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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

CHARLES VALLIDAY

_____

Before: Morgan LCJ, McCloskey LJ and Colton J

_____

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] This appeal raises certain issues concerning the 'No Bill' jurisdiction of the Crown Court under section 2(3) of the Grand Jury (Abolition) (NI) Act 1969.

[2] On 06 December 2019 at Craigavon Crown Court Charles Valliday ("*the Appellant*") having pleaded guilty was convicted of a single count of breaching bail contrary to Article 5(1) of the Criminal Justice (NI) Order 2003. This was preceded by an unsuccessful 'No Bill' application. On 16 January 2020 he was sentenced to 18 months' imprisonment suspended for three years. He appeals against his conviction to this court with the leave of the single judge. His conviction is challenged on a single ground, namely the contention that the presiding judge (per the grounds of appeal) –

> "*… erred in law in failing to accede to the defence application to enter a No Bill under section 2(3) of the Grand Jury (Abolition)(NI) 1969.*"

The Prosecution Case

[3] Article 5 of the Criminal Justice (NI) Order 2003 (the "*2003 Order*") provides in material part:

> "*(1) If a person who has been released on bail fails without reasonable cause to surrender to custody, he shall be guilty of an offence.*
>
> *(2) If a person who -*
>
> *(a) Has been released on bail, and*
>
> *(b) Has, with reasonable cause, failed to surrender to custody,*
>
> *fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable, he shall be guilty of an offence."*

The single offence specified in the indictment was formulated in these terms:

> "*Breach of bail, contrary to Article 5(1) of the Criminal Justice (NI) Order 2003.*
>
> ***Particulars of offence***
>
> *Charles Stephen Valliday, having been released on bail from Maghaberry Prison at 10am on the 9th day of November 2017, failed without reasonable cause to surrender to custody at 3pm that afternoon.*"

[4] It is convenient to note two points at this juncture. First, at the stage when the "No Bill" application was made to the Crown Court judge and refused, the prosecution evidence was the same as at the committal stage. No additional evidence had been served. Second, the application was based on the contention that the committal papers contained no admissible evidence that the Appellant had failed to return to HMP Maghaberry at 3pm on 9 November 2017, as alleged in the Bill of Indictment, with the result that the case against him could not be established. There was no dispute that the Appellant, then a remand prisoner, had been in lawful custody and had been granted compassionate temporary release to attend a relative's funeral.

[5] The starting point in the evidence contained in the committal papers is the written recognizance executed by both the Appellant and on behalf of the Prison Governor on 9 November 2017. This, following the formal recitals concerning the offences for which the Appellant had been remanded in custody, continued:

> "*The Applicant shall be released from 10am on Thursday 09 November 2017 to 3pm on Thursday 09 November 2017 to attend the funeral of his aunt Sarah Valliday, subject to the Applicant being released into the custody of his surety*

> *(Emmanuel Valliday) who shall collect the Applicant from Her Majesty's Prison Maghaberry. The surety shall bring the Applicant directly to 10 Jude Street and from there to the requiem mass at St Peter's Cathedral and thereafter to Milltown Cemetery for the interment. The surety shall then immediately return the Applicant to the Governor of Her Majesty's Prison Maghaberry on or before 3pm on Thursday 09 November 2017. He must remain in the company of his surety throughout the period of his release."*

This is followed by certain restrictive conditions relating to the non-consumption of alcohol and other matters of no consequence in the present context.

[6] The committal papers contained six depositions. These may be summarised as follows:

(i) Prison Officer Ferguson deposed:

> "*On 09/11/17 I was* [Senior Officer in Charge of] *reception. At approx 09.50 hours I read Conditions of Bail Release 09/11/17 from 10.00 hours to 15.00 hours to prisoner Valliday A184. He signed the recognisance papers to state he understood the conditions and I signed to confirm I read them to him. He was released a short time later. Prisoner Valliday, DOB 26/12/71 was committed to HMP Maghaberry on 11/10/17.*"

(ii) The two depositions of Constable Speedy describe the events surrounding the Appellant's arrest on 30 April 2018. The details are unimportant. In short the Appellant was arrested in a fortuitous and unplanned manner on the occasion of an arrest operation relating to another person. This witness was aware that the Appellant was "*wanted for arrest*".

(iii) Next there are two depositions of the arresting officer.

(iv) The sixth and last of the depositions is that of a police constable who describes administering a caution to the Appellant at 11.25 hours on 10 August 2018 and the suspect's mute reaction.

Trial and conviction

[7] On 24 October 2019 the Appellant was committed for trial, unopposed. On 3 December 2019 his case was listed in the Crown Court for arraignment. The "No Bill" application was made by defence counsel on this occasion. It was opposed by prosecuting counsel. The judge refused the application. In refusing the application the judge reasoned (per the transcript):

> *"… a short additional statement would rectify the issue concerned …*
>
> *A short additional statement would rectify that problem that is evident in the papers but not evident in reality."*

[8] On 4 December 2019 the prosecution served additional evidence consisting of a statement made by a different Maghaberry prison officer, in the following terms:

> *"I am the above named person, currently employed as security in HMP Maghaberry. I have checked Prison records and I can confirm that on 9th November 2017 Charles Valliday did not return at 15.00 hours as per his bail conditions. The matter was reported to the PSNI at 15.36 on the same date."*

Sequentially, the next material event unfolded on 6 December 2019 when the arraignment of the Appellant proceeded and he pleaded guilty. As noted sentencing was carried out on 16 January 2020. In passing, during the intervening period a pre-sentence report was commissioned and this recorded *inter alia*:

> *"While Mr Valliday accepts that he did not return to Maghaberry Prison, having been released on compassionate grounds, he advises that he believes that his legal representatives intend to lodge an appeal in this matter … he made an impulsive decision not to return … he spent six months at large, staying in the homes of friends and associates … he had made contact with his solicitor to voluntarily return to custody on the date that he was detected."*

The Central Ground of Appeal

[9] The Appellant's case is encapsulated in three concise propositions in the grounds of appeal:

> *"(a) There was no admissible evidence within the depositions that the accused failed to return to HMP Maghaberry at 3pm on 09 November 2017 as alleged in the Bill of Indictment. Without such evidence the offence could not be made out.*
>
> *(b) There was no admissible evidence that the accused had failed to surrender to bail, the essential element necessarily pre-requisite to the perfection of the charge against him.*

> *(c) The depositions did not disclose a case sufficient to justify putting the accused on trial."*

In a further passage it is contended that the judge –

> *"… erred in law in determining that the evidential deficit in the depositions amounted merely to a formal defect …."*

As our analysis, to follow, will make clear the central issue of law in this appeal is whether the judge, having determined that the statutory test of insufficiency of evidence was satisfied, erred in law in exercising his statutory discretion to nonetheless reject the "No Bill" application. If this question is resolved in favour of the Appellant it will follow that his conviction is unsafe (see *infra*).

The 1969 Act

[10] Section 2(3) of the Grand Jury (Abolition) Act (NI) 1969 provides:

> *"The judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry of 'No Bill' in the Crown book in respect of any indictment presented to that court after the commencement of this Act if he is satisfied that* ***the depositions or, as the case may be, the statements mentioned in subsection (2)(i), do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented.****"*
>
> [Emphasis added.]

This statutory provision has been considered in several decided cases in this jurisdiction.

Decided Cases

[11] In *R v Adams* [1978] 5 NIJB Lord Lowry LCJ offered the following analysis:

> *"Formerly the Grand Jury required to be satisfied that there was a* ***prima facie*** *case before finding a true bill. Here the onus is reversed because the trial ought to proceed unless the judge is satisfied that the evidence does <u>not</u> disclose a case sufficient to justify putting the accused on trial."*

Thus, whereas the onus is plainly on the prosecution at the committal for trial stage, this does not apply in a subsequent 'No Bill' application. Whether either party bears any onus of proof in a section 2(3) application is debatable. We venture not beyond

this observation, as the questions whether there is any onus at all in play and if so the standard of proof do not arise for determination in this appeal.

[12] The issue of the interaction between procedural defects in the prosecution evidence and section 2(3) arose, albeit tangentially only, in *R v Campbell and Others* [1985] NI 19. There many of the witness statements upon which the Appellants were committed for trial contravened the explicit statutory requirement that they be endorsed by the person who recorded them or to whom they were delivered for the purposes of the proceedings. The central issue to be determined by the court in the appeals against conviction is ascertainable from the following passage in the judgment of Lord Lowry LCJ at 363 E/G:

> "*Concluding, as we do, that the endorsement of the witness's declaration demanded by the* [legislation] *is mandatory and that the unendorsed statements of witnesses were inadmissible at the preliminary enquiries and were wrongly received in evidence, we have already noted that without these unendorsed statements there was not evidence to justify the magistrate's committal for trial in any case. In all cases the Defendants were committed for trial and no order to enter 'No Bill' was made by a judge under section 2(3) of the* [1969 Act]. *Each Defendant was arraigned. One pleaded guilty and two not guilty; those two were tried and found guilty and all three were sentenced and have appealed to this court. We now proceed to examine the legal effect of this nexus of events.*"

The Lord Chief Justice continued at 365 E:

> "*To put the question simply …*
>
> *Can the convictions be annulled on the ground that the admissible evidence before the Magistrate did not justify committal for trial?*"

Following an extensive review of the relevant jurisprudence Lord Lowry stated at 375 C/E:

> "*There is, accordingly, substantial authority for, and none against, the proposition that the validity of a committal for trial cannot be challenged on the ground of want of evidence. But there is yet another point which seems to put beyond the reach of argument any contention that the appellants have any remedy based on the allegedly defective committals, now that they have been arraigned, tried and convicted. To convict a person summarily, or to commit him for trial, on evidence which does not support the charge is an error of law in the exercise of jurisdiction and not an example of the absence or excess of*

> *jurisdiction. Therefore the committals, assuming that they are challengeable at all, are not void but voidable and it is therefore of no avail for the Appellants to challenge the committals after they have been convicted. There is abundant authority that this is the kind of error which we are now dealing with.*"

[13] Next Lord Lowry, following consideration of the leading Irish authority of *R (Martin) v Mahony* [1910] 2 IR 695, reiterated the principle that a committal for trial on insufficient evidence is not void as being without and/or in excess of jurisdiction. The Lord Chief Justice continued at 379 H:

> "*After all this discussion, the matter can again be reduced to simple terms. An indictment is a pre-requisite to the trial and conviction. By reason of section 2(2)(a) of the* [1969 Act], *since the stated exceptions are irrelevant, an indictment can be presented only against a person who has been committed for trial. The Appellants have on the face of it been committed for trial, but there was no admissible evidence to justify committal. That deficiency does not destroy the jurisdiction to commit or render the committal null and void. Therefore the committal, indictment, trial and conviction were valid and the convictions appealed from cannot be upset on the jurisdiction point.*"

There follows a discrete passage of note, at 380 C/D:

> "*Finally, if a presiding judge is in the future confronted with irregularly admitted statements it would, in our opinion, be open to him, if that is the sole defect, to refrain from ordering 'No Bill', because he can see that, when the hearing commences, the Crown will be able to present a case: admittedly, as we have seen, the defectively completed written statements could not themselves be put in evidence. Alternatively the Crown could serve notice, when the defect is discovered, of intention to give evidence in the terms of the statements.*"

We observe that this passage is *obiter*. The reason for this is that the sole defect in play in *Campbell* was that of "*irregularly admitted statements*" i.e. witness statements which failed to comply with the governing statutory requirements and should, therefore, not have been admitted in evidence at the committal stage. *Campbell* was an appeal against conviction with no "No Bill" element. In the event all of the appeals against conviction were dismissed.

[14] In *R v McCartan and Skinner* [2005] NICC 20, Hart J, in an oft quoted passage, formulated the following principles relating to section 2(3), at [2]:

> "*(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.*
>
> *(ii) The evidence for the Crown must be taken at its best at this stage.*
>
> *(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the Defendant guilty and in doing so should apply the test formulated by Lord Parker CJ when considering applications for a direction set out in Practice Note [1962] 1 All ER 448.*"

Hart J reiterated these principles in *R v Shoukri and Others* [2008] NIJB 120 at [16].

[15] Lord Lowry's "*sole defect*" statement in *Campbell* was considered in *R v Brady* [2007] NICC 12 and *R v Allison and Another* [2009] NICC 65. In the latter case Judge Smyth stated at [11]:

> "*However when one looks at the reference to this in the text it does not mean that the Lord Chief Justice was permitting fundamental, as opposed to procedural, gaps in evidence to be filled by this means. A criminal statute must be strictly interpreted. The margin of appreciation left to a judge is limited to the terms of the section and the section is clearly a protection for the individual.*"

The judge ordered a No Bill on the ground that the "missing" evidence was "*a basic proof*": see [14].

[16] Notably, in *R v Brady* [2008] NIJB 10 Hart J adopted the same approach to Lord Lowry's "*sole defect*" statement, at [19]:

> "*I am satisfied from this passage that where there is a purely formal defect in the Crown case the judge has a discretion to refrain from ordering a No Bill, if that defect is one which can simply be corrected when the hearing commences by delivering a statement of additional evidence.*"

This passage chimes with its analogue in *Allison* (*supra*).

The Appeal Test

[17] As the appellate jurisdiction of this court in criminal cases is purely statutory, it is necessary to consider the governing statutory provisions. These are contained in sections 1 and 2 of the Criminal Appeal (NI) Act 1980, which provide:

"1. A person convicted on indictment may appeal to the Court of Appeal against his conviction—

(a) with the leave of the Court; or

(b) if, within 28 days from the date of the conviction, the judge of the court of trial grants a certificate that the case is fit for appeal.

Grounds for allowing appeal against conviction

2. (1) Subject to the provisions of this Act, the Court of Appeal—

(a) shall allow an appeal against conviction if it thinks that the conviction is unsafe; and

(b) shall dismiss such an appeal in any other case.

(2) If the Court allows an appeal against conviction it shall quash the conviction.

(3) An order of the Court quashing a conviction shall, except when under section 6 of this Act the appellant is ordered to be retried, operate as a direction to the chief clerk acting for the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."

In short, as confirmed by *R v Pollock* [2007] NICA 34, the sole question for this court is whether it considers the conviction under challenge to be unsafe. It is well established that this entails the application of the test of whether this court, on appeal, has a sense of unease, or a lurking doubt, about the safety of the relevant conviction.

[18] At first blush it might appear that there should be no concerns about the safety of this Appellant's conviction. In brief compass: his committal for trial was unopposed; at the pre-arraignment stage his lawyers argued that a "No Bill" should be entered on the ground that the committal papers did not disclose a case sufficient to justify putting him upon trial; this application was refused by the court; the prosecution immediately thereafter served one short piece of additional evidence; the Appellant was then arraigned; with the benefit of advice he pleaded guilty and was thereby convicted; and he was sentenced thereafter. In this appeal there is no challenge to any of the events postdating the judicial "No Bill" ruling adverse to the Appellant. Whither the unsafety in these circumstances? We shall identify *infra* the correlation between a judicial ruling under section 2(3) infected by error of law and the unsafety of an ensuing conviction.

The Parties' Competing Contentions

[19] It is convenient to consider the parties' central contentions in reverse order. In her skeleton argument the main submission of Ms Kate McKay, of counsel, on behalf of the prosecution was that the (admitted) deficiency in the indictment was formal in nature, was not irrevocably bad and did not give rise to the absence of a fundamental proof in the prosecution case. At the hearing her central submission shifted somewhat, focussing instead on the second stage of the section 2(3) exercise and suggesting that the admittedly missing proof was "*technical*" in nature, with the result that the judge had not erred in law in his exercise of the statutory discretion.

[20] The rejoinder of Mr Michael Duffy (of counsel) on behalf of the Appellant engaged with the fundamental statutory test of unsafety in stark terms: he argued that the conviction is unsafe and must, therefore, be quashed because the indictment should have been quashed as it failed to confer jurisdiction on the Crown Court. He submitted that the legislative intention underpinning section 2(3) is that *where there is insufficient evidence to justify conviction the proceedings should be terminated by the judge*. In response to the court, he submitted that the judge had no basis for exercising his discretion in favour of the prosecution.

Section 2(3) Analysed

[21] Section 2(3) of the 1969 Act prescribes a two stage exercise. At the first stage the judge determines whether the committal papers disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented. At this stage the court is confined to considering the committal papers only. As noted above, the test to be applied is the *Galbraith* test. If the court determines that the committal papers do disclose a "*case sufficient*" in the terms of section 2(3) the exercise is completed. The application to order an entry of "No Bill" must be refused and the second stage does not arise. In contrast, if the court determines at the first stage that the committal papers do <u>not</u> disclose a "*case sufficient*" in the terms of section 2(3) the second stage is reached and the exercise must continue. It is at this stage that the exercise of the court's discretion arises. The existence of this discretion flows from the statutory language "*… shall … have power to order an entry of 'No Bill' ….*".

[22] At this point it is instructive to consider the functions and practice of the grand jury, which was abolished by section 1(1) of the 1969 Act. These are ascertainable from the judgment of Lord Carswell in *R v Clarke* [2008] UKHL 8 at [31]–[35]. As this illuminating treatise shows, the functions and practice of the grand jury were "*founded almost wholly upon ancient usage and not upon statutory enactment*": see [32]. The grand jury was presented with <u>draft indictments</u>. It then considered the oral evidence of certain of the witnesses identified in the draft. In this way the grand jury determined whether to endorse upon the draft indictment a "*true bill*" or "*no true bill*". In making this determination it applied to the test of whether a *prima facie* case had been made out against the accused. A formal indictment followed

only where the determination was one of 'True Bill'. A 'No True Bill' determination meant that there would be no indictment and, hence, no trial. There is one particular feature of the practice of the grand jury to be highlighted. If it determined that the evidence was insufficient to establish a *prima facie* case it did not proceed to exercise any discretion. Rather its "*no true bill*" endorsement upon the draft indictment followed as a matter of course.

[23] Thus section 2(3) of the 1969 Act effected an important change in the law. It did so by requiring the court to proceed to a second stage in every case where it determines that a "*case sufficient*" in the terms of section 2(3) is not established by the committal papers for the purpose of exercising its statutory discretion. In all such cases the court must proceed to the second stage. This new model reflected a clearly identifiable parliamentary intention that a "No Bill" entry should not automatically follow an assessment of insufficient case.

[24] As this judgment has already made clear, at the first stage of the exercise the purview of the court must be confined to the committal papers. This is dictated by the terms of section 2(3). By the same token, a combination of the statutory language and the governing principles identified above make clear that this injunction does not apply in those cases where the second stage of the exercise is reached. At this stage the purview of the court is necessarily of broader scope having regard to the terms in which the discretion is conferred by the statute and the impact of the governing principles which we identify *infra.*

[25] The next question which arises is how the discretion of the court is to be exercised in those cases where the second stage arises. The starting point is that the statutory provision has formulated the judicial discretion in unfettered terms. There is nothing in section 2(3) requiring the court to have regard to specified matters in exercising this discretion. Notwithstanding, there is no unfettered discretion known to the law. Thus, one must look to the policy and objects of this statutory provision in order to determine what the court may legitimately take into account.

[26] Reflection on some further basic dogma helps to illuminate the question of how the judicial discretion at the second stage of the section 2(3) process is to be lawfully exercised. We have already identified in substance the well-known "Padfield" principle: in short, statutory discretions are to be exercised in a manner which furthers the policy and objects of the legislation [*Padfield v Minister of Agriculture* [1968] AC 997 at 1030 b/d, per Lord Reid]. The exercise of every statutory discretion, again by well-established principle, requires the decision maker to identify and consider all material facts and factors, to disregard the immaterial or extraneous and to avoid lapsing into irrationality. An awareness of these juridical barometers should serve to guide judges in the correct direction in making "No Bill" determinations.

[27] It seems uncontroversial to suggest that section 2(3) of the 1969 Act, in common with all measures of criminal justice legislation, is designed to further the

interests of justice. While this is an imprecise term, not susceptible to precise or exhaustive definition, it is necessarily so given the infinite variety of circumstances which may be presented to the judge making the determination under section 2(3). The judge will be guided by Lord Steyn's memorable formulation of the triangulation of interests, discussing Art 6 ECHR:

> "*It is well established that the guarantee of a fair trial under Article 6 is absolute: a conviction obtained in breach of it cannot stand. R v Forbes, [2001] 2 WLR 1, 13, para 24. The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play. ……*"
>
> (*R v A (No 2)* [2002] 1 AC45 at [38])

[28] We develop the foregoing framework of legal principle as follows. One of the themes of certain leading cases is the protection and promotion of the integrity of the criminal justice system. This clearly falls within the embrace of the more general "interests of justice" principle identified above. It is perhaps best illustrated in *R v Clarke* [2008] UKHL 8. There the House of Lords held that the prosecution was irredeemably flawed because the Bill of Indictment had not been signed by the proper officer in contravention of relevant statutory requirement. Furthermore, this invalidity was not cured by the provision of the proper officer's signature at a late stage of the trial. The rationale of this decision included *inter alia* rejection of the prosecution argument that substance should prevail over form. Lord Bingham stated at [17]:

> "*It is always, of course, lamentable if defendants whose guilt there is no reason to doubt escape their just desserts …*
>
> *Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place.*"

Lord Carswell, to like effect at [34], emphasised that the introduction of the statutory procedure requiring the proper officer's signature on the Bill was not "*a matter of mere administrative convenience*" but was, rather, "*a significant step which could not be omitted without the validity of the procedure being affected*".

[29] The striking effect of the decision in *Clarke* was that persons whose guilt could not be seriously debated avoided conviction and punishment. This stark reality has not deflected the senior courts from making comparable decisions in other criminal justice contexts. This is illustrated graphically in *R v Smith* [2000] 1 All ER 263. In

that case the defendant appealed against his conviction on the ground that the trial judge wrongly rejected a submission of no case to answer at the conclusion of the prosecution case. Mantell LJ, delivering the judgment of the English Court of Appeal, stated at 266E/H:

> "*Now that the test for allowing an appeal is simply the safety or otherwise of the conviction, is it competent for the court to consider evidence entertained after the wrongful rejection of a submission of no case to answer? …*
>
> *What if a submission is wrongly rejected but the Defendant is cross examined into admitting his guilt? Should the conviction be said to be unsafe? We think it should. The Defendant was entitled to be acquitted after the evidence against him had been heard. To allow the trial to continue beyond the end of the prosecution case would be an abuse of process and fundamentally unfair. So even in the extreme case the conviction should be regarded as unsafe ….*"

In short, the conviction was adjudged unsafe because the Defendant had been denied his entitlement to a judicial directed jury verdict of not guilty at the close of the prosecution case.

[30] In *R v Hickey and Others* [Unreported, 30 July 1997], cited with approval in *R v Davis and Others* [2001] 1 Cr App R 8 at [58], Roch LJ, giving the judgment of the Court of Appeal, described the integrity of the criminal process as "*the most important consideration*":

> "*This court is not concerned with guilt or innocence of the appellants; but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that* ***the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction****. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.*"
>
> [Emphasis added]

In similar vein, in *R v Martin* [1998] 1 Cr App R 347 both Lord Lloyd of Berwick (at p 353) and Lord Hope of Craighead (at p 356) espoused the (inexhaustive) test of whether the trial process had been "*… such as to threaten either basic rights or the rule of law*".

[31] Judges at every tier of the legal system apply experience, common sense and realism in a variety of ways in the daily exercise of their functions and the discharge of their responsibilities. These are valuable resources. We identify nothing in the language of section 2(3) of the 1969 Act, or the underlying Parliamentary intention, to suggest that these resources may not be deployed – always with caution, of course - in exercising their discretion at the second stage of the statutory exercise. We consider this consonant with *Campbell*. Moreover, resort to these resources can be detected subliminally in decisions such as *Brady*.

[32] One of the questions which this appeal has raised is whether the exercise of the judicial discretion in cases where the second stage of the section 2(3) process is reached will be lawful only where confined to cases where the shortcoming in the prosecution case is formal or technical in nature. We consider that the governing principles as outlined in the body of this judgment do not warrant such a narrow approach. In particular, the *obiter* passage in *Campbell* at page 380C/D is not to be construed in this way. Furthermore, the passage in *R v Brady* [2008] NIJB 10 at [21] does not warrant this construction either. If Hart J had been attempting to prescribe an exhaustive "*purely formal defect*" principle this court would have disapproved. But we are satisfied that he was not purporting to do so. The decision in *Brady* provides a useful illustration of the lawful exercise of the court's discretion at the second stage of the section 2(3) process. It entailed the formation of a predictive evaluative judgement on the part of the court which is in harmony with the governing principles outlined above.

[33] While it would be inappropriate for this court to attempt to provide detailed guidance to Crown Court Judges on how this discretion should be exercised, it is instructive to reflect on a notional spectrum. At one end of this spectrum lie prosecutions which are hopelessly flawed, manifestly lacking in an essential proof or proofs, with no evident corrective mechanism in sight. In such cases the court will find itself reaching the second stage of the section 2(3) process and having to exercise its discretion. In the abstract, it will rarely be in the interests of justice to permit such a prosecution to continue. In contrast, at other points of the notional spectrum the court will encounter cases where the flaw in the committal papers giving rise to the "No Bill" application overcoming the first stage appears susceptible to correction. As the dictum of Lord Lowry in *Campbell* shows, cases of this *genre* may legitimately, depending upon their particular circumstances, justify the exercise of the judicial discretion in a manner which permits the indictment to survive. In practice, and inexhaustively, the evidential flaws in such cases are likely to be formal or technical in nature.

[34] Two practical illustration mays be instructive. In a given case a well prepared prosecutor might, at the second stage of the section 2(3) exercise, seek to bring to the attention of the court some unserved additional evidence, most likely in the form of a witness statement or statements, designed to rectify the flaw or flaws in the prosecution case which has (or have) given rise to the court's determination of the statutory "*case sufficient*" test in favour of the accused person. Subject to elementary

requirements of procedural fairness – which will, fundamentally, entail the provision of reasonable notice to the defendant's legal representatives – the court could, in an appropriate case, consider such evidence and take it into account in determining how to exercise its discretion. Alternatively, the court might receive a representation by the prosecutor that certain further evidence may/can/will be made available. In the first of these instances the court, applying the approach outlined above, will give such weight to the further evidence produced as it considers appropriate. In the second of these illustrations the court will reflect carefully on the desirability of deferring its final determination by an adjournment designed to test whether the further evidence intimated materialises and, if so, its content, mindful always of the undesirability of delay in the criminal trial process.

[35] There is no indication in *Brady* that the court received from the prosecution any material supporting the predictive evaluative judgment just noted. (*Ditto* in *Campbell*). This court considers that the provision of such material by the prosecution is not an essential prerequisite to the lawful exercise of the discretion at the second stage of the section 2(3) process. It is appropriate to add, however, that the provision of such material is likely to render the exercise of the discretion, either way, more robust and, in consequence, less susceptible to successful challenge on appeal to this court.

[36] The illustrations provided above draw attention to the following (inexhaustive) considerations of a practical nature:

(i) Every application to the court for a "No Bill" entry under section 2(3) of the 1969 Act must, procedurally, be made and determined in a manner compliant with all relevant procedural requirements, whether express or implied.

(ii) The parties should normally provide the court with a draft timetabling/case management order, to be approved or modified as the judge considers appropriate.

(iii) Such order will make provision for reasonable notice to both the prosecutor and the court and will also address matters such as skeleton arguments.

(iv) All concerned should, from the outset, have in contemplation the possibility of the two stage exercise arising and the practical and procedural implications which this may entail. Adherence to the foregoing requirements will ensure that the prosecutor makes all of the necessary advance preparations, taking into account in particular, but again inexhaustively, the two illustrations provided in [32] above. All

> concerned must at all times be alert to the imperatives of (a) a fair procedure, (b) the avoidance of unnecessary delay and (c) ensuring that the court is properly equipped to lawfully exercise its discretion in every case where the second stage of the statutory exercise arises. Particular care will be required to ensure that, at the first stage, the court is equipped with nothing other than the committal papers.

[37] To summarise, in every case where the court reaches the second stage of the section 2(3) process it will exercise its discretion by identifying and giving effect to what the interests of justice, as explained and expounded above, require in the particular case. It is through this lens that the decided cases under section 2(3) in this jurisdiction fall to be considered. This prompts the observation that as every case will be unavoidably fact sensitive the court will rarely derive material assistance by comparing the facts of the case of which it is seized with those of earlier decided cases.

[38] The approach to "No Bill" applications exhorted in this judgment should have the desirable effect that first instance judges will not be referred to previous judicial decisions which are of no precedent value, being decisions of courts of co-ordinate jurisdiction and, moreover, made in the particular fact sensitive context prevailing. In future, in most cases it should suffice to alert the first instance judge to this decision which, of course, in matters of principle, is binding on all Crown Courts. The exercise of burdening the judge with, for example, the decisions in *R v Shoukri and Others* [2008] NIJB 120 and *R v Allison and Others* [2009] NICC 65 is unlikely to be appropriate.

[39] One further question which arises is whether this court, on an appeal against conviction, can legitimately take into account evidence which was not available to the first instance judge in determining the application under section 2(3) of the 1969 Act. If this were a court exercising supervisory superintendence in a judicial review challenge the answer would probably be affirmative, having regard to the discretionary nature of judicial review remedies and the breadth of review which this may entail. However, this is an appeal against conviction, to be contrasted with an application for judicial review

[40] The thrust of the decided cases, in particular *Smith* (*supra*), is that an appellate court should disregard events occurring and evidence generated postdating the decision or ruling which in substance is under challenge. In this judgment we have drawn particular attention to the judicial discretion to be exercised at the second stage of the section 2(3) process and the legal principles establishing the barometers by reference to which this court, on appeal, reviews the exercise of such discretion. We consider that at least as a general rule it is not appropriate for this court in appeals of the present kind to take into account trial events and evidence postdating the impugned decision.

The Instant Case

[41] The broad question for this court is whether, having regard to sections 2 and 3 of the 1980 Act, the conviction of the Appellant is unsafe. In the particular circumstances of this appeal, this telescopies to the narrower question of whether the first instance judge, having determined the "*case sufficient*" statutory test in favour of the Appellant, exercised his discretion unlawfully in proceeding to determine that an entry of "No Bill" should not follow.

[42] The judge's ruling has been transcribed. He said *inter alia* the following:

> "[It is] *clear to me that …….. a short additional statement would rectify the issue concerned …*
>
> *I am satisfied that a short additional statement would rectify that problem that is evident in the papers but not evident in reality. Therefore I decline to exercise my jurisdiction ….*"

It is clear from the preceding exchanges between the judge and prosecuting counsel that the prosecution advanced (a) a primary submission that all essential ingredients of the relevant offence were established in the committal papers and (b) an alternative submission that any defect was a merely formal one which could be rectified by service of additional evidence. This passage further illustrates what we have said in [33] above.

[43] In exercising his discretion in favour of the prosecution the judge made an evaluative judgement which involved an element of prediction. He, in substance, pronounced himself satisfied that the defect in the prosecution case, in this instance an evidential one, could be easily remedied by the mechanism of serving additional evidence. It seems likely that he drew on the resources of judicial experience and realism. Reverting to our analysis above, the judge did not have before him concrete material to support this prediction. However, as we have made clear, this is not required in every case. The question for this court is whether, applying the principles which we have identified, this exercise of judicial discretion is vitiated by taking into account something immaterial or extraneous, by failing to take into account everything of a material nature or by irrationality. We are satisfied that the judge's decision is in accordance with all of these touchstones. It follows that there was no error of law in the judge's rejection of the section 2(3) "No Bill" application. From this it follows further that the conviction of the Appellant was not unsafe.

Conclusion

[44] For the reasons given we dismiss the appeal.