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Judgment: approved by the Court for handing down	*ICOS No:* **XXXX**
(subject to editorial corrections)*	*Delivered:* **2/11/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

OWEN CORRIGAN

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Mr McDowell QC with Ms Pinkerton (instructed by PPS) for the Prosecution
Mr Fahy QC with Mr Turkington (instructed by Fahy Corrigan Solicitors) for the Defendant

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Before: Morgan LCJ, McBride J and Huddleston J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an application by the prosecution for leave to appeal pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2004 ("the 2004 Order") the decision of Judge Ramsey QC made on 24 January 2020 to stay criminal proceedings on one count of unlawful wounding contrary to section 20 of the Offences against the Person Act 1861 as an abuse of process on the basis that the defendant could not receive a fair trial by reason of delay and failures in the investigation.

Background

[2] It is common case that on 8 October 2016 at around 1:30 am at the British Legion, Wellington Road, Enniskillen the defendant punched Daniel Boyd once to the face knocking him unconscious and causing a fractured jaw and a cut above his left eye. The incident was captured on CCTV.

[3] The defendant's case was that he was tidying up with a brush at the end of the evening at the British Legion in order to help his friend Mrs Weir. She and her husband were giving him a lift home. At times he was described as "dancing" with the brush. CCTV captures an exchange between Boyd and the defendant after which the defendant gave up the brush. The defendant maintains that someone had called

him a "Fenian" or "Shinner" in the course of this discussion. He returned to the bar area as did Mr Boyd.

[4] While he was at the bar the defendant claimed that the male with whom he had been talking made a beeline for him. He said that he felt threatened and struck him with his fist. As Mr Boyd fell to the floor others grabbed the defendant and pushed him into a corner where he maintains he was assaulted. Police were called at which stage the defendant was outside the premises in a taxi. The police officer noted that he was bleeding and his shirt was torn and bloodied. The defendant's case is that when he was outside the premises in the presence of police someone grabbed him by the testicles and a lady shouted that he was "that wee Shinner from Letterbreen".

[5] Constable Brown entered the premises at approximately 1:40 am. She viewed the CCTV and saw the defendant strike Mr Boyd. She informed Constable McMeekin that the defendant had struck a male inside the British Legion and he was arrested on suspicion of Assault Occasioning Actual Bodily Harm and cautioned. He was taken to Enniskillen Police Station where he was deemed to require medical attention and conveyed to hospital.

[6] He was interviewed later that morning and indicated that he did not need a solicitor present. It was put to him that the CCTV showed that after the brush had been taken off the defendant he then walked over to Daniel Boyd and struck him on the head. That was based on the account given by Constable Brown. It is common case that this description is inaccurate. Both the defendant and Mr Boyd had separately made their way to the bar area where the incident occurred. During this interview the defendant stated that he had delivered the blow because he felt very threatened at the time.

[7] He was subsequently interviewed on 14 June 2017 with a solicitor when the CCTV was available. The discrepancy in the account put to him in the first interview was pointed out by his solicitor. In the course of the interview he alleged that while he was in the bar area he heard a conversation in which it was stated that "the wee Fenian's still there" and that he felt threatened. His defence statement for the hearing contended that he acted in self-defence.

The abuse of process application

[8] The abuse of process application was based on the submission that the defendant could not have a fair trial. The first issue concerned delay. He was interviewed on the day of the incident. CCTV was recovered shortly thereafter. Medical records were sought in February 2017 and he was interviewed shortly after their return on 14 June 2017. The file was submitted promptly after the second interview and after several requests for further information the papers were provided to the PPS on 6 December 2017 together with the CCTV.

[9] The prosecution accepts that there was delay thereafter. The decision to prosecute was not taken until 20 June 2018. A further request for medical notes from Altnagelvin hospital was not made until 14 March 2019. Thereafter on receipt of the

medical records the summons was prepared and the arraignment took place on 24 October 2019.

[10] The second point concerns an allegation of failures in the investigative process. Although statements were taken from the injured party and his wife who was with him on the night in question no attempt appears to have been made to take statements from any of those who were in the British Legion at the time. The CCTV evidence indicates that there were more than a dozen people in or about the bar area.

[11] Complaint was also made that there was no attempt to investigate the circumstances in which the defendant sustained his injuries and had his shirt torn and bloodied. It is clear from the CCTV that he was surrounded by a number of people in an aggressive fashion and Mr Fahy drew attention in particular to the activities of an older man in a white shirt who had not been identified. It was also contended that some investigation should have taken place in relation to what occurred outside the premises after police arrived since it might have supported the defendant's case that sectarian comments had been passed.

[12] There was no real dispute between the parties about the legal principles governing the determination of an application to stay proceedings as an abuse of process. In R v Maxwell [2011] 1 WLR 1837 Lord Dyson stated at paragraph [13] that it was well established that the court has 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. The decision in this case was made on the first basis and it is clear that this case falls far short of satisfying the requirements of the second test.

[13] In cases of delay the position has been clear since Attorney General's Reference (No 1 of 1990) [1992] QB 630 and was reaffirmed in R v F(S) [2012] QB 703. An application to stay proceedings for abuse of the process of the court, made on the grounds of delay, cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice occasioned by the delay which cannot fairly be addressed in the normal trial process.

[14] The approach concerning allegations of investigative failures or missing evidence was established in R (Ebrahim) v Feltham Magistrates' Court [2001] 1 WLR 1293. From Brooke LJ's judgment five propositions can be derived:

(i) The ultimate objective of the discretionary power to stay proceedings is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution… It requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.

(ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

(iii) Where a stay on the grounds of abuse of process was sought on the basis that relevant material was no longer available the court should first determine whether the police or prosecutor had been under any duty to obtain and/or retain that material.

(iv) If there had been a breach of such a duty any unfairness resulting from it should normally be dealt with in the course of the trial.

(v) No stay should be imposed unless the defendant showed on the balance of probabilities either that by reason of such a breach he would suffer serious prejudice to the extent that it was impossible for a fair trial to be held or that there had been such bad faith or serious fault on the part of the police or prosecutor that it was not fair that the defendant should be tried.

The trial judge's decision

[15] The judge set out the facts and then explained that the authorities indicated to him that the jurisdiction must be exercised carefully and sparingly and only for very compelling reasons. The court should never grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue and there has to be a careful examination of the steps that might be taken in the context of the trial to ensure that unfairness to the defendant is avoided. We agree, therefore, that the trial judge properly identified the relevant legal test.

[16] He noted that it had taken 2½ years to issue a summons. He noted that the prosecution accepted there had been some slippage but argued that this had not caused any prejudice to the accused. He had watched the CCTV and said that he had some difficulties because the incident took place in the far corner. There was a large number of people present. It was difficult to make out exactly what was going on and there was no audio.

[17] The judge found it of concern that a man who was among those involved in grabbing the defendant and pushing him into the corner had not been identified. That man was also allegedly involved outside the premises. He was never identified or interviewed during the investigation. The judge noted there was no forensic examination of the scene either outside or inside the premises. None of the people in the premises other than the complainant and his wife was interviewed. He noted that there was no examination of the scene, no preservation of the exhibits and no photographs and he concluded that the CCTV did not represent something which bridged the gap. He accordingly concluded that there was serious prejudice to the defence which could not be remedied by the trial process. He then went on to assert that the defence simply could not present the best self-defence case it could and that the delay together with the inadequate police investigation caused prejudice which could not be remedied.

Consideration

[18] The starting point is to identify the issues in the case. The defendant admitted that he struck Boyd causing him the injuries of which complaint was made. His case

was that he acted in self-defence. The jury have to consider two basic questions in relation to such an issue. First, were the facts as the defendant believed them to be such that the use of force was necessary for the purpose of self-defence and secondly was the degree of force used reasonable for that purpose in light of those perceived facts. If the jury are satisfied beyond reasonable doubt that the answer to either of those questions is no the defence is not available.

[19] Translating that into the circumstances of this case it involved consideration of whether the accused believed himself to be in a hostile sectarian environment in which he was being threatened by Mr Boyd and whether the delivery of a blow of the nature administered was reasonable in those circumstances. The questions in the stay application included whether there had been a failure on the part of the police to take further statements, whether there was a requirement to produce photographs, whether any further exhibits were required, whether a forensic examination was necessary and whether any further examination of the scene was required.

[20] Although the judge referred to a number of these matters there is no indication that he actually considered the extent to which they were relevant to the issues in the case. We accept the police ought to have been aware that this was a self-defence case at least by the time of the first interview on the morning of 8 October 2016. We further accept that in those circumstances the police should have carried out some further investigation by way of obtaining statements from those who were present in the hall to establish whether there was any evidence about what was said and what if any movement of the victim occurred just prior to the delivery of the blow.

[21] We accept that it would have been relevant to seek statements about any sectarian comments within the hall after the blow was struck. The relevance of such comments would have faded considerably by the time the defendant was outside the premises. We note that the learned trial judge referred to no examination of the scene, no preservation of the exhibits, no forensic examination and no photographs. We cannot see how any examination of the scene was required, what exhibits could have been generated, what forensic examination was necessary and why photographs were required in light of the CCTV material. The judge gave no indication as to how the absence of those matters prejudiced in any way the defendant. Insofar as he took them into account he was in error as these matters were not material.

[22] We are entirely satisfied that the absence of statements from those who were in the premises at the relevant time was a matter that the judge should have dealt with within the trial process. There is no indication that he gave any consideration to the way in which that would be achieved. There were criticisms to be made of the investigation on that basis which the defendant could have had explored in cross examination. The judge would have been bound to direct the jury that evidence which might have supported the defendant's case was not investigated.

[23] The investigation by the judge ought to have included an assessment of the defence statement. The defendant indicated that he did not intend to call any witnesses. It was suggested on his behalf that he did not know the names of those present. That was, however, clearly incorrect. In his second interview he stated that himself, Bob Weir and Foster Johnson were standing at the top end of the bar prior to the incident. He had been getting a lift home with Mr and Mrs Weir with whom he was "very great".

[24] Although we accept that there was a duty on the police to take further statements directed to the self-defence issue we consider that the absence of that investigation was a matter that could and should have been dealt with within the context of the trial. The judgment does not suggest that there was any serious consideration given to how that might have been achieved. Although the judge correctly identified the relevant law he does not appear to have applied it.

[25] The same applies in relation to delay. That was plainly a matter that should have been dealt with by way of direction. There was no analysis of the nature of the prejudice caused by the delay and consequently no consideration of how any such prejudice could have been mitigated.

Conclusion

[26] Article 26 of the 2004 Order provides that the Court of Appeal may not reverse a ruling on appeal unless it is satisfied-

(a) that the ruling was wrong in law;

(b) that the ruling involved an error of law or principle; or

(c) that the ruling was a ruling that it was not reasonable for the judge to have made.

[27] In our view the ruling was wrong in law in that it took into account the absence of photographs, exhibits, forensic examination and an examination of the scene, none of which were required and it was contrary to principle in that there was no attempt to analyse how any prejudice caused by the failure to take statements or delay could have been mitigated.

[28] For the reasons given we reverse the ruling and order that a fresh trial may take place in the Crown Court for the offence.