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IN THE CROWN COURT FOR THE DIVISION OF BELFAST

R

-v-

DENIS HUTCHINGS

COLTON J

Introduction

[1] Denis Hutchings appears before the court on a Bill of Indictment alleging the attempted murder and the attempted grievous bodily harm with intent of John Patrick Cunningham on 15 June 1974.

[2] The particulars of the counts are:

(1) That on 15 June 1974 in the County Court Division of Armagh and South Down, he attempted to murder John Patrick Cunningham, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law.

(2) That on 15 June 1974 in the County Court Division of Armagh and South Down, he unlawfully and maliciously attempted to cause grievous bodily harm to John Patrick Cunningham with intent to do him grievous bodily harm, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 18 of the Offences Against the Person Act 1861.

[3] At the relevant time the defendant was the Squadron Quartermaster Corporal of the Lifeguards Regiment which was on emergency tour in Northern Ireland. He and members of the Regiment were travelling in two Land Rovers along Carrickaness Road, Benburb when John Patrick Cunningham was seen acting suspiciously at the side of the road. Upon sight of the patrol, Mr Cunningham ran and entered a nearby field by climbing over a gate. Having entered the field, he ran away from members of the Regiment who had debussed from their Land Rover. He ignored repeated warnings to halt and in the ensuing interaction he was shot twice

and died from his injuries at the scene. It emerged later that the deceased had been unarmed. He had the mental age of a child.

[4] The forensic evidence suggests the deceased was struck by two bullets. Death was due to a bullet wound to the trunk. The fatal bullet struck the left side back in the hindquarter and emerged on the right side of the chest. The second bullet perforated the right shoulder and right hand.

[5] It is the prosecution case that in total five shots were fired at the scene from two SLR rifles. It is alleged that two of these shots were fired by a soldier B, now deceased and that the defendant fired three shots.

[6] The prosecution is unable to prove that any of the shots allegedly fired by the defendant was responsible for the death of the deceased. It is for this reason that the defendant is not charged with murder. However, the prosecution case is that there is a safe inference that by firing shots in the circumstances described the defendant either intended to kill the deceased or, in the alternative, intended to cause him grievous bodily harm in circumstances where the deceased was running away from the soldiers and at a time when he offered no threat to them.

[7] In particular the prosecution place emphasis on what is referred to as the "*yellow card*" document which provided "*Instructions by the Director of Operations for Opening Fire in Northern Ireland – Army Code No. 70771 – Revised November 1972*". The instructions, which applied to soldiers operating in Northern Ireland in 1974, contain the following:

> "***Warning before firing***
>
> *(6)* ***Whenever possible a warning should be given before you open fire.*** *The only circumstances in which you may open fire without giving warning are described in paragraphs 13, 14 and 15 below.*
>
> *(7) A warning should be as loud as possible preferably by loud hailer. It must –*
>
> *(a) Give clear orders to stop attacking or to halt as appropriate.*
>
> *(b) State that fire will be opened if the orders are not obeyed.*
>
> ***You may fire after due warning***
>
> ***(8) Against a person carrying what you can positively identify as a firearm,*** *but only if you have*

reason to think that he is about to use it for offensive purposes.

And

He refuses to halt when called upon to do so and there is no other way of stopping him."

[8] The defendant made an application under section 2(3) and (5) of the Grand Jury Abolition Act (Northern Ireland) 1969 inviting the court to quash the counts on the indictment and to enter a "No Bill". Having heard submissions on the issue Treacy J (as he then was) refused the application and ruled that the depositions disclosed a case sufficient to justify putting the defendant on trial on the counts contained in the indictment.

[9] I am obliged to counsel who appeared in this case for their helpful and detailed written and oral submissions. Mr Charles MacCreanor QC appeared with Mr David Russell on behalf of the Public Prosecution Service. Mr James Lewis QC and Mr Ian Turkington appeared on behalf of the defendant.

Summary of prosecution evidence

[10] It is useful to set out a summary of the prosecution evidence as contained in the depositions upon which the defendant has been returned for trial.

Soldier C

[11] Soldier C has made a statement dated 16 June 1974 in which he indicates he was the driver, travelling in the lead land rover with the defendant who was the front seat passenger. There were 4 other soldiers in the rear of the land rover. All the soldiers were armed with SLRs and two magazines, each containing 20 rounds of 7.62 mm ammunition. He describes how having rounded a left hand bend, he saw a man standing on the left side of the road facing the hedgerow. The man looked at the land rover, appeared startled and confused, swung round to his right, did a complete turn and moved off across the road towards a gateway through the hedge on the right side of the road. As he started to run, he put his right hand inside his jacket and kept it there for a period then withdrew it. He climbed over the gate on the right side of the road. By this time he had stopped the vehicle and the defendant had alighted from it. As the defendant did so, he shouted at the man to "*stop there*". The man continued into the field and the defendant followed him to the gate which he also climbed over. Once in the field he was out of Soldier C's sight but Soldier C states that "*I heard a weapon being cocked and the defendant shout, 'halt, stand still'*". At this point he remounted the vehicle and operated the radio informing Squadron Headquarters of the incident. While doing this he heard a group of 3 or 4 shots fired. He was not aware who had fired or at what. He was then approached by Solider E who informed him that a civilian had been injured.

Soldier E

[12] A statement from Soldier E dated 16 June 1974 is contained in the depositions and I am told that this was at the express request of the defendant. He was in the land rover driven by Soldier C and commanded by the defendant. He too saw the man standing on the left of the road close into the hedge. He describes the man as looking towards the vehicle with surprise, as if he had been caught doing something. He describes him making his way across the road towards a gate which he climbed over. He confirms that the vehicle stopped and the crew alighted. The defendant ran after the man followed closely by himself. As he climbed the gate he heard the defendant shout "*halt, stand still, hands up*". When Soldier E got into the field he looked to his right and saw the man running along the field parallel with the road. He followed the man and actually overtook the defendant. He says in his statement:

> *"Whilst chasing the man he turned around and on doing so, put his right hand into this (sic) jacket, at this stage I cocked my weapon because I thought he had a weapon beneath his coat. I would point out that whilst he was being chased by the defendant and myself, we both on several occasions warned him to stop and stand still. At the same moment I cocked my weapon, I was aware of one shot being fired from behind me. This was followed shortly by 3 or 4 shots. I could not tell from where or from whom the shots came, but as a man reached a fence across the field he fell to the ground."*

At that stage he returned to his land rover.

Alan Mews

[13] At the relevant time Mr Mews was a member of the Royal Military Police and he attended the scene of the shooting. On arrival at the scene he spoke to the soldiers involved and took possession of a SLR rifle 7.62 from Colour Sergeant Hutchinson. He also took possession of the magazine from that weapon. He was told that the weapon had been used by the defendant himself. He kept the weapon in his possession until the arrival of the Special Investigation Branch at which stage the weapon was handed over. He states that there were 17 rounds of ammunition in the magazine. He labelled the magazine AM/1 and said that this would have been countersigned by the defendant. The magazine was handed to the Special Investigation Officer from the RMP, Sergeant Cooper.

Howard Jones

[14] Mr Jones was a Lance Corporal in the Royal Military Police and attended at the scene of the incident. He took possession of a SLR rifle with a magazine

containing 18 rounds from Soldier B. He retained the exhibit before handing it over to Sergeant Cooper.

John Cooper

[15] In his deposition Mr Cooper confirms that he was in the Royal Military Police at the relevant time. He was shown a copy of his handwritten statement dated 16 June 1974. He has no recollection of making the statement or the incident but suggests that as far as he is aware the statement is the truth. In that statement he confirms he attended the scene of the fatal shooting. He confirms that inside the entrance of a gate into the field he found two spent 7.62 empty cases of which he took possession and marked with an exhibit label JC/3. To the left of the gateway inside the field he found two more 7.62 empty cases in respect of which he took possession and marked them JC/1. About 2 yards away he found an additional 7.62 empty case which he again took possession of and marked it JC/2. He confirms that on 17 June 1974 he handed these items to the Department of Industrial and Forensic Science in Belfast.

John McIlroy

[16] Mr McIlroy was a police sergeant at the relevant time and took seven photographs of the scene of the shooting incident. He subsequently attended at the post mortem carried out by Professor Marshall where he took five photographs.

Dr A Ghosh

[17] The deceased was a patient of Dr Ghosh. Dr Ghosh confirms that the deceased was born with an incomplete development of mind and declared to be a person requiring special care within the meaning of Part III of the Mental Health Act (Northern Ireland) 1948. He referred to an incident in June 1973 when soldiers were in the process of putting the deceased into a Saracen because he had been hiding in bushes and acting suspiciously. Dr Ghosh explained Mr Cunningham's circumstances to the soldiers and he was released. Dr Ghosh confirms that the deceased had an apprehension towards soldiers in uniform.

Anthony McGurk

[18] Mr McGurk is a school teacher who lived locally and who knew the deceased. He confirms attending the scene of the shooting and identifying Mr Cunningham to Detective Sergeant McBurney. He confirms the deceased's fear of the military.

Detective Inspector Gibson Gilmore

[19] DI Gilmore confirms that he interviewed the defendant on 15 June 1974. After caution he was asked if he wished to offer a written statement or state verbally

the manner in which he had been involved in the shooting. The following is recorded in DI Gilmore's statement:

> *"Soldier 'A' (the defendant) replied; I have taken legal advice on the matter and I have been advised not to make a statement at this time.*
>
> *Q. Can you tell us how many shots you fired?*
> *A. I don't wish to say anything at this time in view of my legal advisor's instructions.*
> *Q. Were you in charge of the patrol at that particular incident?*
> *A. I was.*
> *Q. Was it you who called on the youth to halt?*
> *A. Yes it was.*
> *Q. On being called to halt did he run on?*
> *A. I don't wish to answer that.*
> *Q. Will you be making a statement to your legal advisor?*
> *A. That will depend on him and the advice he gives us.*
> *Q. Did anyone else in your patrol ask the person to halt?*
> *A. I don't want to answer that until I see my legal advisor.*
>
> *The D/I enquired if he wished to sign the notes.*
>
> *'I won't if I don't have to'."*

George Fairclough

[20] Mr Fairclough was a forensic scientist at the time of the shooting. He examined the following items.

(1) SLR rifle serial number 59A 25891 U E fitted with 'SUTE' Sight No. 531 and magazine containing 17 x 7.62 rounds.

(2) SLR rifle serial number UB 60 A81034 fitted with 'SUTE' Sight No. 526 and magazine containing 18 x 7.62 rounds.

(3) 2 x 7.62 empty cases.

(4) 1 x 7.62 empty case.

(5) 2 x 7.62 empty cases.

[21] Item No. 1 is the rifle taken from the defendant at the scene. After carrying out various forensic tests Mr Fairclough confirms that items 3 and 4 had been discharged from item 1.

William Pogue

[22] Mr Pogue was a resident of Carrickaness Road in 1974. He remembers the day when John Pat Cunningham was shot. He heard the sound of land rovers going past his house. He then heard shouting. He was "*more sure*" it was "*halt*" than "*stop*". He was sure it was the army from the English accent. Not long after he heard "*halt*" shouted he heard shots. He could not remember if one or two shots were fired. His recollection was that the time between hearing "*halt*" being shouted and the shots being fired was no more than 15 to 30 seconds.

Brendan White

[23] Mr White lived close to the scene of the shooting and he recalls 4 or 5 gunshots being fired.

Other Statements

[24] There are other statements from the pathologist, Professor Marshall, the photographer Richard Truesdale, Charles Honan, who prepared some maps and Father McNiece who knew the deceased and attended at the scene after the shooting.

[25] The defendant was re-interviewed by Detective Constable McCaw on 21 April 2015. Essentially in the course of the interviews on the basis of legal advice the defendant indicated that he did not wish to comment.

[26] The defendant did answer some questions and the prosecution referred me to the following answers which are set out in the transcript in the papers.

> *"Q. How do you feel when you fired that first shot Denis?*
> *A. Can't remember."*
>
> *"Re Mews statement:*
>
> *Q. Do you recall your weapon being taken off you?*
> *A. Yes … at the scene … I think at the scene (I don't recall any conversation)."*
>
> *"Q. Mews … takes your rifle off you with 17 rounds and the soldiers have already said previously that they would have carried two magazines each*

containing 20. Would you have been the same Denis as a, patrol commander?

A. Yes.

Q. So three rounds are missing and those are the three rounds fired?

A. No comment."

The application

[27] The defendant has made an application to stay the indictment on the grounds of abuse of process. This application is based on three broad grounds namely the non-availability of evidence; delay in the prosecution and breach of promise. Whilst each of these grounds requires separate consideration they are inter-related and there is a degree of overlap on the applicable legal principles to be applied.

The Applicable Law

[28] There is no real dispute about the applicable law. Essentially there are two basic grounds upon which a criminal trial may be stayed; the first is where a defendant is, or will be, prejudiced in the preparation or conduct of his defence and not be able to receive a fair trial. The second is where a prosecutor has manipulated the court process so as to deprive the defendant of a legal protection or take unfair advantage of a technicality or the particular circumstances would undermine his human rights or the rule of law or would offend the court's sense of justice or propriety.

[29] In ***R v McNally and McManus*** [2009] NICA 3 the Court of Appeal comprehensively set out how these principles should be applied at paragraph [14] onwards:

> "*The principles*
>
> *[14] The general principles governing the grant of a stay of proceedings on the basis that to continue them would amount to an abuse of process are now well settled. There are two principal grounds on which a stay may be granted. The first is that if the proceedings continue, the accused cannot obtain a fair trial – see, for instance,* ***R v Sadler*** *[2002] EWCA Crim 1722 and* ***R(Ebrahim) v Feltham Magistrates' Court*** *[2001] EWHC Admin 130. The second is that, even if a fair trial is possible, it would be otherwise unfair to the accused to allow the trial to continue – see,* ***Attorney General's reference (No 2 of 2001)*** *[2004] 1 All ER 1049 and* ***R v. Murray and others*** *[2006] NICA 33.*

[15] These grounds require to be separately considered. They should not be conflated for the prosaic and obvious reason that considerations that will be relevant to one are not necessarily germane to the other. The first ground requires a careful analysis of the circumstances which are said to give rise to the possibility that a fair trial cannot take place and a close examination of whether the trial process itself can cater for the shortcomings of the prosecution or police investigation. These inquiries should be informed by two important principles. They were set out in paragraph 25 of ***Ebrahim*** *as follows: -*

> *'(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; 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.'*

[16] The principles governing the grant of a stay in circumstances where a fair trial is possible but it would be unfair that the defendant should be required to stand trial were summarised by this court in ***R v. Murray and others****. In that case we referred to the judgment of Lord Bingham of Cornhill in* ***Attorney General's Reference (No 2 of 2001)*** *and made the following observations on it at paragraph [23] et seq: -*

> *'[23] It is, we believe, important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is possible but some other species of unfairness to the accused makes a stay appropriate. We therefore set out in full paragraph [25] of his opinion: -*

*"The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by **Bennett v Horseferry Road Magistrates' Court** [1993] 3 All ER 138, [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which **Darmalingum v State** (2000) 8 BHRC 662 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (**Martin v Tauranga DC** [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."*

[24] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith, unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's convention right is possible, a stay will never be appropriate.

> *[25] We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not."*

[17] Although Lord Bingham was discussing the question of when it would be appropriate to grant a stay where a fair trial was possible and in this case, the focus of the debate has been on whether such a fair trial can in fact take place, these passages serve to highlight the rule that where an alternative course is available to remedy a breach of a defendant's convention right (in this case the right to a fair trial under article 6 of the European Convention on Human Rights) a stay will never be appropriate. By parity of reasoning, a judge should never grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue. Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the defendant is avoided.

[18] It appears to us that this examination must be conducted at two levels. The first involves an inquiry into the individual defects in the prosecution case or the police investigation and the measures that might be taken to deal with each. The second entails the weighing of the impact of the various factors on a collective basis. It does not necessarily follow that, because some steps to mitigate each item of potential unfairness can be taken, the stay must be refused. A judgment can still be made that the overall level of unfairness that is likely to remain is of such significance that the proceedings should not be allowed to

> *continue. It is to be remembered, of course, that the judge must be persuaded of this proposition by the defence, albeit only on a balance of probabilities."*

[30] All of the authorities that have considered the principles underlining a stay for abuse of process emphasise that the imposition of a stay can only be justified in exceptional circumstances. Thus in ***R v Derby Crown Court ex p Brooks*** [1984] 80 Cr App R 164 Sir Roger Ormrod who gave the judgment of the court, says at 168-169:

> *"In our judgment, bearing in mind Viscount Dilhorne's warning in* ***Director of Public Prosecutions v. Humphreys*** *(1976) 63 Cr App R 95 (at) 107; [1977] AC 1, 26 , that this power to stop a prosecution should only be used 'in most exceptional circumstances', and Lord Lane CJ's similar observation in* ***Oxford City Justices, Ex parte Smith*** *(1982) 75 Cr App R 200 (at) 204 , which was specifically directed to Magistrates' courts, that the power of the justices to decline to hear a summons is 'very strictly confined' …"*

[31] In ***Ex parte Bennett*** [1994] 1 AC 42 at page 74 Lord Lowry says that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons.

[32] The courts in this jurisdiction have repeatedly endorsed the view that the imposition of a stay is an exceptional course – see ***Re DPP's Application*** [1999] NI 106; ***R v P*** [2010] NICA 44 and ***R v McNally and McManus***, to which I have referred above.

Can the defendant receive a fair trial?

[33] I turn now to consider the first limb upon which a criminal trial may be stayed. Can the defendant receive a fair trial?

[34] The defendant is highly critical of the investigation of this shooting.

[35] He points to the unavailability of the following material and/or exhibits namely:

(i) The original investigation file.

(ii) The two rifles seized.

(iii) The five spent cartridge cases.

(iv) The two magazines.

[36] The absence of the relevant exhibits means that the defendant has not had the opportunity to independently examine the rifles, to ascertain for example whether they were actually fired, whether there was any forensic link between any of the rifles fired and the defendant and whether the cartridges can be forensically linked to the individual rifle. He is not in a position to independently investigate or challenge the forensic evidence relied upon by the Crown and in particular the evidence from Mr Fairclough.

[37] The absence of the original investigation file, it is argued, means that the defence will never know whether or not it included exculpatory material which undermined the Crown case and/or assisted the defence case.

[38] In addition to the loss of this material the defendant is critical of the entire investigation at the time. These have been categorised as failures to:

(i) Conduct lines of enquiry.

(ii) Comply with routine investigative procedures.

(iii) Follow crime scene management procedures.

(iv) Adhere to good practice for exhibit referencing.

(v) Ensure continuity.

(vi) Monitor and manage investigative audit.

[39] The defence argue that there has been a failure to establish a proper crime scene and secure individual scenes for potential evidence including:

(i) The deceased Mr Cunningham.

(ii) The site where Mr Cunningham fell near the metal strand fence surrounding the fields.

(iii) The patrolling soldiers – a minimum of the defendant and Solider B.

(iv) The sites from where the shots were allegedly fired.

(v) The woodland beyond where the bullet heads would have travelled.

(vi) The initial site at which Mr Cunningham was alleged by some witnesses to have been acting suspiciously.

(vii) The track of Mr Cunningham alongside the hedging and in the field as he ran.

(viii) The two vehicles that transported the patrolling soldiers.

(ix) The absence of a cordon or crime scene and as a consequence a crime scene log has reduced the opportunity for the gathering of all potential evidence.

[40] In terms of exhibit referencing and continuity by way of example it is pointed out that the deceased was identified to Detective Sergeant McBurney by Anthony McGurk at the scene on 15 June 1973 and in turn Detective Sergeant McBurney identified the corpse to the State Pathologist, Professor Marshall the following day at the mortuary at Craigavon Area Hospital. However there was no evidence in the papers as to how, when and by whom the body was conveyed to the mortuary at Craigavon Area Hospital for the post mortem.

[41] In terms of swabs which were taken from the deceased to establish whether there was any gunshot residue to link him to the use of a weapon there is a gap as to records confirming where the swabs were stored between them being taken by Constable Murray on 15 June 1974 and arriving at the Forensic Science Laboratory in Belfast on 18 June 1974. The swabs are not assigned an exhibit reference.

[42] The defence point to inconsistencies as to who allegedly seized the rifles from the defendant and Soldier B. In his statement Sergeant Mews of RMP states that upon his arrival at the scene he seized a SLR, serial number 59A 25891 from Mr Hutchings and a magazine containing 17 rounds. He allocated the weapon an exhibit reference AM1. He stated that the exhibit label was countersigned by Mr Hutchings. Lance Corporal Jones of RMP states that upon his arrival at the scene he seizes a SLR serial number A81084 from Soldier B and a magazine containing 18 rounds. He allocated the weapon an exhibit reference HJ1. He states that the exhibit label was countersigned by Soldier B. Both Sergeant Mews and Lance Corporal Jones state that they handed the weapons to Sergeant Cooper of the Special Investigations Branch around 4.00 pm that afternoon at Gough Barracks.

[43] However it is pointed out that Sergeant Cooper of the Special Investigations Branch in his deposition for the inquest at the Coroner’s Court on 24 January 1975 stated that he had seized the respective weapon from Mr Hutchings and Soldier B at the scene.

[44] Sergeant Cooper is the person who was responsible for the recovery of the spent cartridge cases. It is pointed out that there is no indication in their statements that Sergeant Mews, Lance Corporal Jones or Sergeant Cooper were wearing surgical gloves when they handled the weapons which may have compromised the integrity of the exhibits.

[45] The papers do not indicate who conveyed the weapons or the spent cartridge cases to the Forensic Science Laboratory in Belfast.

[46] In relation to the locations at which the cartridges were found there is criticism of a failure to photograph them in situ so that their position could be accurately confirmed rather than on the basis of estimation from Sergeant Cooper.

[47] Turning to the question of the soldiers and their vehicles, the defendant says that all 10 soldiers in the patrol should have been treated as individual crime scenes. It is suggested that each of the soldiers should have been forensically examined. Their clothing should have been seized to establish whether they had traces of the deceased's blood and/or firearm residue. It is also argued that each of the soldiers' weapons should have been examined. The land rovers should also have been examined.

[48] There is also a criticism of the failure to conduct house to house enquiries to identify potential witnesses.

[49] All of these criticisms have to be seen in the context of the prosecution case, the evidence available and relied upon to support the case and the defence statements submitted by the defence.

[50] The history of the defence statements is relevant.

[51] The original defence statement dated 24 August 2017 includes the following:

> "2. *Without prejudice to the defendant's rights to contest the admissibility of the evidence upon which the prosecution intends to rely, or any part thereof, and to his rights in respect of such issues as the evidence may properly give rise to, the defendant says that he is not guilty of the charges alleged against him and takes issue with the said charges and with the evidence relied upon in respect of same by the prosecution in seeking to establish his guilt.*
>
> *The accused maintains that he did not attempt to murder John Pat Cunningham nor did he attempt to cause him grievous bodily harm with intent to cause him grievous bodily harm (GBH). He contends that he was not involved in the alleged attempted murder of Mr Cunningham. He states he was not acting in concert nor did he contemplate any such actions by Soldier B.*

The accused accepts being party to a military patrol on operation duty along the Carrickaness Road, Benburb, at approximately 11.50 am on 15 June 1974.

The accused accepts that he called upon the deceased to halt numerous times after observing him acting suspiciously. The accused believed that the deceased had a gun. Some 36 hours before the death of Mr Cunningham, some of the patrol had been fired upon when they happened upon a group of IRA terrorists transporting weapons and explosives approximately four miles away. On 15 June the patrol were on cordon and search exercise looking for some of the same terrorists who had escaped and any additional arms caches.

The accused accepts that John Pat Cunningham was shot and died as a result of his injuries. The accused denies that he fired his weapon at John Pat Cunningham.

The accused denies that he is guilty of any of the alleged conduct in respect of which he is charged with as alleged or at all."

[52] Shortly prior to the final submissions in this matter the defendant served the following "updated defence statement" dated 7 December 2017:

"(1) This statement is made without prejudice to the submission that the legislation requiring a defence case statement ('DCS') does not apply as a criminal investigation to this offence began in 1974.

(2) This DCS is not an admission by the defendant as to any facts the prosecution must prove in order to make a case to answer; and the prosecution are put to express proof on all or any such facts required to make a case to answer.

(3) The following is to identify an issue between the prosecution and defence for the purpose of an orderly trial.

(4) The factual issue is whether the defendant fired aimed shots at the deceased. The defence position is that if there is a case for the defendant to answer at trial the defendant will assert that he fired only warning shots at the deceased in order to make him comply with the lawful order to halt.

> *(5) A further issue of law arises in that the defence will submit the entire record of interview should be ruled inadmissible as it is predicated upon an unlawful arrest and unlawful detention. The defence will rely inter alia on the case of* ***B, M, O, Q, R, U, V (Former Soldiers) v the Chief Constable of the Police Service of Northern Ireland*** *[2015] EWHC 3691 (Admin)."*

[53] Ultimately, the issues in this case are relatively straightforward. Did the defendant discharge his weapon after he called upon the deceased to halt? If he did, were those shots aimed at the deceased? If they were aimed at the deceased did the defendant intend to kill the deceased (Count 1) or intend to cause grievous bodily harm to the deceased (Count 2)?

[54] None of the soldiers who were present at the scene in this case say that they actually saw the defendant discharge his weapon. The assertion that the defendant fired his weapon at the scene arises in part from his own admission – see the deposition of Mr Mews which includes the following:

> "*Q. Can you say whether you had that suspicion or whether you knew it had been used?*
>
> *A. I was told it was used.*
>
> *Q. How told you that?*
>
> *A. The defendant.*"

[55] The issue as to whether or not the defendant did fire his weapon will depend on the evidence of Mews, Fairclough and the other forensic witnesses. If, at the end of all the evidence called by the prosecution, there is, in the view of the court a case for the defendant to answer then if he wishes to make the positive case outlined in his updated defence statement that he fired only warning shots at the deceased in order to make him comply with the lawful order to halt this is clearly a matter upon which he can give his own evidence, unhindered by delay or any of the factors identified in his critique of the investigation.

[56] In my view the evidence of these witnesses can be properly tested in a trial. If having heard the evidence of these witnesses a court or jury comes to a conclusion to the requisite standard that he did in fact fire the gun then the issues of the defendant's intention will depend on what inferences the court or jury might draw from all the evidence in the case, including any evidence from the defendant.

[57] I agree that there are many shortcomings and flaws in the investigation of this case. These do a disservice not only to the defendant but also to the deceased and his next of kin. The various criticisms and lacunas referred to by the defendant may

well have the effect of undermining the prosecution case and could assist rather than hinder the defendant.

[58] I do not see how the shortcomings identified in the investigation cause actual or real prejudice to the defendant that cannot be dealt with in the course of the trial in light of the issues that arise in this case. In my view his arguments as to prejudice are speculative.

[59] Much of the criticism of the investigation focuses on the possibility that other soldiers at the scene may have discharged their weapons. Thus treating all of the soldiers as potential crime scenes and seizing their weapons could have eliminated this possibility. Quite simply, on the papers, there is no basis that I can see for the suggestion that someone other than the defendant or Soldier B discharged a weapon at the scene, particularly having regard to the fact that the suggestion the defendant fired at the scene emanates in part from the defendant himself, according to the evidence of Mr Mews, whose evidence can be tested at trial. Furthermore, the forensic evidence from Mr Fairclough, which can also be tested at trial, links the five empty cases found at the scene to the rifles of the defendant and Soldier B. If this case or possibility is canvassed at trial then the court can consider whether the shortcomings mean that a fair trial is not possible for the defendant.

[60] In the course of submissions the defence drew my attention to an averment in an affidavit from the Director of Public Prosecutions which was sworn in the context of judicial review proceedings to the effect that:

> "*(xiv) He was suspected of being a terrorist and there was a suspicion that he may have been armed;*
>
> *(xv) He was called upon to stop, but did not.*"

[61] The "he" being referred to is the deceased Mr Cunningham. Quite frankly I do not see how this averment supports an argument for abuse of process.

[62] It should also be borne in mind that this application is made before the court has had the opportunity to hear any of the evidence and it remains open to the defendant to renew any such application when that evidence has been heard and tested. As was said by the court in the case of ***R v F*** [2011] EWCA Crim 726:

> "*It is now recognised that usually the proper time for the defence to make such an application and for the judge to rule upon it is at trial, after all the evidence has been called.*"

[63] Ultimately what is involved in determining this application is a judicial assessment of whether the defendant can obtain a fair trial notwithstanding the

shortcomings identified in the investigation and the potential prejudice arising from delay.

[64] There is a clear public interest in prosecuting those who are accused of serious crime. In this case the court has already determined that there is sufficient evidence to put the defendant on trial.

[65] It is this public interest which underpins the general principle that the power to order a stay should be exercised sparingly. Echoing this principle in the ***Ebrahim*** case the court says at paragraph [26]:

> "*The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between.*"

Delay

[66] In terms of delay the defendant argues that the shortcomings in the investigation can now not be remedied.

[67] In particular an issue that arises relates to the fact that many of the soldiers on the ground at the time are now deceased. The defendant says that he has been denied the opportunity to take a statement from Soldier B and indeed call him as a witness to in effect confirm that it was he who killed the deceased.

[68] Whilst I am sceptical about whether, if Soldier B were alive, this would be a realistic prospect, it is important to understand that the prosecution do not seek to prove that the defendant actually killed the deceased. Their inability to do so arguably reflects a criticism of the original investigation. Neither does the prosecution rely on a joint enterprise with Soldier B. In any event I note that as a result of statements obtained by the defence and submitted in the course of the submissions in this application the defendant is in a position to call hearsay evidence to the effect that Soldier B in fact killed the deceased and felt that he was justified in doing so. Whether Soldier B would have been able to confirm that the accused fired only warning shots is entirely speculative. If the defendant makes this case at trial in assessing this issue it can take into account the inability of the defendants to call Soldier B as a witness.

[69] The defendant has obtained three detailed written statements from Soldiers G, H and J. None of these witnesses are relied upon by the prosecution.

[70] Soldier H indicates that he has no recollection of the incident and says that the statement attributed to him made in 1974 does not help him to recollect the incident.

He expresses surprise at the fact that the statement does not refer to conversations that might have taken place after the incident.

[71] Soldier J does have a recollection of the incident but he is critical of the statement attributed to him in 1974 which is not "in my words". He goes so far as to say that he does not accept that he made the statement attributed to Soldier J at the time. He does not recognise the content of the statement as being correct and points to numerous factual differences between his current recollection of the incident and that set out in the 1974 statement. Crucially he says that he did not see any soldier fire a weapon nor can he say who fired, where they fired from or what they were firing at and why. He points out that when he was re-interviewed by the PSNI in 2014 he did believe that the defendant and Soldier B were the soldiers who fired but he confirms that he has no idea who fired at and shot Mr Cunningham.

[72] In his statement Soldier G indicates that the statement attributed to him in 1974 does not help his recollection of the incident. His current recollection is of "a few snapshots of events". In 1974 his statement says that:

> "*At the gate I stood slightly behind LCPL/H (Soldier B) who aimed his SLR and fired two shots. I could not see who he fired at, also I was not sure at this time what was happening.*"

He now says that he did not see Soldier B or anyone else fire their weapon. In his 1974 statement he recalled that the defendant told him he had fired a warning shot over the deceased's man head. In his statement of 22 November 2017 he says that he does not recall this now. His recollection was that there were three shots in total. He indicates that his current recollection is no longer reliable and that it has changed with the passage of time.

[73] The defence say that the statements of these soldiers are vivid examples of how the defendant has been prejudiced. The prosecution in this case will rely on the statements of two soldiers who are deceased. Given the contents of the statements of the soldiers who are alive it may well be that the statements of Soldiers C and E are unreliable. No inquiry can now be made of their account of the events.

[74] These criticisms have to be analysed in the context of the issues in the case. The fact remains that none of the soldiers, either at the time or since, assert that the defendant discharged his weapon. Their statements are consistent in terms of the action of the deceased and of the defendant and Soldier B pursuing him and calling on him to stop or halt.

[75] Properly analysed I do not consider that the difficulties the living witnesses have in recollecting these events or the inability to challenge the statements of Soldiers C and E will cause any actual prejudice that cannot be dealt with in the

course of the trial. The witnesses from whom the defence have taken statements can be called to give evidence in the trial if it is considered in the interests of the defendant to do so. I fully accept that the state of play with regard to the evidence of the soldiers demonstrates the difficulty in establishing what occurred on 15 June 1974 but it is not sufficiently prejudicial to sustain an argument that the defendant cannot have a fair trial. There is no significant incriminating evidence that cannot be challenged or exculpatory evidence that is missing from the evidence of the soldiers in their 1974 statements, their subsequent statements to the PSNI or the recent statements taken by the defendants' solicitors.

[76] In relation to the specific issue of delay, in this context, the position was summarised in the case of ***R v S* (SB)** [2006] by Rose LJ at paragraph [21]:

> "In the light of the authorities, the correct approach for a judge to whom an application for abuse of process on the ground of delay is made, is to bear in mind the following principles.
>
> (a) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule.
>
> (b) Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted.
>
> (c) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held.
>
> (d) When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from the delay will be placed before the jury for their consideration in accordance with appropriate directions from the judge.
>
> (e) If, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

[77] Self-evidently there has been very significant delay in this case. That delay is entirely attributable to the prosecution and on no account can be laid at the door of

the accused. I also note that the accused's health is deteriorating. He is 76 years of age and suffers from significant ailments including lack of kidney function and underlying heart and vascular disease. At this stage however there is nothing in the medical evidence that means the defendant cannot be tried.

[78] I admit that I am uneasy about any prosecution 40 years or more after the relevant events. However, in the absence of any statute of limitations, I am satisfied at this stage that a fair trial will be possible and the issues raised by the defence can be fully considered in the course of the trial.

[79] In terms of the "limb one" argument I am conscious that the defendant relies on multi-faceted abuse. I have considered the grounds individually and collectively and have concluded that this is not a case in which I should exercise the exceptional jurisdiction to stay the prosecution. I am satisfied that a fair trial can be held.

Breach of Promise

[80] The second limb is primarily based on a breach of promise argument.

[81] On the basis of the material provided to me the following emerges.

[82] On 15 November 1974 the Captain of Army Legal Services, Headquarters Northern Ireland, wrote to the Ministry of Defence with copies to "A" Branch OC 175 IRO COY RMP, Provost Branch, Arrests Section in the following terms:

> "***Shooting of John Patrick Cunningham by members of patrol of the Lifeguards at Carrickaness, Benburb, Dungannon, County Tyrone on 15 June 1974***
>
> *I have been informed by the Director of Public Prosecutions that he has directed that there is to be no prosecution of any military personnel arising out of this incident.*
>
> *The incident was the subject of a joint RUC/RMP investigation and a copy of CCRIO RMP 06654/4 dated 16 June 1974, which is already in the hands of copy addressees, is enclosed for information …"*

[83] It is not clear to me whether the defendant was written to by the DPP or whether this information was passed on to him via the MOD.

[84] In any event the defendant says that this letter represents an unqualified promise that he will not face prosecution arising out of the incident.

[85] On 15 October 1975 the officer commanding in the military police wrote to the WOIC enclosing a copy of the letter of 15 November 1974. The letter was in effect a

request for the defendant and Soldier B to agree to be interviewed. In respect of these soldiers the letter says:

> "3. *May witness statements be recorded from these two NCOs as to their involvement in the shooting incident referred to in reference A. The Director of Public of Prosecutions, Northern Ireland, has directed that there is to be no prosecution of any military personnel concerned in this case. Witness statements, however, are now required from SQMC Hutchings and (Soldier B) to rebut a political claim.*
>
> *4. It is requested that this matter be expedited and the statements forwarded to this office at your earliest convenience."*

[86] By letter dated 26 November 1975 the captain of the relevant company replied in the following terms:

> *"1. The two soldiers referred to in paragraph 2 of reference 'E' have been separately re-interviewed. The content of paragraph 3 of reference 'E' has been explained to them but, acting on the advice given by solicitors in Northern Ireland they refuse to make any statement about the incident.*
> *2. They were jointly seen on a second occasion, within 15 minutes of the first interview, when the content of paragraph 3 of reference 'E' was again explained to them in the presence of Captain AP de Ritter LG Adjt LG. Again both refused to make statements, a view which was supported by Captain de Ritter."*

[87] In September 2011 the Historical Enquiries Team ("HET") examined the circumstances of Mr Cunningham's death and provided a report to the next of kin. On 11 October 2012 the Attorney General for Northern Ireland received a letter from solicitors representing the family of the deceased requesting that he exercise his discretion pursuant to section 14(1) of the Coroner's Act (Northern Ireland) 1959 ("the 1959 Act") to direct the Coroner to hold a new inquest into his death.

[88] Having considered the matter the Attorney General wrote to the Director of Public Prosecutions on 28 November 2013 attaching a copy of the HET Report together with copies of the inquest depositions. In his letter he indicated that the Director should "*consider reviewing the original decision not to prosecute, in accordance with the Code for prosecutors*".

[89] The letter also notes that the matter was referred to the PPS in October 2011 on behalf of the next of kin to which the PPS responded explaining the original decision.

[90] It was as a result of a review then carried out by the Director that a decision was made to bring the current prosecution.

[91] In relation to the legal principles I return to the judgment of Kerr LCJ in ***McNally*** and ***McManus***. Clearly the category of case to which the second limb applies extends beyond executive manipulation or bad faith. I do not consider that there is evidence of either in this case. The judgment suggests that it would be unwise to attempt to describe the type of case to which this limb applies as they will be recognisable when they appear – "*No doubt because of their exceptional quality*".

[92] In considering this matter the comments of Lord Steyn in ***Latif*** [1996] 1 All ER 353 are of benefit:

> "*The law is settled. Weighing counterveiling considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience that requires the criminal proceedings to be stayed:* ***R v Horseferry Road Magistrates' Court, ex parte (Bennett)*** *[1994]* ***1 AC*** *42.* ***Ex p Bennett*** *was a case where a stay was appropriate because the defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in* ***ex p Bennett*** *conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest and the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances would not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest and not conveying the impression that the court will adopt the approach that the end justifies any means."*

[93] I also bear in mind that as Lord Lowry observed in ***Bennett***:

> *"Discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct."*

[94] The reported cases suggest that for a defendant to be granted a stay on the basis of a breach of promise it is necessary to show that the defendant has acted to his detriment. For example in ***Re Wilson (Jason) v PPS*** [2012] NIQB 102 [2014] NIJB 101 the PPS reviewed and reversed two previous decisions not to prosecute Wilson for assault occasioning actual bodily harm. It was decided that it is not likely to constitute an abuse of process unless:

(i) There has been an unequivocal representation that a defendant will not be prosecuted.

(ii) That he has acted on that representation to his detriment.

[95] In terms of the decision not to prosecute it is not at all clear that this was directly communicated by the DPP to the defendant. Rather, it appears that the MOD was informed of this decision which presumably was communicated to the defendant. Whilst it is right to say that the letter does not include the standard qualification typical of similar letters today which points out that a decision to prosecute may be considered in light of the Prosecution Code it certainly appears that the defendants and Soldier B's lawyers were certainly alive to this risk. This is clear from the fact that on legal advice, backed by the soldier's captain, both Soldier B and the defendant refused to provide statements for the purposes of "*a political claim*" – (presumably a compensation claim?) when this was requested in November 1975.

[96] The detriment suggested in this case has already been considered, in particular that had he been told of a possibility of prosecution he would have taken steps to ensure that items were retained by the police. Furthermore he would have arranged to take statements from the soldiers who were present on the ground at the time. The detriment alleged relates to the potential fairness of the trial.

[97] I have already indicated that I do not consider that these issues will prevent the defendant having a fair trial.

[98] The defence referred me to the recent high profile case of ***R v Downey*** in which a defendant who faced charges in relation to the notorious bombing carried out by the IRA in Hyde Park London successfully applied for a stay based on abuse of process. In that case the defendant relied upon a written assurance given in the name of the Government in the course of an international peace process to the effect that "*the Police Service of Northern Ireland are not aware of any interest in you from any police force in the United Kingdom*".

[99] In that case, acting on that assurance, the defendant entered the United Kingdom where he was arrested and charged. It was conceded in that case by the prosecution that the defendant had suffered a detriment. He had submitted himself to the jurisdiction based on the assurance of the Government. The trial judge held that:

> "*In the very particular circumstances of this case it seems to me that it* (the public interest in ensuring that those who are accused of serious crimes should be tried) *is very significantly outweighed in the balancing exercise by the overlapping public interests ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and the public interest in holding officials of the State to promises they had made in full understanding of what is involved in the bargain.*"

The detriment identified was of an entirely different character to the detriment identified in this case. Indeed in the ***Downey*** case the trial judge rejected arguments of the type relied upon by the defendant in this case.

[100] This is not a case where there is any evidence of impropriety or bad faith on behalf of the prosecuting authorities. There is no suggestion of contamination or evidence of misconduct. The Director has reviewed the evidence in accordance with the Prosecutor's Code and come to the conclusion that the test for prosecution is met. The court has already determined that there is sufficient evidence to put the defendant on trial. I do not therefore consider that this is a case in which the public interest in prosecution is outweighed by the fact that the defendant was informed in 1974 that he would not be prosecuted arising from the incident. I do not consider that the continuation of the proceedings amounts to an affront to the public conscience or that a stay is necessary to protect the integrity of the criminal justice system.

[101] Overall in my consideration of this matter the fundamental issue remains the fairness of the trial in this case and I am satisfied that the defendant can have a fair trial having regard to the matters I have set out above. This matter can of course be revisited when the prosecution evidence has been heard and tested.

[102] The application to stay the prosecution is refused.