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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **09/09/2024**

IN THE CROWN COURT OF NORTHERN IRELAND

THE KING

v

DAMIEN DUFFY and SHEA REYNOLDS

RULING

Sam Magee KC and Robin Steer KC (instructed by the Public Prosecution Service) for the Crown
Dessie Hutton KC and Lauren Cheshire BL (instructed by Phoenix Law) for Shea Reynolds
Brendan Kelly KC and Stephen Toal KC (instructed by KRW Solicitors) for Damian Duffy

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HER HONOUR JUDGE SMYTH

Recorder of Belfast

Introduction

[1] The defendants are jointly charged with six counts on the indictment arising from the deployment of a Swann wildlife camera on two occasions in September 2016. Counts 1-3 relate to the deployment of the camera at Annaghone Road, Coalisland and counts 3-6 relate to its deployment at Drumnabreeze Road, Maheralin, the home of Mr Les Woods, a retired police officer. In short, the prosecution alleges that the camera was deployed with a view to gathering information which could be used by terrorists to carry out acts of terrorism. The camera was retrieved by police from Mr Woods' home, who replaced it with a dummy replica and then monitored it in real time until it was retrieved by two men, alleged to be the defendants on 20 September 2016. The SD card from the camera seized by police was examined and found to contain a number of clips which the prosecution allege supports its case that the defendants are guilty of the offences.

[2] In their defence statements, both defendants challenge every aspect of the Crown case and neither makes any positive case.

[3] The prosecution evidence is now complete and both defendants have made applications that there is no case to answer under the principles in *R v Galbraith* [1973] Cr App R 124, in particular, the second limb. In respect of Damien Duffy, applications have also been made that the proceedings should be stayed as an abuse of process or in the alternative that evidence of identification evidence from surveillance officers should be excluded, that the ruling admitting his previous conviction for a terrorist offence should be reconsidered and refused and that hearsay rulings relating to Mr Woods and other officers who attended the scene at Drumnabreeze Road should also be reconsidered and refused. A stay is also sought on behalf of Mr Reynolds.

[4] The prosecution relies on a number of strands of circumstantial evidence including a string of apparent coincidences from which probative force is said to be derived. It is submitted that such evidence is capable of rebutting the suggestion of coincidence or alternative explanation should one be advanced.

[5] The principles that apply to a circumstantial case at a direction stage are set out in *R v Michael Grimes* [2017] NICA 19 at para [51]:

> "(1) …
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> (2) Where a key issue in a submission of no case to answer is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence.
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> (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

[6] In determining a *Galbraith* application, the appropriate test where a judge is sitting without a jury and is the arbiter of both the law and facts is set out with approval by the Northern Ireland Court of Appeal in *R v Courtney* [2007] NICA 6:

> "Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to the exceptional cases where the judge can say, as did Lord Lowry in *Hasson* that there was no possibility of his being convicted to the requisite standard by the evidence given for the prosecution."

[7] At para [14], the court explained that this does not involve the application of a different test from that of the second limb in *Galbraith.* The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. In short, the question I should ask myself is whether I am convinced that there are no circumstances in which I could properly convict based on the evidence I have heard.

[8] I am mindful that since I will have to determine the outcome of this case both in fact and law, it is not appropriate at this stage that I should engage in a detailed evaluation of the weight that should be afforded to the individual strands of evidence. There is also an agreed admissions document which I have taken into account in full, although it is not necessary to refer to it in detail at this stage.

[9] The prosecution has summarized the relevant strands of evidence as follows:

> (1) The identification evidence from surveillance or "Oscar" witnesses showing the association of the defendants with each other and the silver Golf car SUI 7104, which is consistent with their involvement in the offences. This evidence is supported by ANPR evidence which is consistent with the alleged sightings of the vehicle.
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> (2) The video files from the SD card of the wildlife camera which are dated 4–8 September 2016. Whilst the dates and timestamps cannot be *forensically* established to be accurate (as the files were stored in unallocated space on the SD card), the camera was noted to be accurate (save for a discrepancy of two minutes) when it was examined by Simon McConnell on 20 September 2016, the date of his examination. The fact that the file names for the dates and times between 4 September 2016 and 8 September 2016 are listed in that same way on the SD card are consistent with those dates and times also being accurate and is consistent with the movements of the silver Golf car and persons sighted on 4 and 8 September

2016 and consistent with the camera being deployed and retrieved on those dates. There is no evidence from any source that the file dates or movements of the persons alleged are inconsistent with the prosecution case.

[4] The prosecution submits that the purpose in deploying the wildlife camera on the Annaghone Road between 4 and 8 September 2016 was to observe vehicles including their registration plates. It relies in particular, on clips which indicate that the camera was transported on 8 September 2016 in a vehicle to a property, that the camera was in Damien Duffy's kitchen at Westclare on that date, that Shea Reynolds was in that property on that date.

[5] A police fingerprint expert opines that Shea Reynolds' fingerprint is on the camera.

[6] The identification of the silver Golf car on 14 September 2016 by the surveillance witnesses, the heli-tele footage and the evidence of Det. Const. Julie Hayes relating to that footage. It is the prosecution case that this car performed four circuits of a route which involved going past 63 Drumnabreeze Road, the home of Les Woods, on 14 September 2016 and that the purpose was consistent with the deployment of this camera there on that date.

[7] The prosecution submits that the recovery of the wildlife camera by Mr Woods on the morning of 15 September 2016 is consistent with it being deployed on the previous day as alleged and that the absence of further clips on the camera is consistent with it being deployed for a short period of time. The positioning of the wildlife camera pointing across the driveway at 63 Drumnabreeze Road is consistent with the purpose of capturing vehicle movement as per its previous deployment at the Annaghhone Road.

[10] The phone records RC1 of Les Woods' phone independently verify and are consistent with him discovering the camera at the location found and taking photographs of it in situ as stated by him.

[11] There is no evidence of either movement or physical interference with this camera, which the

> prosecution submits is supported by the fact that the two unidentified persons on 20 September 2016 were able to locate the replacement camera at night-time with little difficulty from the location where they expected it to be.
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> [12] Mobile phone evidence, namely cell site evidence is consistent with the defendants alleged movements as are messages from Ciaran Magee's phone. Relevant searches on a phone connected to Damien Duffy support the conclusion that he was looking for information in connection with the dummy camera and in particular, why no images could be retrieved from the SD card.
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> [13] Neither defendant answered any questions or gave any account of his movements on the relevant dates or offered any innocent explanation for presence in the car or association during police interview.
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> [14] The prosecution also relies on evidence adduced from the officer in charge at trial on behalf of Mr Duffy that Mr Reynolds is related through his partner to well-known dissident republicans in the Lurgan area who have previously been charged with very serious offences."

Damien Duffy

No case to answer

[15] In respect of the application that there is no case to answer, it is submitted that the evidence is so tenuous, vague or inconsistent with other evidence that no reasonable jury properly directed could properly convict upon it.

[16] The defence focus on the quality of the identification evidence from surveillance officers who gave evidence under cyphers and submit that:

> "…When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions… the judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification." (see F 19.9 Blackstone's Criminal Practice 2024).

[17] In particular, the defence submit that weaknesses of general application were exposed:

> "(1) The officers had no independent memory of the events and relied on the transmissions log which contained details of individual transmissions, signed and amended where necessary and statements written after the event.
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> (1) The transmissions were not digitally recorded.
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> (2) Some officers suggested that the loggist might not have recorded the transmission accurately.
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> (3) The officers accepted that they were trained not to stare, which it is submitted, by its nature reduced the observations in this case to a glance.
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> (4) The timings of each purported identification were shown to be one second or less, which is classic fleeting glance evidence.
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> (5) The difficult and challenging conditions of each purported identification including moving vehicles at speed, darkness and obstructions.
>
> (6) The admission that each witness was "primed" to identify the accused in this case by photographs, radio transmissions and associations to each other, certain locations and a Golf vehicle."

[18] The prosecution submits that it was put to only one of the surveillance officers on behalf of Mr Duffy that his identification was wrong, and no positive case of error was put on behalf of Mr Reynolds. ANPR evidence, which was served late in the course of the trial, is consistent with the alleged sightings of the silver Golf and counsel on behalf of Reynolds conceded that CCTV footage at a filling station on 14 September at Lough Road Lurgan during the period 23.15–23.45 shows Mr Reynolds. The prosecution relies on a comparison of clothing seized from the homes of both Mr Duffy and Mr Reynolds which the defence does not accept. The defence points out that 11 police officers failed to identify the defendants as the men who retrieved the dummy, and the clothing is of a mass-produced type.

[19] The prosecution contends that evidence from surveillance officers necessarily entails observations of persons in respect of whom prior briefings have been given. No authority has been relied upon or expert evidence served to suggest innate unreliability, unfairness or breach of any code. The defence submits that the dangers

of confirmation bias are obvious from the nature of the briefing and the fact that members of the Duffy family were known to have terrorist convictions.

[20] The prosecution further submits that the acknowledgement in the defence submission that this was a surveillance operation and that the officers were "primed" to expect to see them demonstrates that this is "recognition" evidence which as a matter of law is regarded as more reliable than stranger identification (*Archbold 14.22).*

[21] The prosecution relies on the fact that officers did not all make positive observations. Where they could not confirm the identification, "unconfirmed" was recorded or "believed to be." It is submitted that this demonstrates an awareness of the importance of recording the identification correctly.

[22] Although the observations were not digitally recorded, the prosecution submits that this is not in breach of any Code. The loggist recorded transmissions contemporaneously and was tendered for cross-examination. There is no evidence that the decision to manually record transmissions was the result of a stratagem. Additional entries of relevant information recorded during the debrief were written into the log by the officer, verified with his signature. This was the first opportunity to do so after the radio transmission, which may not have been as complete as possible in the circumstances. There is no evidence that any officer did so for any improper purpose.

[23] The prosecution accepts that there are some flaws in the evidence of some surveillance officers and that the passage of time between the identifications and the giving of evidence is a relevant matter to be taken into account. Recollection is likely to have been based on the log and an edited copy was provided to the defence. It is submitted that full disclosure has been made of any relevant matters and if the identification evidence was considered unfair, an application would have been made to exclude it at an earlier stage.

[24] A phone, retrieved from the communal area of Mr Duffy's home which had no password and was registered to Mrs Cera McStravick of Levin Road in Lurgan had user and email accounts linked to "Dee Duffy." The results of analysis of internet searches are set out in the agreed admissions document at para [39]. The prosecution submits that relevant searches support the conclusion that they related to the dummy camera retrieved by the two unidentified men, albeit the absence of a password leaves open the possibility that someone else may have made the searches.

[25] Images from the SD card can be favourably compared with photographs of Mr Duffy's kitchen when his house was searched. The defence submit that that merely shows that the camera was present in his home.

[26] The defence submit that sightings of the silver Golf in Lurgan do not assist the prosecution because it is not disputed that Mr Duffy has family links with the area.

In relation to sightings in the Coalisland area, it is accepted that Mr Reynolds has family links to the Duffy family and there are a number of "high ranking dissident republicans" living in the area of Mr Duffy's home and in the general Coalisland area. The fact that the vehicle is seen in that general area is not evidence of terrorist offending against Mr Duffy.

[27] The prosecution submits that there is no circumstance pointing away from the defendants' guilt.

The abuse of process application

[28] The defence submits that there are three limbs to the abuse of process application:

> "(1) That the delay of seven years in bringing this case to trial has made crucial parts of the evidence impossible to properly challenge, making it more likely than not that a fair trial cannot take place.
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> (2) That there was a deliberate decision not to record the transmissions from the identification witnesses which is a manipulation of the process, designed to defeat transparency.
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> (3) That the decision to have two disclosure officers, which meant that the officer in charge did not have access to or knowledge of all of the evidence in the case, is an improper manipulation of the process. The defence concede that the admission by senior prosecuting counsel that they were fully aware of all potential disclosure material, both sensitive and non-sensitive reduces the force of this submission."

[29] The prosecution submits that the test for abuse of process is not met. In relation to the seven year delay a chronology of the proceedings has been prepared by the prosecution. The case was originally listed for trial on 9 September 2019 but taken out of the list because of an awaited defence report. The Covid pandemic further delayed the trial, and a second trial date was vacated in November 2021 due to an ongoing trial. A series of s8 applications have been pursued and it appears that there were significant disclosure issues to be resolved, which continued throughout this trial that commenced in October 2023.

[30] The prosecution observes that both defendants were arrested and questioned in 2016 and had every opportunity to indicate any matters relied on in their defence during police interviews. It is, however, accepted that the delay has meant that the surveillance officers have little or no independent memory and rely on the log and

their statements. Delay is a factor which often which has to be taken into account but in itself, is not a basis for a stay because the defendants can have a fair trial.

[31] In relation to the second limb of the application, there is no evidence that the decision to use a loggist to manually record transmissions was made for an improper purpose. A redacted log was provided which contained the entries made and any additions with the Oscar name recorded. The defence raised an issue about an apparent difference in the quality of ink used in parts of the log, the suggestion being that the log may have been improperly altered. There is no evidence of impropriety. The loggist suggested a photocopying issue and whilst no evidence was called, the PPS wrote to the defence about the matter. The defence objected to me seeing the correspondence or being told what it contained. In those circumstances, I am unable to reach any conclusion which might support an abuse of process application on the grounds that it would be unfair to try the defendant.

[32] Finally, the criticism of the decision to have two disclosure officers with the officer in charge having no knowledge of information held by the Terrorist Investigation Team is based on a concern that disclosure may not be complete. However, in view of Senior Crown counsel's admission that all material was made available to the PPS and to Crown Counsel, who directed on disclosure both in advance and throughout the trial, it is difficult, if not impossible, to sustain that criticism. There is, no doubt, good reason for strictly limiting availability of highly sensitive information and the admission by Senior Crown Counsel should alleviate concern on the part of the defence that relevant information may not have been disclosed, either intentionally or unintentionally.

The applications to reconsider the rulings on bad character and hearsay

[33] I have admitted Mr Duffy's previous conviction for a terrorist offence and explained my reasons in a ruling. The weight that I should attach to that conviction, if any, is a matter that I will have to consider at the conclusion of the case, with appropriate warnings when the defence have had an opportunity to call evidence. There is no basis upon which I should reconsider that ruling at this stage. Nor is there any basis for reconsidering the hearsay rulings in which the reasons for granting them were set out. I will remind myself of the warnings commonly given to juries when I consider the weight that I should attach to the evidence contained in the statements admitted as hearsay evidence, at the conclusion of the case.

Shea Reynolds

No case to answer

[34] The defence submits that "considered globally", there is insufficient evidence upon which a jury, properly directed could convict him of any of the counts. Counsel on behalf of Mr Reynolds repeated many of the themes advanced in respect of Mr Duffy such as the unreliability of the surveillance evidence because of flaws

and inconsistencies in some of the evidence, the fact that it was not digitally recorded, the manipulation of the court process in not digitally recording it and the inherent dangers of confirmation bias due to the briefing of the surveillance officers in advance. In particular, it is submitted that:

> "(1) The court should conclude that any jury considering the Crown's evidence would not convict on the basis that it could not be sure that the Crown's evidence was full, accurate and truthful. The defence submit that hearsay applications granted on the basis of fear and ill heath in respect of witnesses whose statements are either continuity or which deal with the circumstances in which the camera was found, prevented the defence from exploring what police knew about this operation, whether the crime scene had been interfered with and in particular, whether the camera had been tampered with. The defence submit that a stay of proceedings should also be granted on this basis.
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> (2) In the alternative, even if a jury were able to place weight on the Crown's evidence, at its height it is consistent with a myriad of possible scenarios other than that suggested by the Crown in its evidence so that no jury could possibly convict on the evidence.
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> (3) The additions to the log in the course of the de-brief by the surveillance officers was in the context of hearing the details of other officer's observations. The manner of all of the recordings in the log is "suspicious."
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> (4) Some of the surveillance officers were asked to make a second statement, which only became apparent in the course of cross-examination. Disclosure revealed that a member of the investigation team brought to the attention of one of the surveillance officers identification details provided by another officer. However, it is noted that the officer approached confirmed that he had no recollection of those details and did not change his statement.
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> (5) Julie Hayes who provided aerial commentary on the night the camera is alleged to have been placed in Mr Woods' home, refers at all times in her communications to "the vehicle." At no time does she refer to the silver Golf or its VRN. Furthermore, she relies on thermal imaging for the identification. The defence

submit that she is not an expert witness and not qualified to give an opinion.

(6) Matters put to the defendant in the course of police interviews included the fact that another person, Shane Stevenson was suspected of being involved in the retrieval of the dummy camera on 20 September 2016 and the fact that another Swan wildlife camera was found in his house.

(7) Matters put to Ciaran Magee in interview included the fact that he was one of the two men who retrieved the dummy camera.

(8) The prosecution erroneously opened the case on the basis that Mr Magee had asked for use of the silver Golf on the evening of the 14 September 2016 and that there had been no response from Mr Reynolds. In fact, Mr Reynolds had replied, and the response appears to confirm that Mr Magee could have the car.

(9) In any event, the running of this trial has been so materially unfair to the defence that the trial should be stopped at this stage without requiring the defence to answer the Crown's allegations. The defence rely particularly on the disclosure process and the involvement of two surveillance officers which resulted in the investigating officer informing the Disclosure Judge that all relevant material had been disclosed, when other material of which she was unaware, was disclosable. As already stated in relation to Mr Duffy, senior prosecuting counsel has confirmed that the prosecution team was aware of all material in the case.

(10) The defence rely on technical evidence relating to the camera and submit that despite denials by the relevant police witness, it is open to the court to conclude that the SD card may have come from a different camera.

(11) The defence further rely on the evidence of Mr Bunter, forensic Scientist who disputes the findings of the police fingerprint expert that the fingerprint on the camera is attributable to Shea Reynolds and opines that the findings are inconclusive.

(12) The evidence has established that a manual for a wildlife camera was found in the home of another suspect, a wildlife camera was also found in another

> suspect's home and another silver Golf was also the subject of interest. It is not disputed that other persons were likely to be involved in the terrorist operation."

[35] The prosecution relies on its submission in relation to Mr Duffy's application and that the issues raised are matters that go to weight, to be considered at the conclusion of the case. It further submits that there is simply no evidence to suggest that the log has been altered or that it did not exist at the material time. Nor is there any evidence that the SD card had been in a different camera. With regard to Julie Hayes evidence, she made it clear that her aerial observations and identification of the silver Golf were based not just on thermal imaging but also on information relayed to her by surveillance officers on the ground. The defence submission rests on "suspicion" that the log is inaccurate and that the crime scene (in particular the camera) were tampered with. There is no evidence to support that conclusion.

Consideration

[36] In relation to the abuse of process application, this is a power to be exercised carefully and sparingly and only for very compelling reasons (see *R v McNally and McManus* [2009] NICA 3). It is unfortunate that there has been delay in this case but there is no suggestion that the delay was deliberately caused. It is important to note that both defendants were interviewed very shortly after this incident when events would have been fresh in their minds and yet no account of their movements on the relevant dates was given nor was any positive case made. Whilst the delay has inevitably had an impact on the memories of the surveillance officers, that can be taken into account in the assessment of the weight of their evidence and whether the prosecution has discharged the burden of proof. I do not accept that the defendants cannot have a fair trial due to delay and an application to stay the proceedings on that ground is refused.

[37] A stay is also sought on the ground that it would be unfair to try the defendants because to do so would offend the court's sense of justice and propriety. Whilst general unfairness is relied upon, specifically the defence relies on the disclosure process, the failure to call evidence which would have enabled the background to the finding of the camera to be explored and the manner in which recordings of observations was recorded. There is no evidence of malice or bad faith, and the hearsay statements were admitted on statutory grounds after argument and evidence was considered. I am not satisfied that there are compelling reasons to stay the proceedings on this ground.

[38] With regard to the applications of no case, although the defendants are jointly charged and many of the issues raised by the defence relate to both, I have considered the case against and for each of them separately.

[39] The question I have to ask myself is whether I am convinced that there are no circumstances in which I could properly convict either defendant based on the

evidence I have heard. Taking into account the submissions made and the prosecution response, I am not so convinced.

[40] I accept that there are issues with some of the evidence from some of the surveillance officers and that these are matters that go to weight and credibility. The weight that should be attached to each strand of evidence can only be determined at the conclusion of the case and at that stage, I will have to consider the identification evidence and whether there is other evidence that supports it. I am mindful that the ANPR evidence supports only the identification of the silver Golf and not the occupants.

[41] I am taking the fingerprint evidence in relation to Mr Reynolds at its height at this stage, although for convenience, I have heard that evidence challenged by Mr Bunter, the defence expert. I have to be sure that this prosecution evidence is correct before I can accept it and issues have been raised which ultimately, may undermine the weight that can be attached to this part of the prosecution case.

[42] In relation to the bad character evidence of Mr Duffy, the weight that can be attached to it, if any, cannot properly be determined until the conclusion of the case.

[43] Having considered the evidence relating to the examination of the camera and the SD card, there is no basis on which the court could infer that the SD card had never been in the wildlife camera seized. That suggestion was specifically discounted by the relevant witness.

[44] Nor is there any evidence that either the crime scene or the camera was tampered with. The defence "suspicion" is not evidence.

[45] Taking all the evidence into account on an all-encompassing basis, there is, in my judgment, sufficient evidence to raise a *prima facie* case against both defendants. The question for the court at the conclusion of this trial is what inferences can properly be drawn from the evidence and what weight should be attached to the combination of each of the strands of evidence relied on by the prosecution.