

THE CENTRAL CRIMINAL COURT

DUBLIN

DIRECTOR OF PUBLIC PROSECUTIONS

Prosecution

-v-

DESMOND DUNDON, ANTHONY MCCARTHY, JAMES
MCCARTHY, DAVID STANNERS and CHRISTOPHER
COSTELLO

Defendants

RULING OF MR. JUSTICE CARNEY

ON WEDNESDAY, 29TH OCTOBER 2003 - DAY 1

I hereby certify the
following to be a true
and accurate transcript
of my shorthand notes of
the evidence in the
above-named matter.

1 THE HEARING COMMENCED ON WEDNESDAY, 29TH OCTOBER
2 2003, AS FOLLOWS:

3
4 **MR. BUCKLEY:** I appear with Mr.
5 O'Sullivan in the matter
6 that is for mention, my Lord.

7 **MR. O'HANLON:** I appear for Anthony
8 McCarthy with Mr.
9 O'Lideadha instructed by Michael Hanahoe & Company.

10 **MR. O'CARROLL:** I appear for Desmond
11 Dundon, my Lord, with
12 Michael Maloney instructed by John Devane.

13 **MR. SAMMON:** I appear for Mr David
14 Stanners with Mr. Michael
15 Bowman instructed by A. McCarthy, solicitors.

16 **MR. EDWARDS:** My Lord, I appear for Mr.
17 James McCarthy with Mr.
18 Andrew Sexton instructed by A. McCarthy, solicitors.

19 **MR. JUSTICE CARNEY:** All right gentlemen, I
20 think you all know I have a
21 plan to catch in the early afternoon.

22 **MR. SAMMON:** Yes, my Lord, your Lordship
23 indicated that yesterday.

24 **MR. JUSTICE CARNEY:** Yes.

25 **MR. SAMMON:** I think I moved the
26 application yesterday, my
27 Lord, seeking fairly short notice of today's hearing.
28 Your Lordship did acquaint those of us who were in
29 Court that your Lordship had this difficulty, and

1 I think that after a brief word amongst ourselves, we
2 were of the view that we could complete the matter
3 quite quickly.

4

5 What I propose to do is this, my Lord. It seems to
6 me, speaking on behalf of my client, that it is not a
7 useful exercise for me to read a large volume of
8 specially tabloid newsprint to your Lordship for the
9 purposes of record. What I intend to do is to hand
10 in certain materials that will be deemed to be an
11 Exhibit by your Lordship`s Registrar for your
12 Lordship to consider and to consider, having read
13 same, my Lord, as to whether it is safe for this
14 trial to proceed within terms of this material having
15 been put before the respectful jurors in the case in
16 terms of access and it is a question for your
17 Lordship to make a judgment as to whether, within the
18 terms of the interests of justice, and in terms of
19 the carriage of a fair trial, this trial ought to
20 proceed.

21

22 It is my respectful application to your Lordship that
23 this trial would be better served, and that justice
24 would be better served, if this trial was adjourned
25 for a period until such time as has such heat as may
26 have been generated by this matter will have died
27 down.

28

29 I intend therefore, in furtherance of that, my Lord,

1 to hand into your Lordship a bundle of documents that
2 are photocopies of the tabloids and the originals are
3 being handed in as well (**Handed**). That seems to
4 deal with the tabloid interest in the matter, my
5 Lord.

6
7 Also, my Lord, in terms of the press, The Irish Times
8 carried an article last Saturday, October 25th, 2003,
9 and if I could hand that into your Lordship also
10 (**Handed**). What is especially of concern from the
11 aspect of my client in relation to that is that there
12 was an article by Arthur Beesley, a political
13 reporter, speaking of the opposition being critical
14 of policies of crime, that is the headline, and
15 referring to the growth of organised crime and
16 putting matters in those terms so as, in my
17 respectful position, to put a juror in a position in
18 coming to this trial, if this trial was to take place
19 at the early stages of next week, that these matters
20 would clearly have a strong possibility of colouring
21 a juror`s view. If I could hand that into your
22 Lordship as well and the photocopy of same (**Handed**).

23
24 I understand, my Lord, that there were other
25 materials which may require your Lordship to
26 consider, soundtracks or videotapes. Some of my
27 colleagues will be handing in that material to your
28 Lordship. I am not putting the matter any further
29 than that, my Lord. It is a matter for your Lordship

1 to consider the matter and, in my respectful
2 submission, the trial would be better served if it
3 were not to go ahead next week.

4 **MR. O' CARROLL:** Speaking on behalf of my
5 client, my Lord, I fully
6 subscribe what my Friend has said and I would endorse
7 the same mechanism whereby your Lordship would read
8 all the material and then it would be a matter for
9 your Lordship`s discretion and having regard to the
10 material...(INTERJECTION).

11 **MR. JUSTICE CARNEY:** I am familiar with a great
12 deal of it. I do, in spite
13 of being a Judge, keep in touch with what is in the
14 newspapers.

15 **MR. O' CARROLL:** I am sure you do, my Lord.
16 That is all I would say,
17 my Lord, that your Lordship should read the material.
18 Your Lordship has many years experience in the
19 Central Criminal Court and is familiar with the law
20 in relation to this matter. In my submission to your
21 Lordship, on the basis of the material, the wisest
22 thing for your Lordship to do would be to adjourn the
23 trial for a period of time to allow the fade factor
24 to kick in.

25 **MR. O'HANLON:** May it please the Court, on
26 behalf of Mr. Anthony
27 McCarthy, I join with the application. I would also
28 ask your Lordship to consider a programme which was
29 aired on RTE, or Network 2 I think it is called, "The

1 Panel", in which the issue of the difficulty of
2 acquiring a jury was commented upon adversely.

3 **MR. JUSTICE CARNEY:** By pure accident,
4 I happened to see that
5 edition of "The Panel".

6 **MR. O'HANLON:** It would be my submission
7 that one couldn't but come
8 to the conclusion that they were airing the opinion
9 that the jurors or potential jurors were failing to
10 turn up for other than legitimate reasons, and they
11 were further commenting on the potential difficulties
12 for the jurors should the trial have gone ahead in a
13 manner which could only prejudice other jurors, that
14 the thrust and the conclusion, in my submission, that
15 one could only come to in relation to publicity,
16 whether it relates to particular defendants or not,
17 is the absolute overwhelming theory that is contained
18 in these media coverages that these Defendants are
19 part of one gang and that issue -- it is very hard,
20 in my submission, now for a jury to come to this case
21 without that presumption.

22 **MR. JUSTICE CARNEY:** We did actually agree down
23 in Limerick, I think maybe
24 before you came into the case, when there were
25 applications made for separate trials and matters of
26 that kind, that the case could not be run without
27 reference to a feud.

28 **MR. O'HANLON:** That is all very well, my
29 Lord, but a jury couldn't

1 be asked or shouldn't come in with the presumption
2 that each or any of these Defendants are part of a
3 gang. It is quite clear in the context of what is
4 being suggested in the evidence will include
5 reference to that but not to particular Defendants
6 and the result of the media coverage raises this
7 presumption which, in my submission, requires the
8 fade factor to be allowed to take its part and even a
9 moderate adjournment.

10
11 If your Lordship is of the opinion, having carefully
12 considered the matter, that it would require
13 separating the Defendants so a potential jury do not
14 immediately associate a trial of five Defendants with
15 the media coverage, then that might be one alternate
16 way to get over this problem.

17 **MR. JUSTICE CARNEY:** There is already an inbuilt
18 fade factor in the length
19 of time that has been projected for this case which I
20 myself think is totally overstated, Mr. O'Hanlon,
21 totally overstated.

22 **MR. O'HANLON:** It would be optimistic that
23 that is, but one can't
24 predict in a case with this number of Defendants and
25 the nature of the evidence as to how long it would
26 take.

27 **MR. JUSTICE CARNEY:** Yes.

28 **MR. EDWARDS:** My Lord, on behalf of James
29 McCarthy, I would like to

1 adopt the submissions my Friends, Mr. Sammon, Mr.
2 O`Carroll, and Mr. O`Hanlon, and simply to add the
3 following addendum.

4
5 In particular with reference to Mr. O'Hanlon's
6 submission, I would urge on the Court the very
7 significant factor that though juries must be
8 accepted as living in the real world and must be
9 accepted as having some degree of knowledge of the
10 fact that there is a feud situation in Limerick, and
11 the fact it is likely that that will raise its head
12 in this case in some shape or form, recent coverage
13 in the newspapers has attributed crimes of the most
14 heinous variety as having happened in the context of
15 the alleged feud, and I think the State are in a
16 position to confirm, my Lord, that in respect of
17 recent murders which have been reported in the last
18 week, recent alleged arson attacks, recent alleged
19 attacks on a member of the legal profession, that they
20 have nothing whatever to do with our clients in this
21 case, my client in particular, and the particular
22 feud which is alluded to.

23
24 The press, nevertheless, have sought to create the
25 impression in the public at large, and these are
26 national newspapers and the national broadcasting
27 medium, that these matters are to do with it, are
28 part of the feud with which this case may be in part
29 concerned and, in the circumstances, having regard to

1 the decisions in The Director of Public Prosecutions
2 v Hall and The Director of Public Prosecutions V Hall
3 No. 2 Z and D and the other cases on advert of these,
4 I have to submit to the Court that there must at this
5 point be a real and substantial risk that the accused
6 in this case, and my client in particular, would not
7 receive a fair trial at this time and I therefore
8 support the application for an adjournment to enable
9 the fade factor to operate and to enable the heat
10 that has been generated by the recent publications
11 and the recent broadcasts to dissipate.

12 **MR. NIX:** My Lord, I seem to have
13 been forgotten about.

14
15 My Lord, there are a number of points I want to make.
16 Last Friday in the Central Court in Limerick I
17 congratulated Miss Karen Caulter, crime correspondent
18 in The Irish Times on her prescience because before
19 we arrived into Court we knew the trial was going to
20 be transferred from Limerick and was going to come to
21 Dublin and start next Tuesday because it was in The
22 Irish Times.

23
24 I also at that time indicated -- I am sorry, I didn't
25 get a transcript but I was supposed to get one (**Same**
26 **handed**) -- my concern that my client, amongst the
27 other clients, was seen being brought in shackles
28 from a corporate prison service van into Limerick
29 Courthouse for his trial by both RTE and by TV3 and

1 I asked at that time that some discretion be shown
2 that these people would at least be entitled to the
3 benefit of the presumption of innocence.

4
5 In last Sunday`s Independent on Sunday, and I mark it
6 out particularly, on the front page of this article
7 there are a number of lies -- I will not even call
8 them untruths because any child who could do a bit of
9 investigation would have found out the reality of it
10 -- with the headline "Fire Bomb Attack on murder
11 cases DPP solicitor".

12
13 First of all, Mr. O`Sullivan is not a solicitor. It
14 goes on, "Lawyer in hiding is guarding his home
15 linked to jinxed trial". That is a lie and I am
16 happy to name it and I have no doubt Mr. O`Sullivan
17 is happy to name it. He is not afraid. He is not in
18 hiding.

19
20 The next thing is it is linked to our clients, these
21 five men. The dogs in the street in Limerick know
22 who is responsible for the Courthouse and Mr.
23 O'Sullivan`s house and I think the Gardáí would be
24 very pleased to say that not one of these accused, or
25 anybody associated with them, or anybody concerned
26 with them were involved in that. That is the second
27 point I want to make.

28
29 The final point I want to make is this. The coverage

1 of this case has attracted what I can only describe
2 as a frenzy. If Karen Coulter believed that she had
3 information about the trial being transferred it
4 gives credence to the newspaper articles, it gives
5 credence to the print media and it will do that in
6 the minds of jurors and I associate myself with them.
7 I don't ask for this case to be adjourned. I ask
8 simply that the commencement be deferred to allow the
9 fade factor to come into place. I am particularly
10 concerned about the file of photographs or file of
11 films that will now exist in RTE and TV3 and night
12 after night we see trundled out the accused men being
13 brought from a corporate prison van into Limerick
14 Courthouse. It is outrageous.

15
16 I think it is outrageous, particularly at my request
17 or plea in the Central Criminal Court last Friday
18 that the contemptuous attitude to these peoples`
19 presumption of freedom has been dealt with as it has.
20 It is nothing short of a disgrace.

21 **MR. BUCKLEY:** May it please your
22 Lordship, on behalf of the
23 Director of Public Prosecutions, I would strenuously
24 oppose the application to adjourn this trial, my
25 Lord.

26
27 In light of citing DPP v Z, the onus is on the
28 accused to satisfy your Lordship that there is a real
29 or serious risk that the accused would not get a fair

1 trial which could not be avoided by appropriate
2 rulings and directions and DPP v Z is reported in
3 [1994] IR2. DPP v D is reported at page 465, I am
4 sure your Lordship is aware of it, and DPP v Z is
5 reported at page 476.

6
7 If I might just read from the Judgment of the former
8 Chief Justice, Finlay CJ in DPP v Z at page 507:"

9
10 "A Court must give some consideration to the
11 community's right to have this alleged crime
12 prosecuted in the usual way. However, in the
13 hierarchy of constitutional rights, there is no
14 doubt that the applicant's right to fair
15 procedures is superior to...(Reading to the
16 words)... right to prosecute. If there was a
17 real risk that the accused would not receive a
18 fair trial, then there would be no question of
19 the accused's right to a fair trial being
20 balanced detrimentally against a community's
21 right to have alleged crimes prosecuted.

22
23 With regard to the general principles of law, I
24 would only add to the principles which I have
25 already outlined. The obvious fact to be
26 applied from the decision of this Court in
27 D v The Director of Public Prosecutions that
28 where one speaks of "an onus to establish a
29 real risk of an unfair trial", it necessarily
and inevitably means an unfair trial which
cannot be avoided by appropriate rulings and
directions on the part of the trial judge."

30
31 I would rely on that decision strongly to support my
32 application that your Lordship, in exercising his
33 discretion, should not adjourn this trial.

34
35 Also there is a later decision, DPP v Catherine
36 Nevin, a Judgment of the Court of Criminal Appeal
37 delivered on 14th March 2003. The Court comprised of

1 Geoghegan, Quirke and Peart JJ and the Judgment was
2 delivered by Geoghegan J and I can hand a copy of
3 that up to your Lordship, my Lord. Again, that
4 supports the contention I am making, my Lord.

5

6 I might say, just before I finish, that in relation
7 to the article in the newspaper Ireland on Sunday
8 dated Sunday, 26th October, I agree with Mr. Nix that
9 that article in its entirety almost is totally
10 untrue, my Lord. There is no suggestion on behalf of
11 the Prosecution that these accused had anything
12 whatsoever to do with an alleged arson attack on Mr.
13 O'Sullivan's house, nor did Mr. O'Sullivan at any
14 stage go into hiding or anything of that kind. I
15 would support Mr. Nix in saying that.

16 **MR. EDWARDS:** I would invite my Friend,
17 my Lord, to also deal with
18 the allegation that the recent murder, which has been
19 described in the press as an execution, had anything
20 to do with my client or indeed his associates in this
21 case. My information from that State informally is
22 that the State accept that it is nothing whatever to
23 do with this.

24 **MR. BUCKLEY:** It certainly is not
25 suggested that these
26 accused had anything to do with that murder, my Lord.
27 That article is totally inaccurate in its entirety, I
28 think, my Lord.

29

1 So far as this case is concerned, there is an inbuilt
2 fade factor in that it, in any view, is going to go
3 on for some time, not the length of time which was
4 mentioned on "The Panel". I wonder, is that a
5 mischievous suggestion to put off jurors?, I don't
6 know. It is not going to take any length of time
7 such as mentioned on that programme but it is going
8 to take some time and have an inbuilt fade factor.

9

10 My experience is that juries in controversial and
11 difficult cases act on the evidence and on the
12 directions given by the Trial Judge and a piece of
13 evidence I rely upon in relation to this view is that
14 in the contested rape cases, which are tried by, on
15 average, evenly sexually mixed juries, there is a
16 majority, a slim majority but a majority of
17 acquittals. One could hardly think of a more
18 controversial form of case and it is quite clear that
19 if juries in a case of that nature being evenly
20 sexually mixed are by a slight margin acquitting a
21 majority of people, they are quite clearly acting
22 strictly on the evidence, strictly on matters of
23 credibility, and strictly on the Trial Judge's
24 directions in relation to the burden of proof and, as
25 I say, from full-time jury Judge in this Court, I am
26 satisfied that the accused will get a fair trial and
27 there is obviously great concern about this case.

28

29 It is quite clear there is going to be great concern

1 in relation to this case and there is a public
2 interest, as counsel adverted to in this case being
3 tried, but there is also an enormous public interest
4 in this case being tried with expedition and,
5 accordingly, the trial will proceed on the date fixed
6 or within a day or two of that date if I am still
7 occupied on the murder case I am at present trying.

8 **MR. SAMMON:** My Lord, might I ask that
9 the documents, these are
10 the copies of the newsprint, that they be retained by
11 your Registrar as an Exhibit in relation to the
12 application and might I ask that a transcript be made
13 available of your Lordship`s Ruling and that your
14 Lordship would consider granting a Certificate of
15 Leave to Appeal your Lordship`s decision to the Court
16 of Criminal Appeal?

17 **MR. JUSTICE CARNEY:** I don't believe I have
18 any jurisdiction to grant a
19 Certificate of Leave to Appeal until this conviction,
20 have I, if there is a conviction.

21 **MR. BUCKLEY:** That would be my
22 submission, my Lord.

23 **MR. SAMMON:** I wish to just protect the
24 position, my Lord.

25 **MR. JUSTICE CARNEY:** I think that is the current
26 law, that unless and until
27 there is a conviction, the Court of Criminal Appeal
28 does not have jurisdiction. It is also current
29 statute law that there is not an appeal from here to

1 the Supreme Court.

2 **MR. SAMMON:** I appreciate that, my Lord,
3 but I make the application
4 to preserve the position.

5 **MR. JUSTICE CARNEY:** Very good. I do preserve
6 the documentation, the
7 originals on the Court file, and I will also direct
8 that a transcript be made up and be made available to
9 you.

10 **MR. SAMMON:** May it please my Lord.

11 **MR. O'HANLON:** I would ask that your
12 Lordship would receive the
13 videotape for "The Panel", I am aware your Lordship
14 has seen it, for the same purpose.

15 **MR. JUSTICE CARNEY:** The Court of Criminal
16 Appeal and the Supreme
17 Court might not necessarily have seen it, so I will.

18 **MR. O'HANLON:** Similarly on behalf of Mr.
19 McCarthy, I would also seek
20 to preserve his position by asking for leave to
21 appeal against your Lordship`s decision in the
22 matter.

23 **MR. JUSTICE CARNEY:** I don't believe it is open
24 under statute law as it
25 currently stands, so I refuse.

26 **MR. O'HANLON:** May it please the Court.

27 **MR. EDWARDS:** I would be associated with
28 my Friends` applications.

29 **MR. JUSTICE CARNEY:** Very good, similar order.

1

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