

Neutral Citation No: [2021] NICC 8

Ref: McB11513

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

ICOS No: 18/72668

Delivered: 11/05/2021

**IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT DUNGANNON**

THE QUEEN

v

STEPHEN McKINNEY

RULING

TO PERMIT A VIEW OR INSPECTION OF AN OBJECT OUT OF COURT

**Mr R Weir QC and Mr Chambers appeared for the Prosecution
Mr O'Rourke QC and Mr McCann (instructed by Oliver Roche, Solicitors) appeared for
the Defendant**

McBRIDE J

[1] The prosecution asked the court to permit a view of the Noble Cadet II ("the boat") to take place at the police jetty at Enniskillen police station. The purpose of the view was to allow the jury to be taken to the site of the boat so that they could view the interior and exterior of the boat from the jetty. The prosecution submitted that such a viewing was necessary as the photographs, maps and diagrams already provided to the jury and which formed part of the evidence in this trial, did not adequately convey the size of the boat and it was considered that the jury would have a better understanding of the dimensions involved by a viewing of the boat.

[2] The defence objected to the viewing on the basis that it was neither necessary nor fair to permit such a viewing. Mr O'Rourke QC in a detailed skeleton argument and in his oral submissions submitted that a viewing was not necessary in the sense of being 'required' or 'essential.' He submitted that there was no evidential basis upon which the court could conclude that a viewing was necessary as no witness had given evidence to this effect and no evidence had been given to the effect that the maps and/or the photographs did not adequately convey the true scale of the

boat. He submitted that the jury had the benefit of professional photographs, maps and detailed drawings and indicated that if the prosecution had so wished they could have provided a 3D video tour of the boat.

[3] Secondly, he submitted that if such a viewing was considered necessary it should be conducted by putting the boat on a trailer and then viewed in the precincts of the court.

[4] Thirdly, he submitted that the prosecution had not established that a viewing was relevant to any issue in the case and fourthly submitted that even if necessity was established the court should refuse the application on the basis that a viewing would create unfairness. In particular, he submitted that there was potential prejudice to the defendant as the viewing was to take place in daylight hours whereas the incident had occurred in the early hours of the morning. He submitted that even with a warning to the jury about the differences between day and night, the prejudice could not be undone.

[5] I am grateful to counsel for their research and their written skeletons and also for conducting further research at my request in relation to the appropriate test and principles to be applied in respect of this application.

Relevant legal Authorities

[6] A view is a term used to describe both an inspection out of court of some material object which it is inconvenient or impossible to bring to court and an inspection of the *locus in quo* – See *London General Omnibus Company Limited v Lavelle* [1901] 1 Ch 135.

[7] Although both Blackstone and Archbold accept that the court has power to order a view neither author sets out the basis of the existence of such a power or the principles upon which such a power should be exercised.

[8] The power to order a view in civil cases is set out in Order 35 Rule 5 of the Rules of the Court of Judicature. It provides:

“1. The judge by whom any cause or matter is tried may inspect any place or thing with respect to which any question arises in the cause of a matter.

2. Where a cause or matter is tried with a jury and the judge inspects any place or thing under paragraph [1] he may authorise the jury to inspect also.”

[9] Thus, in civil cases the power of the trial judge to inspect a place or thing is a matter of judicial discretion. According to the commentary on this rule in the White Book neither party can compel or prevent the trial judge from holding a view should

he decide in his discretion to conduct such a viewing. The function of a view is that it not merely enables a judge or juror to follow the case but the inspection review becomes just as much part of the evidence as the testimony of witnesses and unless the testimony of experts or other witnesses is required the judge may form a conclusion based on the inspection alone and even contrary to the evidence of witnesses.

[10] There is no similar equivalent rule or statutory power in respect of criminal proceedings. Nonetheless, there is jurisprudence and academic support for the proposition that a trial judge in criminal proceedings has an inherent common law power to permit the jury to view an object, place or thing outside the precincts of the court at any time during the trial – See *Whalley* [1847] 2 C&R 376 and Phipson on Evidence, paragraph 1.23 which states:

“In criminal trials the judge has an inherent jurisdiction to adjourn the court to enable the jury to view any place, premises, property or thing during the trial.”

[11] Although all counsel accepted the court had such a power an understanding of the foundation of the power assists in identifying the principles upon which the court should exercise its power. As the power is an inherent power the court can consider all relevant authorities on a “view” including civil authorities to identify the principles upon which this court should act.

[12] As appears from the examples set out by Phipson in paragraph 1.22 following the general rule is that an inspection is allowed whenever it is practicable and will assist the Tribunal in arriving at a decision. In *London General Omnibus Co Ltd v Lavelle* [1901] 1 Ch 135 the court remarked that a view was not to be put in the place of evidence but was to enable the Tribunal to understand the questions raised and to follow and apply the evidence.

[13] Applying these principles I have decided to exercise my discretion to direct that this case should be adjourned at a convenient time to enable a viewing by the jury of the Noble Cadet II at Enniskillen police jetty. Such a viewing obviously will take place in the presence of all legal representatives and the defendant if he wishes to attend. I also will be in attendance.

[14] I consider that a viewing is highly relevant to the issues in this case. The events which took place on the boat are of central importance in the determination of the factual issues in the case and ultimately the question of whether the defendant is or is not guilty of the offence charged. Much of the evidence to date and the evidence which will follow, will involve questions about the dimensions and the movements of persons on the boat. I consider that a view will assist the jury in arriving at its verdict as it will enable them to understand the questions raised and to follow and apply the evidence in relation to the actions and movements of the various witnesses and the defendant on the boat.

[15] I take judicial notice of the fact that maps, photographs and measurements do not always convey adequately the dimensions of an object or thing and in some circumstances a viewing is necessary as it is the only way to obtain a proper understanding of scale. I do not consider that the court requires expert evidence to this effect before it can exercise its power to permit a viewing.

[16] I accept that in practice it will only be in rare cases that the court will grant such a viewing. This is because in most cases jurors will have a familiarity with the object or thing in question, for example, jurors will have everyday experience and knowledge of houses, bars, roads and parks and consequently a viewing will rarely be permitted in such circumstances in the absence of good reason being shown why it is required in the particular circumstances of that case. Most jurors however do not have familiarity with a cabin cruiser and for this reason I consider the maps, photographs, diagrams and even a three dimensional video would not be sufficient to convey its dimensions in the same way that a viewing would.

[17] In my judgment a viewing in the car park would not be practical. Scaffolding would have to be erected to enable the jury to view the boat and I therefore do not consider that this would be a viable alternative.

[18] I further reject the submission that a viewing would be unfair on the basis that the viewing is to take place in daylight hours, I do not consider that this would create any prejudice in the mind of the jury. The purpose of the viewing is to understand issues of dimension and scale and not what can or cannot be seen. Further, I consider the jury are well able to understand the difference between day and night and will if it becomes relevant be given appropriate warnings by counsel and the court.

[19] Before a viewing can take place the court is required to produce some ground rules. I therefore invite submissions from counsel before I issue ground rules. As set out in Blackstone and Archbold ground rules should deal with what should be shown to the jury, in what order and the way the scene is to be set up; who is permitted to speak; what is to be said; how questions from the jury can be addressed and travel arrangements.

Ground Rules

After hearing submissions from counsel the ground rules are as follows:

1. The view will take place at Police Pontoon jetty on 27 May 2021. All jurors, judge, defendant and legal representatives to be in attendance.
2. The scene will be set up on 26 May 2021 and defence legal representatives can attend to confirm they are satisfied with the scene.

3. The jury will travel together by bus with jury keepers leaving at 11 am.
4. The jury will be advised on 26 May 2021 by the judge of the following matters:
 - (a) The fact a view is to take place giving date and location.
 - (b) That the jurors should wear suitable clothing and footwear given the nature of the locus where the boat will be viewed.
 - (c) The purpose of the view – to view the dimensions of the interior and exterior of the boat from the jetty.
 - (d) The need to listen to and comply with all safety instructions given including the wearing of life jackets.
 - (e) Any questions about the dimensions of the boat should be put in writing. The judge will then address them after discussion with the advocates, either at the scene or later at court.
 - (f) The safety briefing will be given by a suitably qualified police officer who is not a witness in this case.