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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **17/08/2023**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT BELFAST

THE KING

v

JAMES FOX

Mr J Kearny KC with Mr J O'Keefe (instructed by Tiernan Solicitors) for the Defendant
Mr S Magee KC with Mr M Chambers (instructed by the PPS) for the Prosecution

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RULING ON AN APPLICATION FOR A NO BILL

O'HARA J

Introduction

[1] This is an application by the defendant for the entry of a No Bill under section 2(3) of the Grand July Abolition Act 1969, on the basis that the committal papers do not disclose a case sufficient to justify putting him on trial. To put it another way, the defendant says that even taking the prosecution case as its height it cannot be proved beyond a reasonable doubt that he is guilty of any or all of the various counts which he faces.

[2] The defendant is charged with three offences:

(i) Murder of Francis Kerr 10 November 1994.

(ii) Robbery of a Royal Mail sorting office in Newry on 10 November 1994.

(iii) Membership of the IRA.

Background

[3] The broad background is that on 10 November 1994 an armed gang made its way into a Royal Mail sorting office in Newry, Co Down, to carry out a robbery. In the course of that robbery a Royal Mail employee, Mr Kerr, was shot and killed. The prosecution case is that the defendant was part of the gang and is guilty of the charges on the basis of joint enterprise. It is further alleged that those who carried out the robbery were members of the IRA. On this basis the defendant is charged with membership.

The Law

[4] Section 2(3) of the 1969 Act provides:

> "(3) 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."

[5] The correct interpretation of that provision is well-established and has been considered frequently over the last 50 years. From cases such as *R v Adams* [1978] 5 NIJB, *Re Macklin's Application* [1999] NI 106, *R v McCartan and Skinner* [2005] NICC 20 and *R v Valliday* [2020] NICA 43 the following principles can be drawn:

> (a) 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.
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> (b) The evidence for the Crown must be taken at its height (or best) at this stage.
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> (c) 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.

[6] In *Valliday* the Court of Appeal highlighted the fact that the test under section 2(3) has two parts. The first is whether on looking at the committal papers alone the

court is satisfied that a case is disclosed which is sufficient to put the defendant on trial. If it is so satisfied, the application for a No Bill must be dismissed. If, however, the court is not so satisfied the court does not inevitably grant the application. That is because the section gives the judge power to enter a No Bill, but it does not oblige him to do so.

[7] How then is this discretionary power to be exercised? As the Court of Appeal makes clear the judge's discretion is broad but not limitless. The easy illustration is that if the flaw in the committal papers is merely technical or formal in nature, and therefore easily corrected, the judge should refuse the application for a No Bill. But the discretion is wider than that. A No Bill can be refused where the flaw is not just technical or formal provided that the interests of justice are not such that a prosecution should not be allowed to continue. Whether that is so will depend in each case on judges using their experience and common sense to balance competing arguments in order to determine where the interests of justice lie. The more flawed the prosecution case, the more likely is it that the No Bill application will be granted because it cannot be in the interests of justice for a defendant to go on trial when the case against him has fundamental weaknesses. Beyond making that rather obvious point, it is difficult to be more definitive because of the almost endless variety of circumstances which might arise.

Evidential issues

[8] During the course of this protracted No Bill hearing there was debate about the nature of the evidence relied on by the prosecution. In particular, two issues arose. The first was the detail around the defendant's convictions in Ireland for the robbery of a bonded warehouse in Dundalk, Co Louth, in May 1987. There is an unresolved debate about whether the defendant pleaded guilty or was found guilty. It was ultimately agreed that that debate does not go anywhere. The fact is that he was convicted for playing a part in that armed robbery. The prosecution relies on this conviction, not just as bad character evidence, but also as evidence that is especially relevant because of what are said to be similarities between the two robberies in 1987 and 1994.

[9] The issue of similarity then leads onto the next issue, which was debated, namely what evidence the prosecution can put before any trial judge about the 1987 robbery to prove similarity. When the No Bill hearing started, that "evidence" was limited to a summary of less than one page prepared by Mr Magee KC from his reading of the papers. By the end of the No Bill hearing, additional evidence had been served which appears to comprise the papers which were before the Irish court by way of statements and depositions. While the defence has raised, or left open, an issue about the formatting of those statements and therefore their admissibility, that would be a matter for any trial judge, not for a ruling on a No Bill application. Taking the prosecution case at its height, as I must do at this stage, there is evidence that the defendant was involved in an armed robbery in Dundalk in 1987 which bore some similarities to the offence in Newry in 1994.

[10] Attention then turned to what evidence there is which implicates the defendant in the crimes committed in Newry. On the prosecution case there is evidence that very soon after the murder and robbery were committed, a Renault car was found approximately seven miles away. In that car was what appeared to be a post office worker's uniform including a pair of trousers, a shirt, a jacket, an anorak and a hat. Blood traces found on the trousers and jacket matched Mr Kerr's blood, giving a very strong indication that whoever had been wearing those clothes had been at the scene of the murder, or at the very least, in contact with someone who had been there less than an hour earlier.

[11] Other items found in the car were also connected with the scene of the crime, on the prosecution case.

[12] In 2019 there was a re-examination of tape lifts taken from the post office uniform found in the Renault car. This new examination was conducted with all of the advantages of progress in forensic science during the intervening 25 years. It is the prosecution case that this re-examination found traces which are very likely to be of the defendant's DNA on the jacket and trousers. There is also evidence, though perhaps less certain, that three hairs found on the cap in the car came from the defendant or at least someone closely related to him on the maternal side.

[13] In the course of his detailed submissions Mr Kearney KC challenged the status and admissibility of all of the prosecution evidence as well as the conclusions which could reasonably be drawn from it. I am satisfied that there are issues which will be the subject of considerable debate at any trial which is not made easier in various respects by the fact that it would take place so many years after the event. But my conclusion is that these are matters for trial rather than for determination in the course of a No Bill hearing at which, I repeat, I take the prosecution case at its height. The No Bill hearing has served to highlight some gaps in the prosecution case which have to a degree been remedied as the hearing progressed, eg the amendment of the charge relating to IRA membership and the introduction as additional evidence of papers from the trial relating to the Dundalk robbery.

[14] Having considered all of the helpful submissions presented to me, in light of the application as it developed, I conclude that a jury could convict the defendant of each of the charges which he faces.

[15] Accordingly, I dismiss the application for a No Bill. The case will now proceed to trial.