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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McLaughlin's (Damien) Application (Judicial Review) [2016] NIQB 39

IN THE MATTER OF AN APPLICATION BY DAMIEN MCLAUGHLIN FOR JUDICIAL REVIEW

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AND IN THE MATTER OF A DECISION TAKEN BY DISTRICT JUDGE PETER KING ON 5 JUNE 2015

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Before: Morgan LCJ and Maguire J

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MORGAN LCJ (delivering the judgment of the court)

[1] The applicant is being prosecuted for the murder of a prison officer, David Black. His case was listed for a mixed committal before District Judge (MC) Peter King. In the course of the committal, argument was heard as to whether the prosecution should be entitled to rely upon disputed hearsay evidence consisting of an audio-video recording of interviews conducted by officers of An Garda Siochana (AGS) with Stephen Brady between 2 November 2012 and 5 November 2012. In a ruling given on 5 June 2015 the District Judge admitted the hearsay evidence and returned the applicant for trial on indictment. The applicant challenges the decision to admit the hearsay evidence and the decision to return him for trial.

Background

[2] On the morning of 1 November 2012 Prison Officer David Black was driving to Maghaberry prison on the M1 motorway. At approximately 7:30 AM a car came alongside his Audi vehicle and fired shots fatally wounding him. At 7:45 AM a 999 call was made to the emergency services from a resident of Inglewood, Lurgan reporting that a vehicle was on fire. The caller informed the call handler that three males had run away from the vehicle. Forensic examination showed that the car recovered in Inglewood was that used in the attack on Mr Black. It was identified as a 1994 Toyota Camry, VRM 94 D 50997.

[3] It was established by AGS that the Camry was sold on 10 October 2012 to a man who gave his name as Paul McCann and filled out the vehicle registration certificate for change of ownership. Fingerprint examination of that document revealed a right thumb imprint for Vincent Banks. AGS also made enquiries in relation to the telephone used to contact the seller of the vehicle and established that the mobile number was a non-registered prepaid number for which a SIM pack was sold at Xtravision in Tallaght, Dublin. CCTV from the store shows Vincent Banks making a purchase from the same store at the relevant time.

[4] Further enquiries by AGS established that the Camry vehicle was parked on the outskirts of Carrigallen, a small village in County Leitrim, from 10 October 2012 until 31 October 2012. Two residents of the village had separately contacted Gardai during this period. They were concerned that because the vehicle had been parked opposite the local lough for some time the owner may have come to harm. The vehicle was examined by Gardai and found to be secure on 24 October 2012.

[5] The automatic number plate recognition system (ANPR) showed the Camry passing Clogher PSNI Station at 7:22 PM on 31 October 2012. The Camry was also recorded on the M1 motorway at 7:45 PM that evening. Expert analysis identified the Camry's direction of travel until its final destination in Lurgan from where it set out on the morning of the shooting.

[6] Stephen Brady worked in McHugh's shop and general garage business in Carrigallen. CCTV footage shows him outside the shop on the forecourt just before closing time at approximately 5:45 PM on 31 October 2012. A man wearing a hat and dark jacket approached him on foot. The CCTV did not catch the interaction between them. The man can be seen walking back into the view of the camera with what appears to be a phone to his ear.

[7] The CCTV footage shows the two men entering the shop a short time later. Brady positioned himself behind the shop counter while the man purchased a soft drink and some chocolate. CCTV shows Brady taking a phone from his pocket, opening the cover, swiping the screen and handing the phone over to the man. The man used the phone for about one minute before handing the phone back to Brady. Immediately after the call the two men left the shop. Other CCTV footage has given rise to the identification of the applicant in Carrigallen at the relevant time.

[8] Brady then returned to the garage and CCTV footage shows him going back into the shop and through one of the internal side doors. Brady is then shown leaving the garage carrying something heavy. CCTV footage from Masterson's shop which is directly across the road from McHugh's shows Brady crossing the road and meeting a male on the opposite side. Brady can be seen handing the male something heavy and the male then heads out the Mohill Road in the direction of the location where the Camry was parked.

[9] On 23 May 2011 the applicant had pleaded guilty to possession of firearms, ammunition and sound moderators in suspicious circumstances contrary to Article 64 (1) of the Firearms (Northern Ireland) Order 2004. He also pleaded guilty to possession of 2 rifle scopes contrary to Section 57 (1) of the Terrorism Act 2000. For these offences the applicant was sentenced to 2 years and 3 months imprisonment and 2 years and 3 months on licence. He was released on licence on 23 December 2011. Under the terms of the licence the applicant was required to contact his probation officer on her mobile phone to let her know of any travel arrangements outside the United Kingdom.

[10] Early on the morning of 1 November 2012 police attended at the applicant's home but he was not present. His wife explained that he had gone out drinking on the previous evening. At 10:20 AM on 2 November 2012 the applicant texted his probation officer to say that he was going to Dublin for a few days. The probation officer immediately texted back to him requesting details of where he was staying and how long he expected to remain there. There was no reply to this text. All of the aforementioned material was before the District Judge and in the submission of the prosecution gave rise to a circumstantial case that was sufficient in itself to ensure that the applicant was returned for trial on the basis that he was connected to the car by virtue of his presence close to the location of the car, its movement at that time and his bad character.

[11] The disputed evidence arose as a result of the arrest of Stephen Brady in connection with the murder of Mr Black on 2 November 2012. In the course of those interviews he was questioned as an accomplice and told that he was as guilty as the person who pulled the trigger. He was told that if he told the interviewers what they wanted to know he was out of there. He had no solicitor present. The questioning was aggressive and oppressive and profanities were regularly used by the interviewers. The applicant's name was repeatedly put to him as a person the AGS wanted him to implicate. He was told that whatever he said would not be disclosed to anybody else nor would it be relied upon in court.

[12] The accounts given by Brady varied. After being shown CCTV footage the account he gave was that the applicant, whom he knew, had approached him in the forecourt of the garage around closing time on 31 October 2012. He asked him if he had any car batteries. Brady said he had none for sale but that he did have a car

battery which he could charge. The applicant borrowed Brady's mobile phone. That is consistent with the CCTV showing a man apparently holding a phone close to his ear. Brady and the applicant then went into the shop where Brady sold him a soft drink and some chocolate. The applicant then left while Brady set about closing the shop. Brady then met the applicant across the street and went back to get the battery. He gave the battery to McLaughlin who then walked in the direction of the Camry. Brady entered a shop and then headed in the same direction as confirmed by CCTV. Brady then helped to get the car running with the applicant in the driver's seat. It was so dark that he was unable to identify the vehicle as a Camry but the location was the same as that at which the Camry had been parked.

[13] Stephen Brady did not make a deposition and was not called as a witness. The evidence was that he had been contacted by telephone by AGS but indicated that he was not willing to travel to Northern Ireland to give evidence. No other attempt was made to secure his attendance. No witness summons was issued for service pursuant to the Crime (International Cooperation) Act 2003 and the prosecution accepted that it was not known whether such a summons would have persuaded Brady to attend court.

[14] The issues around the circumstances in which the interviews were conducted were clearly recognised by the District Judge who, in his Ruling, said:

> "Even a brief perusal of the transcript of the interviews revealed that the AGS officers employed a robust interview technique which involved the liberal use of profanity, offers to Brady that he could leave the interview if he told the officers what they "need to know" and oblique threats of the interviewee being prosecuted before the three judges of the Irish Special Criminal Court. The obvious dangers of such an approach were accepted by Detective Garda Colin Barker under cross-examination by Mr O'Higgins.
>
> During the deposition of Detective Garda Cullen the following exchange with the bench is illustrative of the nature of the Brady interviews:
> Judge… Detective Garda you can comment on your experience as a police officer, and given your 26 years serving in AGS have you ever come across an interview conducted like this?
>
> Cullen: No Your Worship.
>
> I am satisfied having taken the deposition of the interviewing Garda officers that their experience of

> the criminal justice system in the Republic of Ireland led them to assume that a full transcript of the Brady interviews were unlikely to ever be presented to a court in that jurisdiction. Whether it was in their contemplation that a court in the United Kingdom may have at some stage had the benefit of the transcripts is open to speculation."

The Legislation

[15] Article 31 of the Magistrates' Court (Northern Ireland) Order 1981 (the 1981 Order) provides for a short form of committal based upon statements served in advance of the hearing. Article 33(1) sets out the conditions upon which such statements can be admitted and at subparagraph (d) provides that the District Judge must be satisfied that none of the parties objects to the statement being admitted in evidence upon a ground which would constitute a valid objection to oral evidence to the like effect as the contents of the statement. Article 34(2) of the 1981 Order enables the accused to require any witness to attend and give evidence on oath including cross-examination and that was the basis upon which the AGS evidence was heard in this case.

[16] Article 37(2) of the 1981 Order provides for discharge or committal:

> "(2) Where the court conducting a preliminary inquiry is of opinion, after considering-
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> (a) the documents referred to in Article 32(1)(b)(i) and (iii) and the statements admitted in evidence under Article 33 (1);
>
> (b) any written depositions;
>
> (c) the exhibits;
>
> (d) any submissions made under Article 34 (1); and
>
> (e) the statement of the accused made and signed under Article 34 (3),
>
> that the evidence is sufficient to put the accused upon trial by jury for any indictable offence it shall commit him for trial; and if it is not of that opinion, it shall, if he is in custody for no cause other than the offence which is the subject of the inquiry, discharge him."

[17] The Criminal Justice (Evidence) (NI) Order 2004 deals with the admission of hearsay in criminal proceedings. The general rule governing admissibility is set out in Article 18:

> "18. - (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if-
>
> (a) any provision of this Part or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by Article 22 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)-
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

[18] Article 20 of the 2004 Order makes admissible statements from an unavailable witness in certain circumstances:

"20. - (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if-

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are-

(a) that the relevant person is dead;

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition;

(c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

(d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

The issues in the appeal

[19] In his written ruling the District Judge noted the prosecution submission that it would only be appropriate to refuse a prosecution application to admit bad character or hearsay evidence in a committal hearing if no reasonable tribunal could hold it to be admissible. The prosecution contended that in all other cases the District Judge should admit the evidence and leave the final decision on admissibility to the trial judge. That was supported by the commentary in Valentine's Criminal Procedure (2nd edition para 6.13) that the magistrate should exclude evidence which no reasonable tribunal could hold to be admissible, but, where the admissibility of evidence was doubtful and especially where its exclusion depended on the exercise of discretion by the court, the evidence should be received by the justices and any challenge to it reserved for the trial.

[20] Having reviewed the case law on the admissibility of hearsay at trial and discretionary decisions on the admissibility of evidence in committal proceedings the District Judge concluded that he was obliged to apply the relevant statutory test and consider the relevant statutory criteria contained in the 2004 Order in relation to the application to adduce hearsay evidence. He concluded that there was a similar obligation in respect of any application to exclude evidence. The fairness of the overall trial was for the trial judge. The fairness of the committal proceedings depended upon whether any reasonable trial judge would allow the evidence to be admitted. If it was concluded that a trial judge, could, when properly applying the provisions, admit the evidence then it should be admitted at committal stage safe in the knowledge that the trial process contained sufficient safeguards to ensure a fair trial.

[21] Having thus set out his approach the District Judge declined to admit the hearsay evidence under Article 20, apparently on the basis that he was not satisfied that it was not reasonably practicable to secure the attendance of the witness. He considered, however, that the evidence should be admitted under Article 18 (1) (d) of the 2004 Order in the interests of justice.

[22] The applicant submitted that the District Judge erred in applying a "no reasonable tribunal" test. The judge was a primary decision maker and could not defer the decision to admit to another tribunal. Secondly, the scheme of the legislation is to enable the accused to cross examine witnesses in advance of trial. It

was, therefore, anomalous to determine whether it was fair to admit hearsay by reference to what may happen at the trial. Thirdly, this was a witness who should have been produced since the prosecution had not been able to satisfy the judge that it was not reasonably practicable to have him attend. Fourthly, the cases upon which the District Judge relied related to the discretion to exclude otherwise admissible evidence and did not bear on the decision to render admissible evidence that was otherwise inadmissible. Fifthly the judge had failed to properly recognize the narrow residual nature of the interests of justice gateway and erred in concluding that in any event the "no reasonable tribunal" test was satisfied

Consideration

[23] There is a considerable body of authority dealing with the approach that should be taken to the exclusion of otherwise admissible evidence in committal proceedings. The judgement of Beldam LJ in R v King's Lynn Justices, *ex parte* Holland [1003] 1 WLR 324 provides a helpful analysis. That was a case in which an application had been made to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 of a group identification because of a failure to comply with the relevant Code of Practice. The court found that the justices had been in error in concluding that they had no jurisdiction to exclude the evidence. Once the justices had heard all the evidence it was for them to decide whether the admission of the disputed evidence at the committal stage would have such an adverse effect on the fairness of the proceedings as a whole that they ought to exercise their discretion to exclude it.

[24] Having noted that the justices should take into account that the Crown Court judge can be invited to exclude the evidence the court gave the following guidance:

> "Even in a case in which without the disputed evidence the justices would have to discharge the defendant, the question whether the evidence is sufficient to justify the committal of the defendant for trial must depend on the likelihood of the judge at the Crown Court refusing to allow the evidence to be given at the trial. Examining justices could exclude the evidence from the consideration only if satisfied that its admission at the trial would be so obviously unfair to the proceedings that no judge properly directing himself could admit it.
>
> *I have no doubt that even in such a case it would generally be far better to leave the decision to the trial judge who will… be in a better position to assess the effect on the fairness of the proceedings and have had greater experience of deciding such questions.*

> I would therefore hold that justices, sitting as examining justices to decide whether to commit a defendant for trial on indictment, ought not to exercise their discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude admissible evidence from their determination save in the clearest case and in exceptional circumstances."

[25] It is important to recognize that this was a case in which the justices were exercising discretionary judgment as to whether the evidence should be excluded. The rationale underpinning the court's analysis was that the issue of the exclusion of otherwise admissible evidence was ultimately for the trial judge. In cases where the trial judge might consider it fair to allow the evidence to go before the jury the justices generally should leave the matter to him rather than exclude the evidence and possibly not return the accused.

[26] Mr Macdonald submitted that *ex parte* Holland was not correctly decided and invited us not to follow it. Although decisions of the Divisional Court in England and Wales are of persuasive authority only, we note that the italicized passage in paragraph 24 above was unanimously approved by the House of Lords in R v Governor of Brixton Prison *ex parte* Levin [1997] AC 741. We accept therefore that this is a decision of considerable authority. We do, however, recognize that the statutory test for the District Judge under Article 37(2) of the 1981 Order itself required the exercise of discretionary judgement and the inclusion of the word "generally" in the italicised portion above indicates a degree of flexibility for judges in applying this test.

[27] The prosecution also placed some reliance on the decision of Mance J in R v Tunbridge Wells Justices *ex parte* Webb (unreported 14 January 1997). That was a case in which the Crown sought to introduce police statements under the relevant hearsay provisions. The statements were admissible only if the admission was in the interests of justice. It was conceded by the defendant that the test was whether the statements could or would be admitted in the interests of justice at the trial when the matter came to be considered on the voire dire before the trial judge. The court considered that concession properly made.

[28] In our view it is difficult to see that there is any principled distinction between the approach to the discretionary judgment to exclude evidence and that to the admission of evidence in committal proceedings where the trial judge will be expected to make a discretionary judicial determination as to whether the evidence should be admitted at trial. This case law supports the proposition that where the trial judge could reasonably admit the evidence the determination of that issue generally should not be removed from him at the committal stage.

[29] In support of his submissions Mr Macdonald relied on Re Allen and others' Application [1998] NI 46. That was a case in which the prosecution sought to introduce identification evidence under the hearsay provisions contained in the Criminal Justice (Evidence) (NI) Order 1988. The evidence consisted of police statements and the legislation rendered the statements admissible only if the court was of opinion that they ought to be admitted in the interests of justice. The magistrate admitted the statements and indicated that he considered that his function was to determine whether there was a *prima facie* case against the applicants and that it was not for him to decide whether the tribunal of fact would be likely to believe the written statements. He said that he was further aware that if he were to rule that the contentious statements be given in evidence it would still be open to the court of trial to refuse to admit them.

[30] The Divisional Court noted that in Neill v North Antrim Magistrates Court [1992] 4 All ER 846 the House of Lords said the court should be cautious about admitting documentary evidence of identification when this was the principal element of the prosecution's case. The court concluded that the magistrate was aware that the onus was on the prosecution to satisfy him that the interests of justice test was satisfied and that he had taken into account the quality of the statements. The challenge to the committal was rejected. The following passage was relied upon by the applicant:

> "Nor do we regard it as wrong of the resident magistrate to have regard to the fact that the Crown Court retains the discretion to decline to admit the statement in evidence, so that the decision of the committing court is not final. The committing magistrate must make his own decision on the admission of the statement, based on the materials before him, and cannot shift the responsibility on to the Crown Court by acceding to all applications for admission of statements under the 1988 Order without making his own determination. It seems to us proper, nevertheless, that he should bear in mind that if he admits a statement that is not the end of the matter and the accused has the further degree of protection that another judge in the Crown Court may look at the issue again before the evidence is received at his trial."

[31] This passage was in the context of an argument advanced on behalf of the applicant that because the magistrate had recognised the possibility that the Crown Court might rule out the statement at trial he had taken into account an irrelevant consideration. The second limb of the argument was that the magistrate had not given any consideration to the credibility of the witness. In that context the passage

set out above does not conflict with the line of authority set out in Holland, Levin and Webb. Immediately thereafter the court said:

> "If, on the other hand, he wrongly refuses to admit the statement and in consequence declines to commit the accused for trial because of lack of evidence, the matter is harder to put right. It seems to us legitimate that in deciding the issue of the admission of such statements in cases where the considerations are finely balanced, the committing magistrate can have regard to these factors. We do not understand that the resident magistrate in the present case intended to do anything more than that."

[32] We accept that there is a difference of tone in the language used suggesting that the approach that the trial judge might take would only become a material consideration in circumstances where the issue was finely balanced. We note that the Divisional Court in Allen was not referred to the line of authority based on Holland nor the approval of that approach by the House of Lords in Levin. Insofar as there is a distinction between the guidance in Allen and the principle set out at paragraph 28 above we consider that the principle should prevail. Accordingly we conclude that the District Judge was entitled as a matter of discretionary judgement to approach the test for admission on the basis that he did.

[33] The alternative bases upon which the applicant challenged the decision to admit the hearsay evidence and return him for trial were that the admission of the evidence under Article 18(1)(d) of the 2004 Order undermined the statutory scheme in Article 20 of the said Order by admitting hearsay evidence when the prosecution had not established that it was not reasonably practicable to call the witness. Secondly, the admission of hearsay evidence deprived the applicant of the opportunity provided by Article 34(2) of the 1981 Order to cross-examine Brady. We accept that these are weighty objections. The District Judge plainly had regard in his ruling to the matters set out in Article 18(2) of the 2004 Order but we consider that we should review how those factors impinged on the admissibility decision.

[34] The first question is how much probative value the statement had in respect of matters in issue in the proceedings or how valuable it was for understanding other evidence. The prosecution case was that the CCTV evidence established that the applicant was in Carrigallen on the evening in question. On their case the CCTV provided direct or circumstantial evidence to establish that the applicant met Brady, used his phone, received a heavy object from him and walked in the direction of the Camry motor vehicle with Brady following. The critical elements of Brady's evidence were first, the corroboration of the applicant's identity, secondly, the request for the battery and thirdly, the connection of the applicant as the driver of the motor vehicle. The second and third issues clearly have significant probative value and are

valuable in understanding other evidence in the case. Apart from the CCTV no other direct evidence can be given of the second and third matters. The applicant contended that the evidence in relation to the second and third matters was the sole and decisive evidence connecting him to the car. We do not accept that this is necessarily sole and decisive evidence of his connection to the car. The circumstantial evidence surrounding his presence in the village and his movements, together with the bad character evidence, provide a basis for connecting him to the motor vehicle.

[35] The circumstances in which the statement was made have been set out above and give rise to concerns about the reliability of the maker. On the other hand we have not been provided with the audiovisual material which shows the demeanor of the maker as he was being interviewed. Brady is outside the jurisdiction and has indicated that he does not wish to give evidence. He was initially interviewed as an accomplice in respect of an offence in this jurisdiction. That is a matter which can properly be taken into account in considering his refusal to cooperate. At this stage the applicant has not demonstrated what prejudice he faces in dealing with this evidence. There is no indication as to whether he disputes his presence in Carrigallen or his meeting with Brady. It is unknown whether he takes issue with the provision of a battery or that he was in the driving seat of a motor vehicle parked at the location where the Camry vehicle was last seen at the relevant time.

[36] We accept that hearsay will rarely be admitted under Article 18(1)(d) of the 2004 Order where the purpose is to circumvent the statutory constraints imposed by Article 20 (see R v Ibrahim [2010] EWCA Crim 1176). We consider, however, that there were material circumstances in this case including the availability of audiovisual material, the CCTV evidence, the fact that the witness was outside the jurisdiction and that his reluctance may be related to his being interviewed as a suspect which lead us to reject the submission that the admission of the evidence was irrational or perverse.

Conclusion

[37] For the reasons given the application is dismissed.