

Neutral Citation No: [2023] NICC 9

Ref: OHA12123

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

ICOS No: 14/126080

Delivered: 31/03/2023

IN THE CROWN COURT OF NORTHERN IRELAND

THE KING

v

**HENRY FITZSIMMONS,
COLIN DUFFY and ALEX McCRORY**

**Mr C Murphy KC with Mr S Magee KC and Mr D Russell BL (instructed by the Public
Prosecution Service) for the Crown**

**Ms E McDermott KC with Mr Jon Paul Shields BL (instructed by Breen Rankin Lenzi
Solicitors) for the defendant Fitzsimmons**

**Mr M Mulholland KC with Mr J O'Keefe BL (instructed by Phoenix Law, Solicitors) for
the defendant Duffy**

**Mr B MacDonald KC with Mr D Hutton KC (instructed by Phoenix Law, Solicitors) for
the defendant McCrory**

RULING ON APPLICATIONS OF NO CASE TO ANSWER

O'HARA J

Introduction

[1] On 30 September 2022, I gave a ruling on the various issues that had been raised during the voir dire. Following that, on 14 October 2022, the prosecution closed its case without calling any further evidence. In light of the complexities of this case the parties required time to present written submissions. After they had been exchanged and considered I heard oral submissions on 10 January 2023 and indicated that I would then give this ruling on whether any or all of the three defendants has a case to answer.

[2] It turned out, however, that further exchanges took place in writing in relation to the defendants, Fitzsimmons and Duffy. Eventually, on 30 January 2023, all the exchanges came to a conclusion, making it possible for me to consider them and now give this ruling.

[3] It is unnecessary for me to set out in detail the law which governs applications of no case to answer because there is no disagreement as to the principles to be applied. In simple terms I must look at the evidence in the round and ask whether, looking at that evidence and treating it with appropriate care and scrutiny, this is a case in which a properly directed jury could convict any of the three defendants.

[4] At the heart of this prosecution is a recording, the Lurgan audio which was made on 6 December 2013. I have admitted that audio in evidence as being entirely authentic. In that recording the voices of a number of men are captured discussing what is obviously terrorist activity including a gun attack on the police in Belfast on 5 December 2013 and other matters including access to weapons and how difficult it has now become to murder people.

[5] Although I admitted the Lurgan audio in evidence, I was not satisfied on the issue of the transcripts of the recording. I ruled that the attributions of speech to each of the three defendants were fundamentally flawed and at para [84] I admitted in evidence the transcripts of the Lurgan audio but without the attributions.

[6] The precise terms of that ruling became problematic during the course of the applications of no case to answer because there are a number of different transcripts, some of which are poisoned, at least to some degree, by their origins.

[7] Accordingly, for the purposes of this ruling, I have listened intently a number of times to the Lurgan audio itself. By doing so, I have sought to avoid the issue that different transcripts include references to "Harry", "Collie/Colin" and "Alec/Alex" whereas others do not. Those references are inconsistent but the important point is that I have relied almost exclusively on the audio alone. The only exception to this approach is that I referred to the transcript prepared blind by Dr Philip Harrison, a course suggested to me by the defendants. In fact it was accepted by all sides during the oral submissions that overwhelmingly the best course for me to take is to listen to the audio.

[8] There are portions of the Lurgan audio which are inaudible. I am satisfied that that is because at some points on the route taken by the speakers none of them was close enough to any of the hidden recording devices for their voices to be captured. At other points the voices can be heard but so faintly as to be of no evidential value.

[9] In the recordings it is possible to discern that there are people who are referred to by name but who are not part of the conversation, eg a "Thomas" and a "Sean." I make it clear that I have listened to the audio with a view to deciding whether I can make out the names of any individuals who are clearly, in context, part of the conversation as opposed to being people mentioned in the course of the conversation who are not themselves part of that conversation.

[10] Having set out that general approach, I now turn to consider each of the three applications for a direction of no case to answer in turn. In doing so, I acknowledge the fact that the prosecution has proved significant connections between these three defendants, particularly in the Statement of Agreed Facts No.2. That is part of what the prosecution relies on as the circumstantial case. At this point, however, for there to be a case for any defendant to answer on any charge, there must be evidence on which I can connect that defendant to these specific charges.

[11] I also acknowledge that in a circumstantial case I should have regard to all of the strands of evidence relied on and look at the prosecution evidence as a whole. The caveat to that proposition is, to use the words of Treacy LJ in *R v McLaughlin* [2020] NICA 58 at para [23]:

“Fragile threads do not make a strong rope.”

Harry Fitzsimmons

[12] For Mr Fitzsimmons it is submitted that the car entering and exiting Forest Glade in Lurgan on 6 December 2013 has not been proved to be the car registered to him. It is further submitted that even if it was his car, it is not a permissible inference that he was in it that day or ever got out and walked on the laneway where the recording devices were placed. In relation to the phone attributed to him, there is no evidence that he had it in his possession on 6 December 2013. It was not even recovered from him when the police later seized it. Furthermore, he was not identified in Lurgan on 6 December 2013 (unlike the defendant Duffy).

[13] So far as references to “Harry” in the audio are concerned, it was initially submitted that references to a name in such common use could not be determinative of identity. That initial submission was added to by a stronger additional submission on 24 January 2023 that the name “Harry” cannot even be made out in the audio.

[14] I have considered the full written and oral submissions for Mr Fitzsimmons, and I am satisfied that he does have a case to answer on all charges. In particular, and without exhaustively analysing each aspect of the prosecution case, a judge could convict Mr Fitzsimmons on the basis that the car filmed arriving in and leaving Forest Glade at the relevant times was his car, that the phone attributed to him was active going towards Lurgan and, again, after the audio ended as the car was driven back towards Belfast and that the name Harry can be made out on the audio indicating that he is an active participant in the conversation. Even without him being visually identified, I am satisfied that he has a case to answer.

[15] There is more to the prosecution case than this summary but it is not necessary or appropriate to say more at this stage.

Colin Duffy

[16] For Mr Duffy it is submitted that there is not a case for him to answer that he was one of the men who was walking in the laneway discussing terrorist activity. He is the only one of the three defendants who the prosecution say can be identified, or more accurately recognised, from video evidence even if that evidence is of limited quality. The defendant challenges any reliance being placed on that video evidence and further challenges reliance being placed on the audio. In addition, issue was taken with whether I could be satisfied, even if the audio evidence provides a basis for a case for him to answer, that the elements of the separate charges against him have all been made out.

[17] I have considered the full written and oral submissions for Mr Duffy, and I am satisfied that he has a case to answer on all charges. It is clear from the audio that "Collie/Colin" is an individual repeatedly referenced as being a participant in the conversation about what I have broadly described at this point as terrorist activities. I am satisfied that a properly directed court could find Mr Duffy guilty of the charges which he faces on the basis of this audio evidence and the video identification, even allowing for the case that there are issues about that identification.

[18] There is more to the prosecution case than this summary but it is not necessary or appropriate to say more at this stage.

Alex McCrory

[19] For Mr McCrory it is submitted that there is no case to answer, fundamentally because there is no evidence (as opposed to conjuncture) that he was in Lurgan on 6 December 2013. While he has admitted to having associations with his two co-defendants, he is not visually identified and, in his case, the name "Alec/Alex" is just not discernible on the audio however often it is listened to. This submission is supported by the absence of his name in the transcript prepared blind by Dr Harrison.

[20] In addition, it is submitted that matters relied on by the prosecution do not, in fact, amount to evidence which relates to these charges. For instance, it is submitted that the fact that he was in Lurgan on 22 September 2013 does not assist in providing a strand, even a fragile strand, that he was there on 6 December 2013, the day that matters. To take another example, the prosecution relies on Mr McCrory's presence in Laganside Courthouse in Belfast on the morning of 6 December at a case involving a Mr Kearney. There is then reference on the audio to the Kearney case and what happened in court. The defence response to that is to submit that there is no evidence to tie up what was said on the audio with what was actually said in court earlier that day.

[21] This prosecution has been brought significantly, though not exclusively, on the basis of the Lurgan audio. Having listened to the audio recordings again, I have concluded that I just cannot make a confident finding that there is any reference to Mr McCrory or to his name in that audio. That difficulty for the prosecution is insuperable and is added to by the fact that there is no identification evidence nor is

there evidence of the sort referred to above in relation to Mr Fitzsimmons upon which a judge could find that he was in Lurgan on the afternoon of 6 December 2013.

[22] There are very good reasons for the security services to have been suspicious of and to have investigated Mr McCrory's activities. However, in his case, and in his case alone, I find that the exclusion of the attribution evidence has had a fatal effect on the prosecution case. Accordingly, I accept the submission that Mr McCrory has no case to answer and I find him not guilty of the charges against him.