**Neutral Citation No. [2014] NICA 60** | *Ref:* **MOR9377**

*Judgment: approved by the Court for handing down* | *Delivered:* **10/09/2014**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

---

**THE QUEEN**

**-v-**

**MARTIN McCAULEY**

---

**Before: Morgan LCJ, Girvan LJ and Coghlin LJ**

---

**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal by way of a reference by the Criminal Cases Review Commission (CCRC) pursuant to the powers contained in Part II of the Criminal Appeal Act 1995 in respect of the conviction of the appellant by Kelly LJ on 2 February 1985 for the offence of possession of three rifles in such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession for a lawful object, contrary to Article 23 of the Firearms (Northern Ireland) Order 1981. He was sentenced on 15 February 1985 to 2 years' imprisonment suspended for three years.

**Background**

[2] It was not disputed that on 24 November 1982 about 4:20 PM three members of an RUC patrol surrounded a hay shed at 12 Ballynerry Road North, an address in the country about 3 miles from Lurgan. The appellant and Michael Tighe were inside the shed. The police fired into the shed killing Tighe and severely wounding the appellant. They pulled the appellant out of the shed and when they entered they found three rifles lying on bales of hay and the dead body of Tighe. It is common ground that there was no gunfire directed at the police from inside the shed and no ammunition was found in the rifles or in the shed. The rifles were examined and, although capable of firing, were old, single shot and heavily corroded with rust.

[3] The Crown case was that an RUC mobile squad unit of three unmarked police vehicles operating in the Lurgan/Portadown area throughout the day of 24 November 1982 received certain information which caused the vehicles to take a route along the Charlestown Road, Portadown, and then into Ballynerry Road North stopping outside number 12 shortly before 4:20 PM. Three members of the first police vehicle of the patrol, Sgt X and Constables Z and Y, each armed, made their way past a dwelling house to the hay shed and took up positions on either side of the front door close up against the front wall. As they stood there they heard a metallic noise from within like a rifle being cocked and one of them heard muffled voices. Sgt X from his position on the immediate left of the door shouted into the barn, "Police – throw out your weapon". There was no reply. He repeated the warning and again there was no reply. Then Constable Z at the immediate right of the door pulled away some of the wood of the makeshift door enabling Sgt X and himself to see a man inside the barn to their right moving slowly forward and holding a rifle waste high pointing in their direction.

[4] The Crown case was that this was the appellant. Sgt X and Constable Z fired almost simultaneously at him. Constable Z then pulled away more of the door and he and Constable Y were able to see a second man, Tighe, in the barn to their left and high up among the bales of hay. Constables Z and Y asserted that he too was holding in both hands a rifle about waist high pointing towards them. Constable Y fired a number of single shots from his rifle. Sgt X then moved back along the wall of the shed to his left, saw through the window the shadow of a man fairly high up in the barn and fired a burst of shots through the window. He moved forward to his original position and saw the first gunman again. Sgt X used his sidearm to fire three rounds at this man. He saw him fall back, then quickly spring up again and throw his rifle forwards onto the hay bales. Constable Z reached in through a gap at the side of the entrance door and pulled the appellant out of the barn. Constable Y saw Tighe reappear to his left holding and pointing a rifle. He fired at him and saw Tighe fall backwards.

[5] The learned trial judge was aware that initially each of the police officers had knowingly given a false account in their first written statements stating that Sgt X had seen a man armed with a rifle at the hay shed and communicated this to Constables Y and Z. This was as a result of the briefing which they received from superior officers from Special Branch after the shooting, who told them that they were required to say it and under orders to do so. This account was intended to disguise the fact that the patrol had been directed to the hay shed on Special Branch information. It was claimed that the disclosure of the truth would have put the source of the information at risk.

[6] That raised obvious issues about the credibility of the police officers. The learned trial judge was further concerned about the inconsistency between the forensic evidence dealing with the firing of the shots and the position of the officers as stated by them in oral evidence. He expressed considerable doubt about the allegation that Tighe and the appellant each held and pointed a rifle in the direction of the officers. He noted that the rifles were without ammunition. It was suggested that the appellant and Tighe each reappeared, each holding and pointing a rifle, a second time after the police had fired into the hay shed. He found it difficult to accept that they would have reappeared in exposed places with their unloaded rifles after a burst of gunfire had been directed towards them. He concluded that in light of its unreliability he should exclude the evidence of the police officers and its implications from his consideration and adjudication.

[7] He then turned to the evidence of the appellant. He indicated that he did not believe a word of the appellant's explanation as to how he and Tighe came to enter the barn. He was satisfied beyond reasonable doubt that they entered for the purpose of handling or working at these rifles and that they were at all material times in their joint possession.

**CCRC investigation**

[8] The CCRC gained access to sensitive material held by the PPS and the Security Service. There was also made available to the Commission the report of the independent enquiry into the hay barn shooting which was carried out between 1984 and 1987 by John Stalker, the then Deputy Chief Constable of Greater Manchester Police, and Colin Sampson, the then Chief Constable of West Yorkshire Police. These materials disclosed that there was an eavesdropping operation carried out at the hay barn prior to and during the shooting of 24 November 1982. The operation was conducted by RUC Special Branch with the technical assistance of the Security Service. The fact of the operation was revealed to the DPP in the circumstances set out below but not to the trial judge or the defence.

[9] The DPP was not informed, however, that the eavesdropping operation produced audio tape recordings of events immediately before and during the RUC raid on the hay barn on the day of the shooting. The tape recording of the RUC raid on the hay barn, according to the recollections of those who listened to it, revealed that no warnings were shouted by RUC officers before they first opened fire on the barn. In November 1982 a senior RUC officer destroyed what he believed was the only copy of the tape, because he considered it potentially damaging to the RUC. Transcripts of the audio recordings were made to which the Security Service had access. The CCRC discovered a memo dated 25 November 1982 from an officer who

said that he had learnt that the RUC officers had exceeded their orders and shot the terrorists without giving them a chance to surrender. The Deputy Head of Special Branch had had the tape and monitor logs destroyed because of the deep embarrassment this might cause.

[10] In fact an unauthorised copy of the relevant tape had been made by the army and eventually came into the possession of the Security Service. This copy was retained by the Security Service until the summer of 1985 when it was destroyed. That means that this copy of the tape was held by the Security Service at the time of the appellant's trial.

[11] As a result of the incident at the hay barn the DPP was investigating not just the possible prosecution of the appellant but also whether any criminal offence had been committed by the police officers involved in the shooting. The CCRC investigation established that on 21 June 1983 the Deputy Head of Special Branch attended a meeting at the DPP's office in which he indicated that police had responded to general intelligence information that PIRA were active in the area. The minute of that meeting suggests that the senior officer of RUC Special Branch deliberately misled the DPP's office by concealing the eavesdropping operation. A memo of the meeting was then sent to the Security Service advising them that the full intelligence background had not been disclosed because DPP staff had no need to know.

[12] The DPP's office was dissatisfied with the information provided and issued further detailed directions, including a request for radio transmissions relating to the incident, and directing the examination and retention of all logs and records made concerning the incident. On 12 August 1983 the DPP was informed by the Security Service that there had been an eavesdropping device but was not told that any recording or transcription had been prepared. Although the DPP directed on 15 September 1983 that on the evidence submitted a prosecution of the RUC personnel involved was not warranted, he formally initiated a request for an independent investigation of the events at the hay shed on 11 April 1984 which was carried out by Mr Stalker.

[13] Mr Stalker made enquiries in relation to any recordings and/or transcripts from the eavesdropping device. The report, eventually prepared by Mr Sampson, indicated that it was clear that the RUC had no intention of volunteering the device. Mr Stalker met with a senior legal adviser to the Security Service on 28 January 1985. It was agreed that the request for access to the device and its product as crucial evidence was reasonable. The Security Service agreed that it would co-operate fully but stated that the actual product of the device was the property of the Chief

Constable of the RUC. It is quite clear that the senior legal adviser to the Security Service failed to inform Mr Stalker that the Security Service had retained its own copy of the relevant tape recording. That officer knew of the tape because he had been informed of its existence at the end of March 1984. It is also clear that the officer was aware of the prosecution of the appellant because in a memo dated 9 January 1985 he referred to the fact that he had been informed that the prosecution of the appellant was going ahead.

[14] Mr Stalker was also highly critical of the manner in which the police investigation into the incident was conducted. Shortly after the shooting the Detective Chief Superintendent in charge of the investigation was advised by officers junior to him that the scene of the incident was out of bounds to CID. He did not, therefore, arrive at the scene until about one and a half hours after the incident had occurred. At that time members of Special Branch were busy at the scene but their presence or purpose was not questioned. It was suggested that this was to ensure that the Security Service eavesdropping device could be removed.

[15] He noted that senior officers appeared unwilling to follow natural lines of enquiry which would have positively identified the involvement of Special Branch before and during the incident at Ballynerry Road North. He noted that the Senior Investigating Officer had not attended at the post-mortem where valuable and significant information should have been gleaned regarding the trajectories of the bullets fatal to Tighe. Neither the officers who fired the shots nor their weapons were made immediately available to members of the CID. The officers were debriefed by Special Branch officers before any interviews were conducted by the CID. The instruction to the officers to make false statements was considered by Mr Stalker to be unprecedented in his experience and without justification. He noted that cartridge cases generated by the shooting were not recovered at the scene of the incident. The only conclusion that he could draw was that they were located and removed by other police officers who were not from the investigating CID team.

**Consideration**

[16] The appellant submitted that his prosecution and conviction constituted an abuse of process as a result of which this court should now find his conviction unsafe. The PPS do not resist the appeal in light of the cumulative effect of the misconduct in this case. The law in relation to abuse of process has been recently considered by the House of Lords in R v Maxwell [2010] UKSC 48 and by the Privy Council in Warren v Attorney General of Jersey [2011] UKPC 10. The general approach was set out by Lord Dyson at paragraph 13 of Maxwell.

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (*per* Lord Lowry in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 , 74 g) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (*per* Lord Steyn in R v Latif [1996] 1 WLR 104 , 112 f )."

[17] In Warren the Privy Council approved the approach of Lord Steyn in relation to the second category of cases.

> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42. Ex p Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Ex p Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful.

> But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

[18] In Maxwell Lord Brown adopted the summary of the approach of the courts of England and Wales to the second category of cases put forward by Prof Choo in *Abuse of Process and Judicial Stays of Criminal Proceedings* 2nd edition (2008).

> "The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged."

That summary was also approved in Warren.

[19] The first question is whether the misconduct of the police in destroying their copy of the eavesdropping tape and the Security Service in not disclosing their copy when they knew that the appellant was facing trial rendered the appellant's trial unfair. As already indicated, the learned trial judge had discounted the police evidence because of his reservations about the weight that he could give to it. His decision, therefore, turned on his assessment of the credibility of the appellant on the issues of how he came to be in the shed and what connection he had with the rifles. The eavesdropping device may not have given much direct evidence in relation to how the appellant entered the shed or what precisely he did when he was there but it seems likely that it would have provided information in relation to what, if anything, was said after the shooting. The appellant's account was that he told the police, after having been pulled out of the shed, that he found the guns there. That

account was rejected by the learned trial judge. It is not possible now to determine what, if anything, was recorded in relation to the events immediately after the shooting but the misconduct of the police in deliberately destroying this source of evidence deprived the appellant of the opportunity to examine the product of the device for the purpose of assisting his defence on that issue. In those circumstances the deliberate destruction of the first tape and the withholding of the copy tape by the Security Service in our view rendered the appellant's trial unfair. On that ground alone, the conviction is unsafe.

[20] The second category of abuse of process requires consideration of the conduct of the authorities. This is a case in which the police officers involved in the shooting lied to the investigating officers when providing their original statements at the direction of senior officers. The briefing of the relevant police officers prior to their making their statements was entirely inappropriate. The tape, which was relevant evidence, was deliberately destroyed. It is at least arguable that the destruction amounted to a perversion of the course of justice. Police initially misled the DPP as to whether there was a listening device. Even when the existence of the device was disclosed by the Security Service, police failed to disclose that there had been an audio recording of the events and a transcription despite a clear direction from the DPP requesting that material. The failure of the Security Service to disclose the tape to Mr Stalker, and to provide it to the prosecution, was reprehensible.

[21] In our view these matters amounted cumulatively to grave misconduct. In considering the balance it is at least some mitigation that the police officers did not attempt to stand over their initial untrue account by the time they came to give evidence. The offence with which the appellant was charged was relatively serious but the learned trial judge acquitted the appellant of the more serious offence of possession with intent to endanger life, having regard to the state of the weapons, and imposed a suspended sentence. For the reasons already given we consider that the appellant was prejudiced.

[22] We consider that this was a case where the misconduct was such that it would be contrary to the public interest in the integrity of the criminal justice system to uphold this conviction. We allow the appeal on that ground also.

**Conclusion**

[23] For the reasons given the appeal is allowed.