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Application to stay proceedings; whether there had been a breach of defendant's right to a trial within a reasonable, contrary to Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whether a re-trial should be afforded in light of change of counsel on the defendant's part; whether the defendant could still expect a fair trial, having regard to the passage of time since evidence was first taken.

W. McCLENAGHAN Esq. Complainant LESLIE REID ALEXANDER CASKEY Defendant	Petty Sessions District of North Down County Court Division of Ards

Ruling on Defendant's Applications;
To Stay proceedings on grounds that the Defendant has been denied his right to trial within a reasonable period
To Re-commence Trial following change of Counsel

This case concerns charges arising from incidents on 25th and 26th January 1999. The Defendant stands accused of obstructing a Police Constable, Const. McFarland , and of driving without insurance on 25th January 1999 and also stands charged with 2 counts of assault occasioning actual bodily harm (one in respect of a Const. Kelly, one in respect of Const. McFarland), a further count of assaulting Const. McFarland in the execution of his duty, one of driving without insurance and, finally, one of resisting Const. McFarland in the execution of his duty, all of these being alleged to have taken place on 26th January 1999. Two other charges have been withdrawn by the prosecution.

In all, 9 Summonses were served upon the Defendant on 22nd March 2000. The trial did not commence until 18th June 2001. It was adjourned early that afternoon, after evidence from just one witness, Mr. McFarland (as he now is). The trial did not resume until 17th June 2002. On that date Mr. Russell, BL intimated an application for a stay on the grounds that the Defendant's right to a trial within a reasonable time had been abrogated. He further indicated an intention to seek an order for a re-trial, in view of the fact that he had been appointed as defence counsel in the case only two weeks previously. In particular, he had not participated in the previous Hearing on 18th June 2001 and needed to have the opportunity to hear Mr. McFarland's evidence-in-chief and to conduct the cross-examination personally. There was also an issue as to whether the evidence of that witness had actually been completed on 18th June 2001. Mr. Shaw, BL for the D.P.P. had in fact initiated the applications by applying for an adjournment on

behalf of the prosecution on the grounds that the witness concerned, Mr. McFarland, had advised at very short notice that he was medically unfit to attend.

In these circumstances, I directed that the case be adjourned and that skeleton argument be filed by each party, with the prosecution also to file what one had hoped would be an agreed schedule, summarizing the history of the case from inception. I also directed that further details be obtained by the prosecution as to Mr. McFarland's condition and as to whether he was likely to be fit to attend court on any future occasion. The matter came before me again on 8th August 2002, when I heard argument in regard to the Defendant's applications.
In his skeleton argument, Mr. Russell pursued the following applications;

A. An Application for an Order that the court stay the present proceedings against the Defendant on the grounds that the relevant period taken up such proceedings, so far, is such that it amounts to a violation of the Defendant's rights under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
B. An application to recommence the case de novo by reference to the stage reached in cross-examination of Mr. McFarland on 18th June 2001 and to the change of counsel on the Defendant's part.

I had the benefit of receiving Mr. Russell's skeleton arguments some time before the adjourned Hearing and thereby had the opportunity to acquaint myself with a number of the authorities in advance of 8th August. That facilitated a significantly more focused and informed exchange than might otherwise have been the case.

Application A: That the Trial be stayed on the grounds that the delay amounts to a violation of the Defendant's rights under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 6(1) of the Convention provides that;

> In the determination of his civil rights and obligations or in any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable period

The Defendant contends that for his trial to commence only in June 2001, then to be delayed until a year and more thereafter, and in respect of matters alleged to have taken place in January 1999 is a manifest failure to determine a criminal charge within a reasonable period.

The following passage is found in the judgment of Bingham, L in Procurator Fiscal, Linlithgow v Watson and Burrows; H.M. Advocate v JK Privy Council DRA No. 1 of 2001, delivered on 29th January 2002, at para. 52;

> In any case in which it is said that the reasonable time requirement … has been or will be violated, the first step

> is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

The judgment also contains a very helpful review of many European decisions in this field.

The incidents giving rise to the charges against the Defendant having occurred on 25th and 26th January 1999 and with a summary trial still continuing as at August 2002, 3 years and 6 months or more later, I am satisfied that the period of time taken (thus far) gives grounds for real concern "… on its face and without more…". I accept Mr. Russell's submission that the delay is clearly outside the normal timescale for disposal of most contested cases in the magistrates' courts. I am satisfied, in other words, that it is appropriate that I proceed to enquire further.

The first point to consider, in moving toward an enquiry into the cause of the delay in the determination of this matter, is specifying the period in question, more particularly the starting point.

Mr. Shaw, BL for the prosecution, has submitted that the proper point from which to calculate time running on the Defendant's Convention rights is the date upon which the Summons was issued [7th February, 2000] He relies in support of this upon the judgment of Woolf, CJ in The Attorney's General's Reference (No. 2 of 2001), (2001) 1WLR 1869 at paras. 10, 11 and 13 and that of Gillen, J in R v Murphy (unreported judgment of 20th December 2001). The only caveat he would add is that the position might be different if the Defendant had suffered prejudice arising from delay by the prosecuting authority at earlier stages. Mr. Russell, BL contends that time starts to run on 26th January 1999, relying upon the same Attorney General's Reference, Deweer v Belgium 2 EHRR 439, X v UK 14 D.R. 26 and X v UK 17 D.R. 122.

In R v Murphy, Gillen, J reasoned (at page 4);

> I am not persuaded that the reasoning in this regard in *Attorney General's Reference (No 2)* is flawed. Each case will depend upon its own facts and whilst it is easy to envisage a not insubstantial number of exceptions to the general rule, I believe that in the ordinary way interrogation or interview of a suspect by itself will not amount to a charging of that suspect for the purpose of the reasonable

> time requirement in art 6(1). In the present case the defendant was interviewed in the Republic of Ireland with reference to offences which that jurisdiction might wish to prefer against him. In the event he was not charged in the Republic of Ireland arising out of these matters. I see nothing in these circumstances that would bring these interviews within the definition of an official notification that he had committed a criminal offence at least within Northern Ireland. In my view the logical time in this instance when that definition could arise was when he was charged in March 1998 shortly after his interviews in February 1998. In the event that I am correct in this conclusion, the relevant period to be considered therefore is that between March 1998 and February 2001, which is a period of 2 years and 11 months.

It is quite apparent, then, that the learned judge was basing his decision upon the facts of that particular case. The facts in the instant case, however, are significantly different and lead me to the opposite conclusion.

Mr. Caskey was detained by police on 26th January 1999, following the events on the 25th and on the following day. He was released without charge on the 27th, but with a view to prosecution. I do not think he could have been in much doubt at that point but that the police were, for their part, intent upon having charges brought against him and Mr. Shaw conceded as much. I consider that the service of the 9 summonses, almost a year later, was merely the follow-on from that interview, in Mr. Caskey's mind. Having regard to the nature of the offences and the circumstances in which they were alleged to have been committed, the plain fact is that his interviewers did not regard Mr. Caskey as merely a suspect, but as the perpetrator. For the purposes of this judgment, I therefore treat time as running from 27th January 1999.

Section 6 of the Human Rights Act 1998 provides;

> 6. *Acts of Public Authorities*
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right
> (2) …
> (3) In this section "public authority" includes
> (a) a court or tribunal …

It is quite clear that a court, just as much as a prosecuting authority, is required to recognize an accused person's Convention rights and, for its own part, to avoid acting in a way incompatible therewith, a course of conduct now deemed unlawful by virtue of the 1998 Act.

By way of further preliminary, I note from the judgment in R v Murphy that the House of Lords, in Magill v Porter Magill v Weeks [2001] UKHL 67, (2001) *Times* 14th December, that "… it is not necessary for an accused to show that prejudice has been or is likely to be caused as a result of the delay." I would simply add that the Defendant in the instant case has never been detained in respect of these matters since 27th January 1999 (other than in respect of the Arrest Warrant of 20th December 2000 arising from his failure to attend trial) and that Mr. Russell

did not seek to make a case for prejudice in his submissions before me, in this context at any rate.

Bingham, L , in Procurator Fiscal, Linlithgow v Watson and Burrows; H.M. Advocate v JK, at para. 53 et sequi., went on to set out the proper rubric for such enquiry;

> 53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.
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> 54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.
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> *55.* The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted "with all due diligence and expedition." But

> a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter.

In the course of a lengthy day, the greater part – until well into the afternoon –was spent upon eliciting the history of the case since inception. I set out below that sequence as I have found it to be and as agreed by counsel on each side.

26th January 1999	Mr. Caskey was arrested and taken into custody. His detention was authorized "for the purposes of charging".
27th January 1999	Mr. Caskey was released from custody "to be reported" with a view to prosecution. *I am informed by Mr. Shaw that it would have been unlikely that Mr. Caskey would have been made the subject of a Charge Sheet at that point and bailed to attend Court on foot thereof; the Section 47 assaults would have necessitated him being remanded in custody, pending a Certificate of Suitability for Summary Trial. On the other hand, an entry in the Custody Record timed at 06.50 hrs. on 27th January 1999 notes that the prisoner was "unable to sign bail", so it might well have been that he would otherwise have been bailed to report further to the police at least.*
28th January 1999	In light of allegations made by Mr. Caskey, an "Early Referral" was completed and dispatched to Complaints and Discipline Branch, flagged as a "priority". (Mr. McCaskey had declined to make a written Statement of Complaint at that time, saying he would do so later, through his solicitor). Witness Statements were taken from Const. McFarland and Const. Kelly. A Medical Report on Const. McFarland's injuries was received.from his GP, Dr. Gould. Witness Statement taken from Const. Wilson.
8th February 1999	Chief Insp. McCullough of Complaints & Discipline Branch wrote, recorded delivery, 1st class post, to Mr. Caskey, requesting his attendance at Bangor Police Station on 2nd March in order that a Statement of Complaint might be taken. Proof of delivery was obtained. A response by 25th February was requested, but none was ever made.
1st March 1999	C.Insp. McCullough received a telephone call from Mr. Caskey's solicitor, saying the suggested appointment next day did not suit, due to another commitment on his client's part (found my me to be satisfactory) and requesting an alternative. *There was no suggestion at that stage that Mr. Caskey objected to*

	the interview taking place at a Police Station. A further letter was sent to Mr. Caskey, copied to his solicitor, (*date not advised*) requesting his attendance at Bangor Station at 3.00 pm on 18th March. Proof of delivery was again received.
6th March 1999	Letter from solicitor, confirming the foregoing appointment.
18th March 1999	Both Chief Insp. McCullough and a Mr. Moore of the Independent Commission for Police Complaints for Northern Ireland duly attend at Bangor Station for 3.00 pm. Neither Mr. Caskey nor his solicitor show up.
24th March 1999	Dr. Reid reports on examination of Const Kelly on 27th January. *The prosecution were unable to explain why this had taken so long, other than the general observation on Mr. Shaw's part that such medical evidence often has to be chased up.*
12th April 1999	Witness Statement taken from Sgt. O'Hara. *The prosecution were again unable to advance an explanation for the delay in obtaining this remaining Witness Statement.*
27th May 1999	Further Medical Report on Const. McFarland's injuries received from Dr. Reid, deputy Forensic Medical Officer, recording his finding on examination on 27th January 1999. *No explanation could be tendered for delay in obtaining this Report.*
29th June 1999	Following further telephone contact from Mr. Caskey's solicitor (*date not advised*), Chief Insp., by arrangement, interviews Mr. Caskey at his solicitor's offices and a formal Statement of Complaint is taken. *Mr. Russell conveyed his client's instructions that the reason for the previous non-attendance was that the latter did not wish to attend a Police Station. I do not regard that as an adequate explanation for his behaviour, nor for the behaviour of his solicitors, for that matter.*
3rd August 1999	A Const. Wilson recommended the form of charges against Mr. Caskey, in accordance with procedures appropriate to an orthodox police prosecution. *It seems likely, I am told, that Const. Wilson was assigned the role of investigating office from the outset, by reason of the controversy over injuries sustained by Mr. Caskey in the course of his detention.* *No explanation could be advanced by the prosecution as to why it took so many months for this recommendation to be formulated.*
20th August 1999	The files reached a Chief Inspector Black. *He was however aware that a formal Complaint had been made and it seems likely that it was he who re-directed the prosecution file to the DPP. I remain unclear as to whether, in fact, the file ought to have been routed to the DPP much sooner, perhaps as soon as 28th January, when the Early Referral was filed. In any event, it seems that it was definitively a matter for the DPP when Mr. Caskey,*

	belatedly, made his formal Statement of Complaint.
31st August 1999	The file was received in the DPP's Office.
7th September 1999	Interim Directions were issued. *This was not really any form of Direction at all, although I am advised that this is how such a missive would always be described. It was simply an acknowledgement of the file, recording that the DPP officer, having spoken to the Investigating Officer in the related Complaint file, would await consideration of the papers gathered by the latter.*
20th October 1999	Further interim Directions were issued. *Again, this was no a Direction, despite the heading of the short letter in question. It recorded that the DPP officer concerned had established that the Investigating Officer in the matter of the Complain had yet to interview 3 officers and that it was intended to await the latter's report, expected by 8th November 1999 before giving a Final Direction*
27th October 1999	Chief Insp. McCullough interviewed both Const. Kelly and Sgt. O'Hara with reference to Mr. Caskey's Complaint *It would appear that Const. McFarland was never interviewed in this regard.*
26th January 2000	The Direction to prosecute was issued, with the 9 charges formulated. *No explanation could be provided by the prosecution as to why it had taken such length, even if counted only from end-October, to complete this Direction, having regard to the preparatory work of Const. Wilson earlier.*
7th February 2000	Summonses issued for a return date of 3rd March 2000
20th March 2000	Notice of Intention to Tender Written Statements; return date on Summonses amended to 7th April 2000. *It seems that the Summonses, once issued, were held back when it was realized that the package of tendered written evidence was not prepared.*
22nd March 2000	Summonses served on the Defendant.
7th April 2000	Defendant appeared, but his legal representatives sought an adjournment in order to take fuller instructions. Adjourned to 19th May.
19th May 2000	Adjourned for Hearing as a contested case on 16th June 2000.
16th June 2000	Listed for trial, but the presiding Resident Magistrate found he had to disqualify himself, due to prior knowledge of the Defendant. Case adjourned by the court to 30th June 2000, for mention only, to check availability of witnesses to fix a new trial date. *It was common case between counsel that to have the case listed for contest so soon represented considerable expedition. Mr. Russell also conceded that the presiding Magistrate's initiative was quite proper and appropriate, by reference to the Defendant's right to a trial*

	before an independent tribunal.
30th June 2000	Case fixed for trial on 29th September 2000.
29th September 2000	Prosecution applied for an adjournment, due to difficulties in securing attendance of witness(es). Trial re-scheduled for 20th December 2000. In any event, Mr Fyffe, RM, who had previously disqualified himself, was sitting. *Prosecution was unable now to provide further details as to this adjournment application. It may have been granted on its own merits. However, it has to be conceded that, the contest having once again been listed before the presiding Magistrate, by what amounts to an administrative error, it could not have proceeded on that date in any event.*
20th December 2000	The Defendant did not appear for the scheduled trial. His solicitors' application for a simple adjournment was refused by the court and a Bench Warrant was issued for the arrest of the Defendant. *Mr. Russell conceded that, in the context of this Article 6(1) application, the fact is that the Defendant could have had his trial on 20th December 2001, within a reasonable time from issue of Summonses, if he had turned up. The Defendant claims that he had been abroad and had not received his solicitor's notification of the Trial date in consequence. I do not consider that an acceptable excuse.*
10th January 2001	The Warrant was executed by prior arrangement with the Defendant and the case was further adjourned to 24th January for mention, to re-check on availability of witnesses for an alternative trial date, the Defendant being excused from attendance on that date.
24th January 2001	The case was adjourned to 7th February for mention, to confirm availability of witnesses and to have the Defendant formally put upon his election and plea.
7th February 2001	Trial date re-scheduled for 28th March 2001.
28th March 2001	The Trial was re-listed again before the presiding Residing Magistrate, who had previously disqualified himself. The case therefore had to be adjourned once more, this time for just 2 days, to 30th March, for mention only, in order to check my own availability for a Trial on 1st May, to check availability of witnesses and to arrange for an Additional Day.
30th March 2001	Adjournment to 1st May confirmed, for a Trial before me.
1st May 2001	Listed for Trial. Was adjourned on prosecution application, due to absence of Sgt. O'Hara, by consent. Trial date re-scheduled, on Additional Day, for 18th June. *The defence did not wish to proceed without Sgt. O'Hara being available to give evidence in person and to be cross-examined. Sgt. O'Hara was injured in a security incident in North Belfast, in an*

	MSU on Limestone Rd. In all, the prosecution intended to call 4 police offers, including Sgt. Hara, and 2 medical witnesses, Dr. Gould and Dr. Reid.
18th June 2001	The Trial finally opened, before me, with 2 days Additional Days set aside. In circumstances which I consider in more detail below, the proceedings got no further than taking evidence from the first witness, Mr. McFarland and the case was adjourned in the early afternoon, on the Defendant's application, with an Order for disclosure of the personnel records and GP notes and records for that witness, Mr. McFarland. The Trial was re-scheduled for 17th September.
21st June 2001	The Court Clerk wrote to the Police and the GP for personnel and medical records in respect of Mr. McFarland.
11th July 2001	Court Clerk wrote to me, forwarding copy Police personnel records in respect of Mr. McFarland.
8th August 2001	I replied to the Court Clerk, forwarding my written analysis of the records, directing what should be disclosed to the defence.
3rd September 2001	Court Clerk forwarded copy GP notes and records to me for appraisal.
11th September 2001	I wrote to the Court Clerk, having examined the GP notes and records and directing upon the manner in which these should be copied to the defence representatives.
17th September 2001	Scheduled resumption of Trial had to be adjourned, on application of the Defendant, by reason of the continued illness of the prosecution witness, Sgt. O'Hara (*further details set out below).* Re-listed for 31st October, for mention.
31st October 2001	Sgt. O'Hara still ill.
19th December 2001	Sgt. O'Hara still ill.
27th February 2002	Trial re-scheduled for resumed Trial on 17th June 2002

It was common case that this was not a complex matter. It simply concerns a factual dispute as to what happened in two separate but related incidents – two altercations between Mr. Caskey and police officers, including Const. McFarland - one on the 25th and the other on 26th January 1999. Matters did become somewhat more complicated with Mr. Caskey having, belatedly, make a formal Complaint, on 29th June 1999, triggering an investigation by Complaints & Discipline Branch, but that aspect had only limited impact upon the preparation stage.

It was submitted by Mr. Russell that the Police had everything required to institute such investigation by 27th January 1999 and should have proceeded with it at that stage. I cannot agree. I take the view that in order for a formal investigation to be commenced against a police officer the investigator must establish just what is alleged by the Complainant. I do not see how the suspect's right to a fair investigation can be assured if he be put to answer allegations framed speculatively and without endorsement by the Complainant.. What happened here, quite properly, is that early intimation of the Complaint caused notification to issue to Complaints and Discipline Branch and early correspondence with Mr. Caskey, in efforts to establish clearly and definitively just what those complaints were, with sufficient precision to allow meaningful interviews to be undertaken. I am satisfied that those efforts to get matters underway as a priority were not reciprocated by Mr. Caskey and that the prosecuting authorities cannot be held responsible for the initial period of delay, from 2nd March until 29th June 1999, a matter of almost 4 months.

On the other hand, so far as the preparation of the primary file regarding the intended prosecution of Mr. Caskey be concerned it is not apparent that there was reasonable cause for the delay in obtaining a Statement from Sgt. O'Hara until 12th April 1999. The acquisition of the further medical report on Const. McFarland's injuries ran things into May. There was already on file a report on Const. McFarland from his GP, dating back to 28th January. I think, in the round, that the file ought to have been completed, ready for settling the recommended charges and consideration by a Chief Inspector, by end-March, if things had all gone as one would have wished.

The delays by Mr. Caskey in respect of the formal Complaint were overlaid upon the foregoing, however, and the net effect is that the period during which the actions of the prosecuting authorities might be thought to have occasioned unreasonable delay runs from end-June to end-July, the point at which I take Const. Wilson to have been settling the recommendations in respect of charging, for consideration of a Chief Inspector.

I am aware that the month of July, with all the demands upon police time which that season regularly imposes in this province, is not one in which to expect sustained progress in background paperwork such as this. I take judicial notice of the fact that the Royal Ulster Constabulary, as it then was, has been sorely stretched in terms of manpower in what has come to be termed "the marching season" over these last few years. I am not prepared to find culpable delay on the part of the authorities between 29th June and receipt of the file by the DPP on 31st August 1999.

What happened then, in simple terms, is that the DPP officer deferred consideration of Directions until a report was obtained from the officer investigating Mr. Caskey's complaints. I consider that the officer was entitled, as he expressly did, to regard the Complaint file as "inextricably linked", but note that, on 20th October 1999, the officer was still reasoning that he could not settle Directions because the officer investigating the Complaint had yet to carry out the

necessary interviews of police officers, though the final report was then expected by 8th November. In the absence of any explanation being tendered by the prosecution for this, I hold that the period from 29th June to 8th November 1999 was excessive, in respect of a conclusive report on Mr. Caskey's Complaint. In any event, likewise in the absence of any explanation, I consider the period from then until 26th January 2000 was unreasonable, as regards the DPP issuing its Directions in respect of prosecution. Further, I have been given no reason as to why, even then, the process could not have been issued in proper form the following month. In all, I consider that the prosecuting authorities were responsible for a delay of some 3 months after 31st August 1999 and up to 7th April 2000. I have not been given any satisfactory reason as to why proceedings in this case could not have been issued with a return date for sometime in January 2000, instead of 7th April 2000.

Once proceedings had been issued, it became the responsibility for the judicial authorities and the court administration to arrange for a trial within a reasonable period. Counting from 7th April 2000, it was conceded by Mr. Russell that to have a trial date, one way or another, for 20th December 2000 represented reasonable dispatch. I think that is undoubtedly the position.

If a trial had taken place on 20th December 2000 (though it would have stretched over one or two days more), that would have amounted to a period of some 23 months since the police interview.

In Procutator Fiscal, Linlithgow (2001), Bingham, L remarked;

> 56. A period of 20 months elapsed (or would have elapsed) between the charging of the officers at the end of January 1999 and their trial in August or September 2000. They were not in custody. While a shorter interval between charge and trial would obviously be desirable, this is not a period which, on its face and without more, causes me real concern, such as to suggest that a basic human right of the officers may have been infringed. I am aware of no case in which the court has found so short a period to violate the reasonable time requirement, save in *Mansur v Turkey* (1995) 20 EHRR 535, where special considerations were present (see paragraph 45 above). I would not for my part think it necessary to embark on the more detailed inquiry required by the court ...

It was rightly conceded that no complaint of a breach of Article 6(1) could have been formulated on 20th December 2000, had the Defendant turned up for his trial. It follows that the real complaint emerges by reference to the fact that the trial, as re-scheduled from time to time, would only have proceeded on 17th June 2002, a further period of some 18 months. (For present purposes, I am not here addressing the proposition that the trial, even then, ought to have been started de novo, with consequential and further delay).

Mr. Russell argued that the period for which Mr. Caskey should be regarded as directly responsible, as regards consequential delay, by reason of his failure to

attend trial runs only from 20th December 2000 until 28th March 2001, a matter of some 3 months. To a large extent, I agree with that proposition. However, hindsight informs us that, once that opportunity for final disposal was squandered, all sorts of things arose to frustrate efforts to secure an effective and alternative trial date. While it may not be amenable to precise quantification, I do nevertheless consider that the Defendant continued to have a degree of responsibility for all delay arising after 20th December 2000. In saying that, however, I do not intend in any way to derogate from the observation by Bingham, L , in Procurator Fiscal, Linlithgow v Watson and Burrows; H.M. Advocate v JK, quoted above, with regard to how time-wasting by the Defendant does not entitle the authorities themselves to waste time unnecessarily and excessively.

It is apparent that an administrative error caused the case to be re-listed for trial on 28th March 2001 before the same Magistrate who had already disqualified himself and that a delay thereby arose, running from then until 1st May 2001, when it was first listed before me, a matter of one month or thereabouts. In isolation, a delay of one month does not carry the Defendant's contention very far, but I recognise that proper principle requires one to have regard to the length of delay as a whole, rather than take a reductionist approach in respect of each individual period.

On that date (1st May 2001) there was an application for an adjournment by the prosecution, to which the Defendant gave his consent, on the grounds that one of the witnesses, a Sgt. O'Hara, had recently been injured while on duty. It is common case that this adjournment suited the Defendant and his right to a fair trial, on his terms, just as much as the prosecution. The Defendant evidently preferred to endure some further delay, pending that officer's recovery, so that he might have the latter cross-examined, rather than have the prosecution apply to have the evidence received in documentary form. (In this respect, though, it must be noted that the Defendant had at no time served Notice objecting to any tendered evidence being received without need of formal proof, a feature Mr. Russell gave me to understand to be an oversight.) In the circumstances, I do not regard the ensuing delay, up to 18th June 2001 to be properly treated as default on the part of the authorities. The indisposition of the witness was simply a misadventure.

The case then, finally, came on for trial before me, sitting as a Deputy Resident Magistrate, at Bangor petty sessions on 18th June 2001 and on a special day, at which this was the only case listed. The first witness called by the prosecution, and the only one that day, was Mr. McFarland.

Mr. McFarland gave his evidence-in-chief and was then cross-examined by Mr. Holmes, BL for the defendant. Mr. Holmes completed his cross-examination, and would have confirmed to the court that he had no further questions, a little after 1.00 p.m. that afternoon. The closing point put to the witness by Mr. Holmes was that his injuries were very minor. Mr. Shaw, BL, for the prosecution, then sought and was granted leave to re-examine the witness, whereby it was adduced in

evidence that the witness had been obliged to retire from what was then the Royal Ulster Constabulary on foot of the medical reports arising out of the incidents on 26th January 1999, the subject of these criminal charges against the Defendant. At that, Mr. Holmes raised the matter of disclosure of medical evidence.

The court recessed at 1.16 pm. Mr. Shaw and Mr. Holmes saw me in chambers during that recess and Mr. Holmes spoke further on the subject of disclosure of medical records. Mr. Holmes, in terms, explained that the suggestion that Mr. McFarland had been retired from the Police as a result of this incident was entirely unexpected. Mr. Holmes contended that if that were to be accepted as fact, it put an entirely different complexion on the case; his client's firm instructions had always been that Mr. McFarland's injuries were very slight. The defence, he went on, had been unaware of that contention and had seen absolutely no medical evidence to support it. In such circumstances, while he very much regretted the consequential delay, Mr. Holmes felt he had no choice but to seek disclosure on the defendant's behalf of all the records concerning Mr. McFarland's medical retirement. Mr. Shaw, for his part, acquiesced in that proposition, saying simply that it suited him.

When Court resumed, an Order for disclosure was made on application of Mr. Holmes and the Trial was adjourned to 17th September in the expectation that it could then proceed to a conclusion.

I have already mentioned that the Defendant had not served Notice objecting to the tendered evidence which accompanied the Summonses as served upon him. Unfortunately, this is not uncommon in the Magistrates' Court, even though the case is being contested. In consequence, I have evolved the precautionary practice of reading none of the tendered Statements when I find them still attached to the papers before me in a case listed as a contested matter until I have expressly asked of the defence whether they are really agreed. Almost invariably, I am then told that the defence does indeed object to them being tendered in evidence without formal proof.

I do not mean to suggest that I consider it fatal, for fair trial purposes, should I inadvertently read tendered Statements which are still attached to the Summonses by reason of default on the part of a Defendant's representatives.

In any event, by reason of my practice in such circumstances, I had not read the tendered Statements from Dr. Gould and Dr. Reid, concerning Mr. McFarland's injuries (as found upon examination on 27th January 1999) on 18th June 2001, when dealing with Mr. Holmes' application. I have done so now, for the purposes of this application. (Mr. Shaw has confirmed that the contents are to be formally proven by the respective authors in any continued trial). In light of the contents, I can only say that I find myself surprised by the contention that Mr. McFarland's injuries were very slight.

Whether it was right to make the order for disclosure sought on behalf of the Defendant – whether a magistrates' court has power to make any such order – is

another matter. My response might well be different if I were to face such an application now, having since had the benefit of argument on the subject of disclosure in the magistrates' courts. For present purposes, the relevant consideration is that the application was made, vigorously, on the part of the Defendant and with nothing more than acquiescence on the prosecution's part. Mr. Russell confirmed that the ensuing delay was not something upon which he could rely, for the purposes of his Article 6(1) application, and that the *vires* issue was academic to that extent.

In any event, for better or worse, relevant abstracts from both Mr. McFarland's personnel records and his GP notes and records were disclosed to the defence in the intervening period. As it happens, were they admitted in evidence, they would only have served to corroborate Mr. McFarland's oral evidence that he was indeed compelled to retire from what is now the Police Service of Northern Ireland by reason of injuries sustained during the events which are the subject of the trial.

On 17th September 2001 I was again assigned to Bangor Magistrates' Court for the continued trial, but Mr. Shaw and Mr. Holmes requested a meeting in chambers at the outset. It was explained to me there that Sgt. Shaw, who was scheduled as the third prosecution witness, had been injured in the course of his duties and was not expected back on duty for some time in consequence. (I had quite forgotten – and was not reminded - that this was the same circumstance which had occasioned the adjournment the previous May. It now seems that Sgt. O'Hara had been in attendance in June 2001, but was again incapacitated by reason of the same injuries.)

Mr. Holmes indicated that he considered the attendance of that witness for cross-examination to be of vital importance (my note is that it would be "extremely difficult for the defence to continue"). Mr. Shaw, BL indicated that the prosecution had no difficulty about producing the witness, subject only to this matter of sick leave. He remarked more than once that the defence position on the point suited him. I remarked that it did seem odd to me that the defence should take a position like that in regard to a witness being called, after all, to further prove the charges against the Defendant. I conjectured, somewhat whimsically, that the proper course might be for the defendant to issue a witness summons against Sergeant O'Hara. In any event, I did indicate that, while it was no doubt right that a reasonable period be allowed for that witness to recover sufficiently to attend court (since the Defendant was pressing for as much), it was not something which should be allowed to delay the trial indefinitely. Mr. Shaw had already indicated in discussion that it might well be as late as December before the witness was fit again. There was however no assurance that it might not take longer. With this in mind, I expressed the view to both counsel that one might well have to proceed with the trial no later than December 2001, forcing the prosecution to complete its case without that witness [or seeking to have it adduced in another fashion, of course].

I was also at pains to explain to Mr. Holmes that I would treat the application to adjourn matters that day as one being made on behalf of the Defendant, by Mr.

Holmes. I made explicit my mindfulness of the Human Rights point and, accordingly, reasoned that I wished there to be no doubt, later on, that it was the Defendant who sought this hiatus in the trial by reason of the continuing incapacity of a prosecution witness. From a choreography point of view, I made clear that I wished Mr. Holmes to make such an application, on that basis, in open court. Mr. Holmes exhibited no difficulty with that direction.

And that is precisely what occurred. Upon the case being called in Court, Mr. Holmes sought and was granted an adjournment. I endorsed the topmost Summons before me with a note that Sergeant O'Hara was ill and that it was the Defendant's application to have the matter adjourned. It was adjourned to 31st October 2001 for mention. In light of issues as have subsequently be raised, I might add that there was no mention made of Mr. McFarland, no talk of finishing off cross-examination, nor of seeking leave to have him further cross-examined by the defence, in light of the disclosed medical and personnel material.

I now see from papers that in October 2001 a Member of the Legislative Assembly began correspondence with the Northern Ireland Court Service, expressing concern on behalf of his constituent, Mr. McFarland, about the continuing delay in final disposal of this matter. I find it hard to imagine that, had he known of it, the Defendant would have endorsed the implicit request for greater expedition, since it was he who was the party moving the deferment at that time. The Defendant would most likely have answered that the delay was necessary, if equally regretted on his part, in order to advance his Convention right to a fair trial.

As appears from the above tabular summary, the case then appeared before the presiding Resident Magistrate, Mr. Fyffe, RM on a number of occasions. Each time, the Defendant, through counsel, supported the prosecution's application for an adjournment, on the basis that Sgt. O'Hara remained unfit to attend trial. One need hardly add that neither counsel drew the presiding Magistrate's attention to my earlier remark to each – that the case ought not to be denied a trial date beyond December 2001 on that account. And so it was that in February 2002 (not a great deal longer, as it happened), the presiding Magistrate overruled both parties and directed that the case should be re-listed for continuation of the trial before me, whether or not Sgt. O'Hara had recovered sufficiently to give evidence in person. That was how it came to be re-listed before me on 17th June 2002.

Being made aware of these details, Mr. Russell argued that the judicial authorities ought to have disregarded the consensual applications for adjournment that much sooner and that the Defendant had, in consequence, been denied a trial unreasonably after December 2001. I have to say that I do not follow Mr. Russell's logic. If, as is common case, the Defendant moved the original application on 17th September 2001 and fully supported all applications for adjournment thereafter, on the same ground, for so long as the court acceded to them - if the matter was only finally brought back to a trial date because the court overruled the Defendant, just as much as the prosecution, in fixing a new date - then I fail to see how the Defendant, at one and the same time, can legitimately or

justly contend that the court, in his view, was acting unreasonably in acceding to his preference for having the matter further delayed, up to then.

The case next appeared before me on 17th June 2002, almost exactly one year later, with both that and the next day arranged to hear it. In the event, it proved impossible to resume the trial on that occasion. Mr. Shaw appeared once again for the DPP. He explained that he had been very recently advised by Mr. McFarland that he was medically unfit to attend the trial. A faxed medical certificate was handed up, stating that Mr. McFarland suffered from severe stress and was therefore unable to attend.

(In the course of ensuing discussions I regret that I did not accept Mr. Shaw's suggestion that the witness had completed his evidence on the previous occasion. Declaring himself to be subject to my own recollection, Mr. Shaw stated that his own was that Mr. McFarland had finished his evidence on 18th June 2001. Without contribution from the defence representatives on the point, beyond perhaps affirmative nods from defence solicitor, my recollection at the time was that Mr. Holmes had been cross-examining when the assertion arose that the witness had been forced to retire due to injuries received in the incident on 25th January 1999, the subject of the charges against the defendant. Mr. Holmes, I thought, had thereupon sought disclosure of relevant medical evidence and on the basis that he would be resuming his cross-examination when that was produced. Since 17th June 2002 I was able to refer to my trial notes of 18th June 2001 and found that the correct sequence of events was as set out above. Mr. Holmes had in fact completed his cross-examination. In particular, the assertion that the witness had been forced to retire on related medical grounds only arose in re-examination by the prosecution, in response to the contention that Mr. McFarland's injuries had not been very serious. The correct position is that Mr. McFarland's evidence was indeed completed on 18th June 2001.)

Matters became more complicated (at the resumed trial on 17th June 2002) when Mr. Russell, BL made his appearance on behalf of the defendant, in place of Mr. Holmes, BL. The former advised the court that he had taken over conduct of the defence. He submitted that he was thereby at a disadvantage and that it might well be necessary for the trial to start again, since he had not had the opportunity to participate previously and was therefore not familiar with the evidence previously adduced.

In addition, Mr. Russell advised that he would now be making application to have the proceedings stayed, on the basis that it was so long since the events in question that the defendant had been denied his right to a trial within a reasonable period.

As detailed earlier, all this led to the matter being re-listed before me on 8th August for submissions on these points.

I have already ruled that the period from interview up to intended trial on 20th December 2000 does not constitute denial of the right to determination within a

reasonable period. Had the trial proceeded on 18th June 2001, I would not have considered that to have reached the threshold of a Convention breach, finding the Defendant's conduct to be the overwhelming cause of the further delay. As to the additional period, from 18th June 2001 until 17th June 2002, it is this which most of all excites concern that the delays have simply become unacceptable. It is clear, however, that it has, once again, been the conduct of the Defendant and his representatives which constituted the predominant cause.

As previously intimated, with reference to the timing of the Defendant's application, I find it difficult to conceive of this application being brought any sooner than it was because it contradicts the position adopted on the Defendant's behalf, right up to and including 27th February 2002, the last preceding court appearance, when the Defendant was continuing to support or promote serial adjournment applications.

In this regard, one returns to the case of R v Murphy (2001) and the judgment of Gillen, J. One of the points which the learned judge considered was the timing of the Defendant's complaint over the delay. Thus (*Ibid*, page 4);

> It is not without significance that this application has not been mounted until now notwithstanding the presence of a number of senior counsel acting on his behalf. It is clear that a defendant who fails to demand a speedy trial does not forever waive his right. However it can be a factor to be taken into account if the right is asserted only at a late stage. The more serious the deprivation, the more likely a defendant is to complain and his assertion of that right is entitled to strong evidentiary weight in determining whether he is being deprived of the right. In this case no application was ever been made to sever the indictment so that he could be tried separately from Lees. In particular when this case was listed for trial before a judge in February 2001, no application was made that he had been subjected to a breach of art 6(1) of the Convention.

To quote from the judgment of Bingham, L in the Procurator Fiscal, Linlithgow once again;

> 51. The reasonable detention provision and the reasonable time requirement confer important rights on the individual, and they should not be watered down or weakened. But the individual does not enjoy these rights in a vacuum. He is a member of society and other members of society also have interests deserving of respect. This was recognised by the court in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52 when, in paragraph 69 of its judgment, it referred to the striking of a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for which balance was said to be inherent in the whole of the convention. See also *Soering v United Kingdom* (1989) 11 EHRR 439 at p 465, para 89; *B v France* (1992) 16 EHRR 1 at p 34, para 63. It was again recognised in *Doorson v The Netherlands* (1996) 22 EHRR 330, 358 when, in paragraph 70

> of its judgment, the court spoke of the need in appropriate cases to balance the interests of the defence against those of witnesses or victims called upon to testify. While, for the reasons already given, it is important that suspects awaiting trial should not be detained longer than reasonably necessary, and proceedings (including any appeal) should be determined with reasonable expedition, there is also an important countervailing public interest in the bringing to trial of those reasonably suspected of committing crimes and, if they are convicted, in their being appropriately sentenced. If the effectiveness and credibility of the administration of justice are jeopardised by excessive delay in bringing defendants to trial, they are liable to be jeopardised also where those thought to be guilty of crime are seen to escape what appear to be their just deserts.

I therefore reach the conclusion that the delay in securing final determination of the remaining criminal charges against this Defendant do not constitute a breach of the reasonable time requirement – so far as the Defendant and his Convention rights be concerned. It does contain lessons about unmeritorious applications and procrastination on behalf of a Defendant; it does constitute unreasonable delay so far as the public and other parties involved in the trial are concerned, but that is another matter.

In those circumstances, it is not necessary for me to proceed to consider whether, if a breach of the Defendant's Convention right under Article 6(1) were found, the breach would be expunged in the event of an acquittal or, in the event of a conviction, would be expunged by a measured amelioration of the appropriate disposal

Application B1: That this trial be re-commenced in view of the Defendant's change of counsel. During the submissions on 17th June 2002 I asked Mr. Russell whether he wished to inform the court of any particular reason for the Defendant's decision to change counsel. In doing so, however, I acknowledged that Mr. Russell was under no positive obligation to do so. Counsel replied by saying, in terms, that he did not think it appropriate that he should say anything further about the circumstances or about the reasons for that development.

The difficulty for a magistrate in embarking upon any enquiry into the reasons for a change of counsel during an ongoing trial is that he may thereby have disclosed to him information which materially affect his capacity to hear the case impartially. In other words, I think there is a material difference between this kind of situation, on the one hand, and an application to adjourn the commencement of a trial so that the defendant may exercise his right to have counsel of his choice, as such (see the unreported judgment of Kerr J delivered on 8th November 2001 in *Re Doherty (Trading as JMDAutospares)'s Application for Judicial Review*). That is why I confined myself, in that regard, to affording Mr. Russell an opportunity to disclose anything he thought appropriate, rather than embarking upon an enquiry, as such. I was therefore content to proceed in my consideration of the application on the

basis that there was nothing in the circumstances of the change of counsel which of itself has any bearing upon the fairness of the trial to date.

On 8th August, when I intimated this intended approach to Mr. Russell, he then decided that he would inform the court as to the reasons for the change in counsel on the Defendant's part. I was informed that the decision arose in conversation between Mr. Holmes, BL and the Defendant. Mr. Holmes had expressed a personal view, both by reference to previous appearances in this case and in another matter as to the state of relations between himself and myself. Mr. Russell's instructing solicitor was anxious to dispel any impression that Mr. Holmes had expressed a view to the Defendant that a person being represented by him before me would not obtain a fair trial. However, Mr. Russell informed me that the remarks by Mr. Holmes [whatever they were, exactly] married with the Defendant's own observations during previous stages of trial, presumably on 18th June 2001, [or perhaps at previous adjournment applications] and led him, the Defendant, to conclude that he could not expect a fair trial before me if represented by Mr. Holmes.

Mr. Russell made it perfectly clear, however, that he did not wish to suggest that there was a real issue about the Defendant receiving a fair trial by the court as presently constituted. In those circumstances, I need not here dwell further upon the Defendant's reasons for changing counsel, which I continue to treat as a voluntary act on his part.

The pertinent issue before me is whether a refusal to abort this trial because of that change of counsel would constitute a denial of the defendant's right to a fair trial. I quite understand that Mr. Russell may feel that he is at some disadvantage in not having heard the evidence given by Mr. McFarland, nor having cross-examined him in person. That much is inherent where there is then a change of counsel, whether that be on the initiative of counsel or of the client. On the other hand, that disadvantage does have to be measured in the proper context, so far as the trial process is concerned. The defendant himself was in court during that evidence, able to play his own part in ensuring that counsel was fully briefed on his response to the unfolding assertions, while counsel was attended by his instructing solicitor, able to liaise between counsel and client at hearing, able to take notes on the evidence for future reference and to assist toward a comprehensive response in cross-examination (and, I might add, having the opportunity to record the conclusion of the cross-examination and the ensuing re-examination of the witness, as such).

I consider that the difficulties in which Mr. Russell has been placed are such that they do not significantly or adequately compromise the fairness of the trial so as to require, as a matter of justice, that the trial be stopped. I need not dilate upon the competing and, in my view, overriding considerations in this respect, including the defendant's right to a trial within a reasonable period, the rights of the prosecution, its witnesses and the alleged injured party, and the matter of additional costs.

In this case, it is just one factor to be taken into consider that there are difficulties intimated about Mr. McFarland's ability to return and give evidence. At best, this would occasion significant further delay. It might even lead to the same kind of situation which arose with regard to Sgt. O'Hara.

In any event, it seems to me that the core issue is as to whether the tribunal of fact has heard the evidence in full. That done, I see no real basis for contemplating the repeat of the exercise, in front of the same tribunal, just so that one counsel can hear it all again. Likewise, if Mr. Russell were to adopt a different strategy in cross-examination to that pursued by Mr. Holmes, the questions would then arise as to how the tribunal should approach the combination. On that approach, I see some force in an argument that to accede to Mr. Russell's application would more properly entail re-commencement of the trial before a different Magistrate. I do not think a Defendant should be accorded such a response upon his voluntary change of counsel, without good cause, after the trial has got underway.

Application B2: That this trial be re-commenced de novo by reference to the evidence of Mr. McFarland.

I have already set out how it is that Mr. McFarland, the alleged injured party had, on 18th June 2001, given his evidence-in-chief and been cross-examined in full on that. One point arose in re-examination, namely the assertion that he had been required to retire on medical grounds because of injuries sustained in the incident on 25th January 1999. The defendant's legal representative then sought disclosure of all material medical records and the case had to be adjourned in consequence.

In such circumstances, there is in fact no issue about having yet to finish taking evidence from Mr. McFarland.

In light of the foregoing, I have concluded that this trial ought to proceed, notwithstanding the specific applications made by defence counsel. There is however one other consideration, alluded to from time to time in defence counsel's skeleton argument, and which warrants separate consideration. Quite apart from the reasonable time requirement as such, do I remain content that the Defendant can receive a fair trial, notwithstanding the period of time which has now elapsed since (a) the events of 25th/26th January 1999 and (b) the opening of his trial on 18th June 2001?

As already mentioned, this is not a particularly complex case; it is a dispute about what actually happened in interactions between a limited number of persons in two separate incidents over a span of two consecutive days. The prosecution are required to prove their account of the facts beyond reasonable doubt and in respect of each of the five charges if the Defendant is not otherwise to be found entitled to be acquitted.

Mr. Russell contends that the Defendant and other defence witnesses do not have contemporaneous notebook entries or statements as the prosecution witnesses have and that the defence witnesses' ability to recollect events must be impaired. As I understand the position, this is not a case in which any witness is asserting that he no longer has any personal recollection of the events and would wish to adopt contemporaneous notes in substitution.

In Mr. McFarland's case, the only witness to give evidence so far, it is correct that he had resort on occasion, during evidence-in-chief, to notes he had written up one hour after the events in question, in order to refresh his memory on points of detail. It is also correct that, during cross-examination, the defence had him refer to his notes to significant effect, whereby the witness withdrew his suggestion, grounded upon his recollections, that Mr. Caskey had refused to give his name and, instead, as recorded in those notes, accepted that the Defendant had in fact refused to hand over his car keys.

By the same token, it was also apparent from the cross-examination on 18th June 2001, that the Defendant had a detailed and contradictory version of the events to present, which details were put to the witness in a comprehensive and very specific fashion.

It is also the case, as detailed earlier, that Mr. Caskey had intimated at the outset an intention to make a formal Complaint about police behaviour, for which purpose he instructed solicitors at an early stage. Doubtless, detailed written instructions were then taken. In addition, Mr. Caskey, I understand, made a full Statement to Complaints & Discipline on 19th June 1999, in the presence of his solicitor. I understand that the defence have had disclosure of all Statements taken in the course of that separate investigation as well as for the purposes of this prosecution. In summary, I see no basis for a presumption that the recollections of the Defendant and his witnesses have now become so vague and unreliable, so distinctly not amenable to written records, that it is no longer possible to mount a credible defence.

Further, it should be borne in mind that it is for the prosecution to prove its case beyond reasonable doubt. It is the prosecution, not the defence, which faces that bracing hurdle.

It has also been suggested that the lapse of time, now more than a year, must impair the court's ability to recollect the evidence even with an adequate note and would make it impossible to recollect the demeanour of the witness and the tenor and "nuances" of his evidence and cross-examination. Well, as Mr. Russell conceded, that is very much a matter for myself. The inference, mind you, is that the deleterious effects would work to the prejudice of the Defendant, rather than the prosecution; that one would have come to have a stronger impression as to the impact and reliability of Mr. McFarland's evidence than was the case on the day. Axiomatically, I cannot say if this be so, but I doubt it very much indeed. In trying cases, I do sometimes feel able to reach a clear view, at the conclusion of the evidence of one witness, as to whether he has given a truthful and reliable account

of the facts in issue, without establishing the testimony from anyone else, in support or contradiction. That experience is rare. More typically, one carries forward provisional views into the consideration of the evidence from subsequent witnesses, both prosecution and defence. Whatever about "nuances", the decision as to whether, ultimately, one retains a doubt about the prosecution evidence (as a whole) will be based on any one of a great range of possible considerations. I am satisfied that, by recollection and by reference to my detailed notes on his evidence and cross-examination, I do retain a sufficient grasp of Mr. McFarland's testimony upon which to safely proceed to consider the further evidence remaining.

I therefore must reject the defence applications and propose to continue the trial.

Dated this 24th August, 2002

John I. Meehan, R.M.
Bangor Petty Sessions