

THE CENTRAL CRIMINAL COURT

DUBLIN

DIRECTOR OF PUBLIC PROSECUTIONS

Prosecution

-v-

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

Defendants

ACTION HEARD BEFORE MR. JUSTICE CARNEY

ON TUESDAY, 4TH NOVEMBER 2003

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 AS FOLLOWS ON TUESDAY, 4TH
2 NOVEMBER 2003

3
4 **MR. O' CARROLL:** In relation to the matter
5 that the jury has just been
6 sworn, my Lord, Mr. Sammon made a point in relation
7 to the jury panel being vetted by the Director of
8 Public Prosecutions. Your Lordship did not make any
9 Ruling in that having regard to the position as to
10 the swearing of the jury. I just want to put on
11 record, my Lord, with the agreement of the concern
12 that Mr. Sammon has mentioned on behalf of his client
13 and I would ask your Lordship to make some Ruling and
14 the Defence be made aware whether in fact the DPP
15 has, in fact, vetted the jury panel in this
16 particular case and, if so, why we have not been told
17 about it and why we have not been given the
18 information that they generated for the purpose of
19 vetting the jury and my solicitor will be taking
20 steps to ascertain what the position is, independent
21 of the case.

22 **MR. O'HANLON:** My Lord, on behalf of the
23 third-named Defendant, I
24 would also like to be associated with that. In my
25 submission, the Defence are entitled to come to the
26 Court with a parity of arms, as such, in relation to
27 the Prosecution and in particular in relation to jury
28 selection, and in that regard, as I understand it, my
29 solicitor received the names and occupations, as your

1 Lordship indicated of the jury today, I would be
2 concerned if it became apparent that the Prosecution
3 had received the names and was in a position to
4 examine the jurors more fully than that information
5 without the same conditions and availability being
6 made available to the Defence. I would object to
7 proceeding with this trial if that has occurred.
8 If that has occurred, I think the trial should be
9 stopped at this stage and that both Prosecution and
10 Defence are entitled to come to Court in relation to
11 jury selection on equal terms.

12 **MR. JUSTICE CARNEY:** Anybody else?

13 **MR. EDWARDS:** I would like to be
14 associated with those
15 applications, my Lord. Would your Lordship hear me on
16 another matter after you have dealt with that?

17 **MR. JUSTICE CARNEY:** Yes.

18 **MR. SAMMON:** Further, in relation to
19 that, I think it is now
20 incumbent upon Mr. Vaughan-Buckley, who is leading
21 counsel for the Director of Public Prosecutions, to
22 tell your Lordship precisely what criteria are being
23 employed by and on behalf of the Prosecution in
24 relation to the jury vetting. It is undoubtedly
25 going on and it is not enough to sit silent now in
26 the face of what has occurred.

27 **MR. JUSTICE CARNEY:** All I
28 know...(INTERJECTION).

29 **MR. SAMMON:** I am not asking your

1 Of the European Convention of Human Rights and in
2 reliance of the Constitutional guarantee of a fair
3 trial and due process.

4 **MR. JUSTICE CARNEY:** Very good, Mr.
5 Edwards, you will have
6 to make the application in Cloverhill because that is
7 where I will be tomorrow.

8 **MR. EDWARDS:** May it please your
9 Lordship.

10 **MR. O' CARROLL:** May I join in that
11 application that Mr.
12 Edwards has just made, my Lord.

13 **MR. JUSTICE CARNEY:** Yes, very good.

14 **MR. O'HANLON:** I would like to be
15 joined in that
16 application. I would also formally like to put on
17 record, my Lord, your Lordship expressed concerned
18 about the estimate of time that was made in relation
19 to this trial in Limerick when it was initially
20 raised and your Lordship expressed a concern that it
21 might have been done to deliberately make it
22 difficult to hold the trial there. I would like to
23 put on record that the Defendant, certainly the one
24 I represent, made no representation to the Court as to
25 the length of the trial and were at all times happy
26 and prepared for the trial to proceed in Limerick and
27 in fact it should be reflected on the record that
28 they consented to proceeding in Limerick with the
29 smaller number of jurors. I would just be concerned

1 with your Lordship that that would not have been on
2 the record having regard to your Lordship's concern
3 about the potential for deliberately in the
4 circumstances making it difficult for the trial to
5 proceed in Limerick.

6 **MR. JUSTICE CARNEY:** Very good. Now, you don't
7 want me to take the
8 substantial application you propose to make until the
9 jury have departed?

10 **MR. SAMMON:** It would seem the jurors
11 are taking longer and there
12 will also apparently be a visit by the Court services
13 in relation to the logistical situation.

14 **MR. JUSTICE CARNEY:** Yes.

15 **MR. SAMMON:** It is very brief, my Lord.
16 I hark back, my Lord, to
17 the application made last
18 week in relation to the publicity that has surrounded
19 this trial, and I wish to revisit that, my Lord.

20
21 I don't know if your Lordship has had the opportunity
22 of acquainting your Lordship's self with today's
23 editorial in The Irish Times but that raises, having
24 read same, for my client very grave concerns.

25
26 Your Lordship is clearly aware of the situation that
27 arose in relation to the trial of a certain Mr. Keane
28 where the Director of Public Prosecution to enter a
29 Nolle Prosequi yesterday. Your Lordship was the

1 Trial Judge in that case.

2

3 My concern on behalf of Mr. Stanners in the
4 editorial, and with no apologies to Sir Anthony
5 O'Reilly I say, in the leading Irish broad sheet,
6 there is set forth the following:

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8 "A challenge for Criminal Justice.

9 The collapse of the trial of Liam Keane for
10 murder coming hard on the heels of the move
11 from Limerick to Dublin of another murder trial
12 where the victim was a member of the Keane
13 family because of difficulties in swearing in a
14 jury undermines the credibility of our criminal
15 justice system.

13 While these events took place in a context
14 where successful trials have been
15 prosecuted in Limerick, including in the
16 Central Criminal Court which has been sitting
17 there since July, the impression has been
18 created that there exists in the city a culture
19 that appears to be able to avoid justice.
20 Right thinking people who see this in their
21 communities as getting away with it and this
22 development will further damage respect and
23 belief in the criminal justice system if
24 allowed to go unchecked. Rights come with
25 responsibilities.

20 As the Minister for Justice embarks on an
21 examination of the adequacy of legislature
22 provision, resourced allocation, and
23 administrative practice to see what,
24 if any changes are required, and this is to be
25 welcomed, he must consider redrawing the
26 balance of rights and presumptions between
27 accused and society.

24 There will inevitably be calls for more Gardáí,
25 for more use of the Special Criminal Court, and
26 for other drastic measures but there are no
27 quick fix solutions for the problems revealed
28 by these Limerick cases any more than there are
29 to the recent spate of killings in Dublin for
30 which few arrests few arrests have been made.

28 The central problem in yesterday's case was
29 that the witnesses were not willing to stand
30 over statements they made to the Gardáí. This

1 turn of events seemed to come as a surprise to
2 the Prosecution and questions must be asked
3 about what contact was maintained with these
4 witnesses by Gardáí after they gave their
5 original statements. Calls for the case to be
6 heard in the Special Criminal Court are
7 misguided as there is no reason to believe that
8 the witnesses would have been any more willing
9 to give evidence there. The central problem in
10 the previous case was the difficulty in getting
11 a jury with unprecedented numbers or potential
12 jurors offering reasons for being unable to
13 commit.

14 It is difficult to avoid the conclusion that an
15 atmosphere of intimidation prevails when such
16 cases are involved.

17 In a Democracy no-one can be forced to give
18 evidence in a criminal trial. Instead the
19 criminal justice system depends on the goodwill
20 of citizens who willingly help in bringing
21 wrong-doers to justice and in participating
22 juries. All necessary support and protection
23 must be given to witnesses who feel under any
24 kind of threat, but there is a more fundamental
25 issue at stake. A relatively small group of
26 people defy society having no entitlement to
27 any of its laws or rules but still insisting on
28 their rights. For the most part society
29 appears to be content even powerless to adapt
30 to them in any meaningful way until there is a
31 crisis like yesterday. Accounting for crime
32 and the causes for crime is the responsibility
33 of the Minister for Justice."

34 Your Lordship has taken a view in relation to the
35 previous application made as to the level of
36 publicity affecting the possibility of a fair trial,
37 your Lordship has effectively taken the view that
38 jurors are robust and will respond to appropriate
39 judicial direction.

40 In my respectful submission, what has occurred now
41 since that application was made to your Lordship has
42 compounded the situation. There has now been made a

1 direct link, as I say, in an editorial in the premier
2 broad sheet, a publication of the State, between a
3 collapsed trial yesterday and this particular trial
4 and also this statement, which I find particularly
5 worrying, "It is difficult to avoid the conclusions
6 that an atmosphere of intimidation prevails if such
7 cases are involved."

8
9 We have had, my Lord, already in this Courtroom today
10 a gentleman, who was apparently willing to serve on a
11 jury, stand up and announce to the world that he was
12 shaking like a leaf, which seemed to cause some sort
13 of infectious reaction in a fellow juror who also
14 pronounced some difficulties.

15
16 In my respectful submission, it is not safe for this
17 trial to proceed under this sort of atmosphere and
18 under these pressures. Justice delayed is justice
19 denied but justice in excessive haste can lead to
20 injustice also, my Lord, and, in my respectful
21 submission, this trial ought to be adjourned until
22 such time as quieter and calmer waters might prevail.

23
24 I am intending, my Lord, to hand into your Lordship
25 the editorial and if that might be granted exhibit
26 status, Mr. O`Hanlon can use it but first of all if
27 the Registrar might mark the same (**Same handed**).

28 **MR. O'HANLON:** My Lord, I also ask to be
29 joined with that

1 application but, as I understand it, on the front
2 page of that paper, there is a further report of the
3 member of the Dail referring to the jury in Limerick.

4 **MR. JUSTICE CARNEY:** You may take it that I have
5 read all the coverage in
6 this morning`s Irish Times. I also watched the
7 questions and answers programme last night in which
8 Mr. Bowman referred to us as being "the Circuit
9 Court".

10 **MR. O'HANLON:** Yes, my Lord. I would be
11 concerned not only about
12 the affect it had given but, furthermore, the extent
13 of the publicity has left the Defence in the
14 situation where there are certain presumptions
15 contained in all of the reporting and reference to
16 this which the Defence are shouldered with which they
17 ought not to have been shouldered with in relation to
18 the idea of members of a gang or part of a gang which
19 is presumed in the manner in which these issues have
20 been reported, and it leaves the Defence in an unfair
21 position having regard to the nature of the publicity
22 and, notwithstanding the ability of the jury to use
23 their best endeavours to arrive at a verdict in
24 accordance with the oath they have taken, they do so
25 in circumstances where, in my submission, it is
26 difficult to contemplate them not having been
27 affected in some way and the Defence not having been
28 left with the burden which they ought not to have
29 been shouldered with. In that regard, I would say

1 that the presumptions which ought to rule in favour
2 of the Defence have been undermined and that the fair
3 procedures which they are entitled to and the
4 fairness of the trial has been undermined and that
5 the matter ought to be put back and some time ought
6 to be permitted between the publicity which this
7 trial has garnered and the hearing of the trial.

8 **MR. EDWARDS:** I would ask to be
9 associated with Friends`
10 applications and to adopt their arguments.

11 **MR. O' CARROLL:** A similar position
12 appertains, my Lord, where
13 Mr. Dundon is concerned.

14 **MR. NIX:** I, equally, my Lord, on
15 behalf of Mr. Costello. I
16 think the pertinent phrase for me is the phrase
17 quoted by Mr. Sammon "calmer waters will prevail"
18 because, to say the least, this trial has been
19 granted, if it is going to take place, a media frenzy
20 and it will be known as "the Limerick case".

21 **MR. JUSTICE CARNEY:** Yes, Mr.
22 Vaughan-Buckley?

23 **MR. VAUGHAN-BUCKLEY:** I would repeat what I said
24 on the last occasion, my
25 Lord. I would submit that the circumstances have not
26 changed. To adjourn this trial, your Lordship would
27 have to hold that there was a real or serious risk
28 that the accused would not get a fair trial which
29 could not be avoided by appropriate rulings and

1 directions from your Lordship, and the onus is on the
2 accused to satisfy your Lordship of that fact, my
3 Lord, and your Rulings and Directions would not
4 ensure they would be given a fair trial, my Lord.
5 I submit that the circumstances have not changed and
6 that the jury will be told specifically by your
7 Lordship that they decide the case on the evidence
8 and not the newspaper reports.

9 **MR. SAMMON:** I am concerned about Mr.
10 Vaughan-Buckley proffering
11 that as being appropriate criterion for judgment by
12 your Lordship. In my respectful submission, real or
13 serious risk is not the appropriate standard and that
14 the appropriate standard in consequence of the
15 decision of the Court of Criminal Appeal in Nicholas
16 Tobin, the judgment of that Court delivered by
17 Fennelly J, the citation is fairly recent, my Lord,
18 it escapes me in terms of my recollection at the
19 moment.

20 **MR. EDWARDS:** 2002, 3 Irish Reports.

21 **MR. SAMMON:** 2002, 3 Irish Reports,
22 thank you, Mr. Edwards. It
23 is an objective standard, in my respectful
24 submission, and a person looking at the situation
25 prevailing in objective terms, asking themselves the
26 question: "Is a fair trial untrammelled by any of
27 these untoward matters going to take place? Is there
28 any risk of that in objective terms?" That is the
29 appropriate criterion. It is not necessary for your

1 Lordship to be satisfied that there is a real risk.

2 **MR. VAUGHAN-BUCKLEY:** What I would summarise is
3 what the Supreme Court said
4 in D v DPP and Z v DPP.

5 **MR. O'HANLON:** I apologise, I don't
6 intend to reply to a reply,
7 but the standard that has been proffered by the
8 Director appears to be the standard which is required
9 in order for your Lordship to consider granting a
10 prohibition of the trial. My application and, as
11 I understand it, my Friend's application is not for a
12 prohibition. The application is that because of the
13 circumstances which prevail at the moment, your
14 Lordship ought to consider adjourning the matter and
15 allowing the matter to proceed at a later date. It
16 is not the same standard as for prohibition, in my
17 submission, and that is not the appropriate standard
18 to be considered.

19 **MR. JUSTICE CARNEY:** Very good. I heard
20 argument on this matter
21 some days ago and gave a Ruling.

22
23 In the first instance, I expressed my confidence in
24 the ability of a jury to give a fair trial and I also
25 gave my reasons for that. Secondly, in the course of
26 the argument it was accepted that there was a public
27 interest in these accused being put on their trial
28 and I indicated that, so far as I was concerned,
29 there was a public interest in their being put on

1 their trial expeditiously and I maintain that view
2 and direct that the matter proceed for trial at 11
3 o'clock in Cloverhill Courthouse tomorrow morning.
4 Have the jury selected their foreman yet?

5 **THE REGISTRAR:** Yes, my Lord.

6 **MR. JUSTICE CARNEY:** That being so, then Miss
7 McLoughlin can see them in
8 relation to arrangements for transportation to
9 Cloverhill and Mr. Kelly as well.

10 **MR. EDWARDS:** Would your Lordship direct
11 a transcript of today's
12 proceedings?

13 **MR. JUSTICE CARNEY:** Yes I will direct a
14 transcript of today's
15 proceedings because I have directed a transcript of
16 the last one, but if you move on to apply for a daily
17 transcript at the trial, you may take it that that
18 will be refused, Mr. Edwards.

19 **MR. EDWARDS:** May it please your
20 Lordship.

21 **MR. JUSTICE CARNEY:** You may have this one but
22 that is the end of it.

23 **MR. O' CARROLL:** In so far as the trial is
24 concerned, would your
25 Lordship consider making a transcript available to
26 the main Prosecution witness around whom the trial is
27 going to turn, namely Owen Tracey?

28 **MR. JUSTICE CARNEY:** No Mr. O'Carroll
29 unless there is any

1 particular reason for it. The traditional law has
2 been that a transcript is only made up for the
3 purpose of an appeal to the Court of Criminal Appeal.
4 Mrs. Justice Denham has ruled that transcripts must
5 be made available on a retrial but matters have not
6 advanced beyond that and there is no entitlement to a
7 transcript as a trial proceeds. There is of course
8 an institution known as junior counsel whose function
9 it is to take a note.

10 **MR. O' CARROLL:** Your Lordship is aware
11 that cases being tried in
12 the Special Criminal Court, for some reason
13 transcripts are made available, my Lord.

14 **MR. JUSTICE CARNEY:** The Special Criminal Court
15 can order their business as
16 they choose but I am following the traditional law
17 and procedure pertaining to this Court, Mr.
18 O'Carroll.

19 **MR. O' CARROLL:** As your Lordship pleases,
20 that is just the point
21 I make in relation to the Special Criminal Court, my
22 Lord. In so far as this trial is concerned, your
23 Lordship is asking: Why should there be a variation
24 from the normal rule where your Lordship does not
25 give transcripts? So far as I am concerned, my
26 client Mr. Dundon is innocent and the accusations
27 being made against him by Mr. Tracey falls because
28 his evidence his evidence will be given at the
29 beginning of the trial and then other matters will be

1 canvassed in front of the jury. I think it would be
2 important that we have a full transcript of the
3 evidence and the cross-examination so that we will be
4 in a position to bring that evidence to bear in so
5 far as the jury's consideration is concerned, my
6 Lord. That is the reason I would be asking your
7 Lordship for a limited transcript in this particular
8 case..

9 **MR. JUSTICE CARNEY:** I can't preclude you making
10 any application in the
11 course of the trial, Mr. O'Carroll, but at this point
12 in time no situation has arisen which would persuade
13 me to depart from the norm. If there is a reason for
14 it, you may apply but in the meantime you have a
15 junior and it is the function of the junior to be the
16 notetaker.

17 **MR. O' CARROLL:** I understand that, my Lord,
18 but I do not think the
19 note-taking ability of any person who would be good
20 in shorthand would be adequate for the purpose of
21 this particular trial, and if the Court is not
22 prepared to make a copy of the transcript available
23 of Mr. Tracey`s evidence, even in cross-examination,
24 it may be necessary for me, as a leader in the case,
25 to direct that a stenographer be made available for
26 the Defence to take a transcript and that would seem
27 to me to be a duplication and an unnecessary
28 duplication and, as I say, it is a narrow
29 application. I am not asking for a transcript of all

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the trial, my Lord. That can be part and parcel of the normal route and I am quite happy with that.

MR. JUSTICE CARNEY: You can reapply whenever you consider it appropriate to do so, Mr. O'Carroll.

MR. O' CARROLL: Thank you my Lord.

**THE COURT ADJOURNED UNTIL 11:00 AM ON WEDNESDAY, 5TH
NOVEMBER 2003**

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