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ICOS No: 18/104930

IN THE CROWN COURT FOR NORTHERN IRELAND

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R

v

DANIEL McGIBBON

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HIS HONOUR JUDGE MILLER QC

Preliminary Issue – Interpretation of Article 49 (4A) of the Mental Health (NI) Order 1986

[1] The defendant is charged with a single count of causing GBH, contrary to **S.20** of the **Offences against the Person Act 1861**. It is common case that at the time he was a detained person at the Avoca Psychiatric ICU located at Knockbracken. It is equally accepted by both Crown and Defence that he is a paranoid schizophrenic.

[2] The Defence have raised the issue of 'fitness to plead' and thus the provisions of **Article 49 of the Mental Health (NI) Order 1986** are engaged.

Article 49 provides as follows:

> "(1) The following provisions of this Article apply where, on the trial of a person charged on indictment with the commission of an offence, *the question arises (at the instance of the defence or otherwise) whether the accused is unfit to be tried (in this Article referred to as 'the question of fitness to be tried')...*
>
> (4) The question of fitness to be tried shall be determined by the court without a jury.
>
> (4A) The court shall not make a determination under paragraph (4) except on the oral evidence of a

medical practitioner appointed for the purposes of Part II by RQIA and on the written or oral evidence of one other medical practitioner."

[3] It is common case there is a presumption that a person who is charged with an offence is fit to plead unless that issue is raised. Almost, though not completely without exception, it will be the Defence rather than the Crown who seek a determination of the court on the question of fitness to be tried. The burden in such circumstances is on the Defence and the court will reach its determination on a balance of probabilities. Further it is accepted that the 'determination' is one for the court to make based on the evidence that is presented before it.

[4] In reaching this determination the court and the medical experts will apply the criteria first set out in **R v Pritchard (1836) 7 Car. & P. 305, (**the *Pritchard* criteria). These criteria can be summarised as follows:

(a) The defendant is unable to understand the allegations against him;

(b) He cannot effectively communicate instructions to the defence team throughout the entire trial process;

(c) He doesn't have the capacity to give evidence in court to the jury; and

(d) He does not appreciate, in broad terms, the nature of the trial and the role of the jury.

[5] The Defence have served a report dated 19 February 2019 from Dr Loughrey (Consultant Clinical Psychiatrist) who opines that the defendant is unfit to plead and therefore to be tried. Although reference is made to other and earlier reports by Dr Paul (Consultant Clinical Psychiatrist), the Defence have not served or placed reliance on any other evidence in support of the professional opinion of Dr Loughrey.

[6] The depositions include in additional evidence, a statement and report by Dr Bunn (Consultant Clinical Psychiatrist) who was the defendant's treating clinical psychiatrist at the time of the alleged assault. It is Dr. Bunn's opinion that at the relevant time Mr McGibbon was capable of forming the intent to commit the act alleged. In response to Dr Loughrey's report the Crown has served an addendum report from Dr. Bunn in which he confirms his earlier stated view and affirms his professional opinion that the defendant is fit to plead and therefore to be tried. Both doctors are appointed pursuant to Part II by RQIA.

[7] So much for the background. The fitness to plead hearing has been fixed for Friday 8 November 2019 at Downpatrick Crown Court. Both Dr Loughrey and Dr Bunn are

scheduled to attend to give oral evidence. The Defence have confirmed that they do not propose calling any other evidence or serve any other reports as supporting evidence. The Crown argue in such circumstances the court would be unable to make a determination in conformity with the requirements of **Article 49**. The Defence dispute this assertion and argue that their proposed approach to this issue is compliant with the statute.

[8] Given the nature of the impasse both sides requested the court to convene a preliminary hearing to determine this issue and give directions in advance of the full hearing.

[9] The court sat on the afternoon of Wednesday 23 October. Mr McCrudden QC appeared on behalf of the defendant (who was excused attendance) and Mr McClean for the Crown. I am very grateful to both counsel for their respective carefully structured and focused arguments. At the conclusion of the hearing I reserved my ruling to today's date.

[10] Mr McCrudden's argument can be summarised very briefly and it is this: applying a strict and clinical interpretation of the provisions of **Article 49 (1) (4) & (4A)** the court can make a determination because it will hear from two approved medical practitioners. At the core of his submission was that there was no requirement that those two doctors should be in agreement in their respective conclusions as to the defendant's fitness to plead.

[11] Mr McClean argued that it was clearly implicit in the legislation that the doctors had to be in agreement and that applying the interpretation argued for by Mr. McCrudden would lead to an absurdity. The purpose of the wording, Mr. McClean submitted, was to provide an evidential threshold below which the determination could not be made. He placed three cases before the court for consideration, to which I shall make reference in due course.

[12] Mr McCrudden first focused on the word '*whether*' in **Article 49 (1)**, which he asserted should be interpreted as implying an alternative namely *'whether or not the defendant was unfit'*. Thus, he submitted, the question for determination was one the court could make based on the evidence of Dr Loughrey notwithstanding the fact that Dr Bunn took a different view on the core issue.

[13] With respect this argument although on first consideration attractive, is wholly dependent on Mr. McCrudden's interpretation of the word '*whether'*. Of course that word, which is one that is used in common parlance in everyday English has more than one meaning. Indeed the more regular synonym, which requires no further implied meaning is '*if*'. Applying that definition leads to a more straightforward, logical and I suggest unambiguous interpretation of the statutory provision and intent.

[14] Applying this approach the question for the determination of the court is *'if the defendant is unfit to be tried'*. Thus it is for the party raising the issue, in this case the Defence, to adduce the evidence in accordance with the requirements of the statute. The court can only make that determination based on the oral evidence of an RQIA approved doctor '*and*' (meaning taken together with) the written or oral evidence of another medical

practitioner. Logically speaking it is a sine qua non of this interpretation that the opinion of that second practitioner must be supportive of that of the first doctor.

[15] That is certainly the view expressed by the court in the only known authority on the issue in this jurisdiction. In **R v McCullough 2011 [NICC] 42** HHJ David Smyth QC summarised the position concisely as follows:

> "[17] *In my view this means that the court is not to make a "determination" of unfitness unless that determination is supported by the requisite evidence. The word "on" has to be read with the words "make a determination". If the evidence of the second doctor disagrees with that of the first, or does not support it, it would be difficult to envisage a court being able to make a determination* ***on*** *such evidence. There must therefore be the requisite evidence in support of a determination. It is not sufficient for the court to receive the oral evidence of two medical practitioners, one of whom is appointed for the purposes of Part II. They must be in agreement with each other and support the determination.*
>
> *[18] Here the two medical doctors called in aid by the defence support (in broad terms) each other. The opinion and conclusions of the prosecution expert are at variance with them.* ***The decision is however for me and, upon the totality of the evidence, I am not satisfied that I should make a determination of unfitness in the circumstances of this case****."* (My emphasis)

[16] Mr McCrudden argued that the learned judge's approach was unduly restrictive and contradicted the strict wording of the Order. In support of his contention he submitted an extract from the **NI Law Commission Report re Unfitness to Plead 2013 [NILC 16],** wherein the above extracts of the judgment were analysed and contrasted with the similar but not identical provisions of **S.4 of the Criminal Procedure (Insanity) Act 1964** (as amended) which govern the procedure in England & Wales. The relevant parts of the 1964 Act provide as follows:

> "S.4 (5) *The question of fitness to be tried shall be determined by the court without a jury.*
>
> *(6) The court shall not make a determination under subsection (5) above except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved".*

[17] Whilst not directly contradicting the approach adopted by HHJ Smyth the Commission commented that it was open to interpretation whether it was the intention of

the legislature to give **Article 49(4)** the meaning afforded it by the learned judge. They recommended that the Order be amended in line with the English statute so as to allow for ***'Evidence from two or more expert witnesses',*** an amendment it argued that would allow the court greater flexibility.

[18] As matters stand the wording of the statute remains unaltered and it must be remembered that in the McCullough case the court did in fact receive the opinions of two medical practitioners on behalf of the Defence who were in agreement that the defendant was unfit to be tried. There was, however other evidence from a doctor instructed by the Crown who took a contrary view. As the learned judge pointed out however, the determination was his to make and on the totality of the evidence presented to him ***in that particular case*** he was not satisfied that he should make that determination.

[19] Reference was also made to two English cases, **R v Ghulam [2010] 1 WLR 891,** and **R v Lederman [2016] R.T.R 16.** The ratio of neither is directly relevant to the issue discussed in the present case but in each obiter comment is made, which is of pertinence.

[20] In **Ghulum**, Stanley Burnton LJ after citing the provisions of **S.4 (5) and (6)**, posited: *'whether the determination referred to in Subsection (6) is a determination whether or not a person is fit to be tried, or is only a determination that a person is unfit to be tried'*. This is in effect the very issue discussed earlier in this ruling relating to the interpretation of the key word *'whether'*. The learned Lord Justice continued with a clear and unambiguous answer as follows:

> '16. *In our judgment, notwithstanding the unqualified wording of subsection (6), it does indeed refer to a determination that a person is unfit to plead. It does not preclude a determination that a person is fit to plead in circumstances where there is not the evidence of two or more registered medical practitioners, at least one of whom is duly approved'.*

[21] Crucially he then continued:

> '*Indeed, in our judgment the statute envisages that the written oral evidence of the two or more registered medical practitioners would both be to the effect that the defendant is unfit to plead. It is difficult to believe, for example, that the statute would permit a defendant to be found unfit to plead in circumstances where there was a consultant psychiatrist duly approved who was of the opinion that he was fit to plead, and a general practitioner who was of the opinion he was unfit to plead'.*

[22] The case of **Lederman** concerned an elderly defendant charged with causing death by dangerous driving. The issue of unfitness was raised by the defence and medical evidence was obtained from two practitioners one of whom considered that the defendant

was unfit to be tried not because he could not follow the proceedings and give instructions as per the Pritchard criteria, but because of the potential impact on his mental state. The other doctor was, however, satisfied that on application of the Pritchard criteria the defendant was not currently fit to be tried. The trial judge determined that the defendant was indeed fit to be tried and that the trial could and should take place in his absence. He was duly convicted by the jury.

[23] The main issue on appeal centred on the decision to proceed in the absence of the defendant but on the core point Mrs. Justice Patterson, (sitting with Lord Thomas of Cwmgiedd CJ and Simon J) observed:

> "49. *Before dealing with that issue we need to deal with whether the learned judge was right in his determination that the appellant was fit to plead. In our view he clearly was.*
>
> *50. First as the prosecution submitted a finding of unfitness can only be made if there is written or oral evidence to that effect from two or more registered medical practitioners, at least one of whom has special experience in the field of mental disorder. The only medical evidence before the court was from Dr Beckett and Professor Yortson. As set out above the experts took divergent views on whether the appellant was unfit to plead.* ***On their evidence the statutory requirement to make such a finding was not met'.***

Conclusion

[24] I have listened to the submissions of both Defence and Crown and considered these in light of the statutory provisions and the case-law placed before the court. Having done so I am satisfied that the clear and unambiguous intention of the statute is that the question for the court to determine is '***if the defendant is unfit to be tried'.*** It is for the Defence to satisfy the court on a balance of probabilities that he is not and it is for the Defence to adduce the evidence, which requires the opinion of two doctors, one of whom is RQIA certified. Finally and crucially I am satisfied that the two doctors must agree with each other on the core issue of fitness for the statutory criteria to be met.

[25] It follows therefore that unless the Defence adduce evidence in compliance with this ruling the court will be precluded from reaching a determination consistent with the statutory requirements. The case stands adjourned to Friday 8 November 2019. It is suggested that consideration be given to a meeting of the experts in advance of the hearing to ascertain whether in fact any agreement is possible.