeal with what has been called a 'lurking doubt which makes one wonder whether an injustice has been done'. An example of such a case would be where the trial judge has drawn an inference of guilt from primary facts where in the opinion of the Court of Appeal that inference was not the only practical inference and that there was a reasonable alternative conclusion which was consistent with innocence. But as against that an Appellate Court must be careful not to resort to conjecture or to its own estimate of a balanced situation as a means of rejecting the trial judge's conclusions."

Discussion

[19] We have set out the findings of fact reached by the learned trial judge earlier in this judgment. They included the appellant's admitted repeated collection of envelopes containing money from witness A, a man whom he had not previously known, upon four occasions, twice in a car park and twice at his home. The collections were performed on behalf of Dicky Barry and involved the use of a password. The envelopes containing money were then taken to Mr Barry at the Ivy Bar. In addition, although not specifically mentioned by the learned trial judge, the appellant had admitted to the police that, while he had not been specifically threatened by him, Dicky Barry was the type of guy that "you wouldn't want to say no to but if you do you don't know what's going to happen". When asked by the police how he felt now about his activities the appellant had said:

> "Well now I know there's money, money involved and things like that there, I'm sure, your man witness A I'm sure he must be worried out of his mind. See I've never done anything like that before, never."

Later, in the course of police interview, after denying any involvement in the UDA the appellant had said:

> "… You know I might have been silly and maybe done his dirty work for him if you like, but I'm in no organisation whatsoever."

[20] The learned trial judge also drew adverse inferences against the appellant from his initial lies to the police during interview and his eventual failure to give evidence at the close of the Crown case.

[21] The general duty upon judges to provide reasons for their decisions was considered by Henry LJ in Flannery v Halifax Estate Agencies [2000] 1 WLR 377 when he conceived of it as a function of due process. Fairness requires that the parties should be left in no doubt as to why they won or lost and, in addition, the duty concentrates the mind of the judge who must explain why he or she has reached the particular decision. It is important to bear in mind the duty of a judge giving his reasons in a non-jury trial of a scheduled offence as set out by Lowry LCJ in R v Thompson (1977) NILR 74 at 83:

> "He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of

> the facts for decisions by others. His task is to reach conclusions and to give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts."

The judge is not bound to spell out every elementary proposition of law, and a judgment will not be defective for want of a detailed treatment of uncontroversial rules of law so long as there no indication to indicate that the judge has misapprehended the law in a material respect – see R v Graham [1996] NILR 157 at 170. In R v Thain [1985] NILR 457 Lord Lowry LCJ observed at page 478:

> "Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, nor is the reasoning carried out in sealed compartments with no intercommunication or overlapping, even if the need to arrange a judgment in a logical order may give that impression."

[22] With the assistance of the perceptive and careful analysis provided by Mr O'Donoghue's submissions we have applied the above principles to the judgment of the learned trial judge bearing in mind that, for various reasons that were explained to this court, a very significant period of time expired between, for example, the completion of witness A's evidence and the delivery of the judgment. In addition, we have reminded ourselves of the need to observe caution when reviewing a judgment with the benefit of hindsight.

[23] It is clear that the question as to whether the evidence called on behalf of the prosecution was adequate to establish the appropriate knowledge on the part of the appellant beyond reasonable doubt was specifically drawn to the attention of the learned trial judge by Mr O'Donoghue. She found as a fact that, while he may not have been aware of the exact threats used, he knew that the co-accused were all involved in some sort of criminal activity aimed at the extraction of money from witness A and that it must have been within his contemplation that blackmail was the offence being committed. It is the function of the trial judge to find the facts and we consider that there was sufficient evidence to warrant such a finding.

[24] It is clear that the learned trial judge also took into account the lies told by the appellant in his initial police interviews in relation to determining guilt. In so doing, she did not refer to or set out in detail the Lucas test. While she may not have been obliged to do so, it might have served as a helpful reminder of the potential reasons for lies other than guilt. However, no such reasons were articulated for the appellant's lies during the course of his police interviews or evidence. For example, it was not suggested that the appellant believed that he was required to collect the

money in the course of some innocent but secret purpose or some discreditable or unlawful activity other than blackmail. Disclosure of the police surveillance simply resulted in the appellant confessing that he had been involved in the collection of money from witness A on behalf of Dicky Barry and that he knew significantly more about the operation and those whose instructions he carried out than he had originally been prepared to disclose.

[26] It is also clear that the learned trial judge drew an adverse inference from the appellant's failure to give evidence in his own defence. At paragraph [102] of her judgment she confirmed that she was unable to ascertain any reason for his omission to do so other than the possibility of further self-incrimination. She also included a reference to potential cross-examination producing evidence against Mr Walsh. With the benefit of hindsight, it might have been clearer to put the reference to Mr Walsh in the context of drawing an inference that the appellant had no innocent explanation to counter the evidence produced on behalf of the prosecution. In the event, despite the well-constructed submissions advanced by Mr O'Donoghue, we have not been persuaded that the conviction of the appellant should be regarded as unsafe and, consequently, his appeal against conviction will be dismissed.