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

Delivered: **24/11/05**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF A RESIDENT MAGISTRATE

CHIEF CONSTABLE HUGH ORDE

Complainant/Respondent;

-and-

KEVIN McMANUS

Defendant/Appellant.

Before Kerr LCJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a resident magistrate dismissing the appellant's application for an order that proceedings against him be stayed. The application had been made on the ground that the prosecution would amount to an abuse of the process of the court by reason of delay.

Factual background

[2] On 2 August 2001, a fatal road traffic accident occurred near a Texaco filling station on the Derrygonnelly Road, Enniskillen. It involved a council bin lorry that was being driven by the appellant and an articulated lorry. Both vehicles were travelling in the same direction. At the time of the

collision, the lorry was in the process of overtaking the bin lorry which was turning right into the forecourt of the Texaco filling station. Before the accident, Mr Seamus Miller, a council cleansing operative, had been standing on a foot platform of the bin lorry. When the two lorries collided he sustained serious injuries that ultimately proved fatal.

[3] On 30 January 2002, just within the six month period permitted under article 19(1) of the Magistrates' Courts (NI) Order 1981, a complaint was made before a Justice of the Peace in relation to an offence of careless driving on the part of the appellant. On 5 December 2003, over twenty two months later and a total of two years and four months after the date of the accident itself, a summons was issued alleging that the appellant had been driving without due care and attention contrary to Article 12 of the Road Traffic (Northern Ireland) Order 1995.

[4] The appellant's legal representatives applied to the magistrates' court to stay the proceedings on the grounds of abuse of process due to the delay in the prosecution of the summary offence. The magistrates' court heard argument on the application on 5 May 2004 and delivered its decision in writing on 2 June 2004. The resident magistrate's findings are set out in paragraphs 82 to 84 of his judgment, as follows: -

> "82. I proceed on the basis that the complaint in this instance was made at a time when there had been no decision to prosecute, the prosecution having failed to satisfy me to the contrary. The protective step was taken simply in order to buy time. I cannot say that there was a continuing intention to prosecute thereafter and I certainly do not find that there was any point or matter of public interest which warranted or excused either the act of making the complaint outside of a continuous prosecution process, properly understood, or the exceptional delay which arose after that. On the contrary, this practice is as contrary to the public interest and to the will of Parliament as it was when Lord Lowry, LCJ pronounced upon it in 1979 (*Maguire v Murray*).
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> 83. On the other hand, I am not free to disregard the true nature of the case being brought against this Defendant, as is manifest from the documents tendered with his summons. Whether the summons be served within weeks, months or years of the event, the objective evidence captured at the scene, including the photographs, reveal a case which contends that the Defendant must have turned into

the path of another vehicle which was already established on his offside and therefore capable of being seen in his wing mirror. Indeed, he admitted at the time that he had crossed over the central line before impact. The physical evidence bears that out. There is nothing he can do about that, nor can I conceive at this time of any rebuttal evidence which he might have been able to adduce 2 years ago but he either cannot or may not be able to adduce at this stage. In other words, I cannot find that any actual prejudice has been established on behalf of the Defendant, nor do I feel able to infer such prejudice.

84. In those circumstances, upon my understanding of the law, I cannot see my way to granting the Defendant's application for a stay of proceedings by reason of a delay amounting to abuse of process."

[5] On 16 June 2004, by way of a Notice of Requisition, the appellant asked the resident magistrate to state a case for the opinion of the Court of Appeal. On 8 December 2004 the resident magistrate stated a case and identified the following four questions as requiring determination by the Court of Appeal: -

"1. Did I err in law by exploring the evidence to be adduced at trial against the Defendant in the form of the documents tendered by the prosecution?

2. Did I err in law by then making a finding that prejudice to the [appellant] had not been established and could not be inferred?

3. Did I err in law by taking cognizance of the import of such tendered documents notwithstanding the fact that the [appellant] had already given due notice of his objection to such documentary evidence being tendered at any subsequent trial?

4. Did I err in law by drawing conclusions upon the import of the tendered documents without inviting submissions as to the contents and/or implications of the evidence intimated in those documents?"

[6] Because of the way in which the point of law had been drafted in the Notice of Requisition, the resident magistrate was led to believe that the only points that arose related to the four matters set out in the preceding paragraph and he drafted his case stated solely on the basis of his decision to read the tendered statements. On the appeal, however, it became clear that the critical issue was the magistrate's decision that there had been no prejudice to the appellant and that, on that account, the application to stay proceedings had to be dismissed. In light of this, the parties suggested a reformulation of the question of law to be considered by this court as follows:-

> "Was the absence of actual or inferred prejudice to the appellant, without consideration of any other matters regarding the fairness of the trial, sufficient in itself to entitle the resident magistrate to find that a fair trial of the appellant was possible and was the resident magistrate entitled to refuse to make an order staying the proceedings on this ground?"

The time limit for bringing proceedings

[7] Article 19 (1) of the Magistrates' Courts (NI) Order 1981 provides: -

> "*Time within which complaint charging offence must be made to give jurisdiction*
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> 19. – (1) Where no period of limitation is provided for by any other enactment-
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> (a) a magistrates' court shall not have jurisdiction to hear and determine a complaint charging the commission of a summary offence other than an offence which is also triable upon indictment unless the complaint was made within six months from the time when the offence was committed or ceased to continue."

The arguments

[8] Counsel for the appellant, Mr Devlin, submitted that the resident magistrate had failed to recognise that there were two categories of abuse of process application. These, he suggested had been identified by Sir Roger Ormrod in *R v Derby Crown Court ex parte Brooks* [1984] Crim App R 164, and had been accepted by this court in *Re Molloy's Application* [1998] NI 78, where Carswell LCJ said (at page 84): -

> "In *R v Derby Crown Court, ex p Brooks* (1984) 80 Cr App R 164 the court accepted the validity of a distinction between two categories of case, described by Sir Roger Ormrod (at 168) as—
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>> '… those in which the prosecutor can be said to have manipulated or misused the rules of procedure and those in which there has been inordinate and inexcusable delay which has actually prejudiced the defendant.'
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> He went on to define the occasions when an abuse of the process of the court may arise in the following terms (at 168–169):
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>> 'The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service.'"

[9] Mr Devlin relied on paragraph 82 of the resident magistrate's judgment (set out in paragraph [4] above) as providing an unequivocal finding of fact that the laying of the information shortly before the six month time limit expired was a device used at a time when there was no intention to prosecute and that this course of action was taken simply in order to buy time. He suggested that this device had been used to artificially extend the period within which it was lawful to prosecute. On that account alone, Mr Devlin argued, there was an abuse of process. But he also claimed that the delay in prosecuting was inordinate and for that reason also the magistrate ought to have stayed the proceedings.

[10] In advancing this case Mr Devlin relied strongly on the decision of the Divisional Court in England in the case of *R v Brentford Justice, ex parte Wong* [1981] 1 ALL ER 884. He suggested that the background to that case closely resembled the facts of the present case. In both cases the information was laid shortly before the six month time limit expired; at the time the information was laid no decision to prosecute had been reached; a finding was made by the court that the information had been laid to buy time and as a protective measure; the offence charged in each case was relatively minor, being driving without due care and attention; and there was delay after the laying of the information and the date on which the defendant was told he was going to be charged (although in the present case this time period was twenty-two months and in the *Wong* case this period of time was only three months).

[11] It was pointed out that *Wong* had been identified in *Re Molloy* as a 'category one' case *i.e.* a case in which the prosecution had manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law. It was argued that, on the basis of the resident magistrate's findings in paragraph 82 of his judgment, the present case also fell into this category and the appellant was therefore entitled to the statutory immunity from summary proceedings on the foot of a summons since the complaint had not been laid within the six month period provided for in article 19.

[12] It was accepted that no actual prejudice had been suffered by the appellant but it was submitted that this was not a prerequisite in category one abuse of process cases. Mr Devlin contended that the resident magistrate had misdirected himself in law by basing his decision on the narrow issue of whether the appellant had established actual prejudice rather than examining the wider issue of the fairness of the trial process as a whole. He should have inquired whether the irregularities of the prosecution process were sufficient to require the court to intervene. Prejudice to the appellant was only one element to be considered as part of an ongoing analysis as to the impact of those irregularities on the overall fairness of the trial.

[13] Mr Devlin suggested that the other matters to be taken into account in assessing any impact on the fairness of the trial were the manipulation of the trial process in the laying of the complaint specifically for the purpose of buying time for the prosecution; the lack of any justification for that action; and the gross and unexplained delay between the laying of the complaint and the issue of the summons.

[14] On the question whether the burden of proving that the prosecution manipulated the process of the court lay with the appellant, Mr Devlin referred us to *A-G's Reference (No 1 of 1990)* [1992] 3 ALL ER 169 where it was stated that it was not helpful to consider these issues as a question of where

the burden of proof lay; it was simply a matter which the court should assess in the round and make its findings on the information before it.

[15] Counsel for the respondent, Mr Valentine, relying on the decision of this court in *Re Director of Public Prosecutions for Northern Ireland's Application for Judicial Review* [1999] NI 106 submitted that it was not enough to show that there was some 'generalised unfairness' to the appellant. It needed to be established that he would not receive a fair trial. It was clear, he said, from the chronology that steps in the prosecution process were being taken at regular intervals. The magistrate had not found that there was deliberate delay. For instance, the tachograph records showing that the driver of the articulated lorry was driving at approximately forty miles per hour were only provided to the prosecution on 15 July 2003 and, although the forensic scientist visited the scene a few days after the accident, it was not until 7 October 2003 that he provided his statement that the appellant should have seen the lorry overtaking him. The resident magistrate found that the delay was prolonged and unjustified but that this was not done as any deliberate manipulation of the process and that this was not a delay which was caused deliberately with a view to prejudicing a fair trial.

[16] Mr Valentine submitted that it was open to the prosecutor in certain circumstances to buy time to continue the prosecution. This was justified in the present case because vital proofs in the form of the tachograph records and the forensic scientist's report were awaited. The delay in itself did not render the trial of the appellant unfair. The lack of prejudice to the appellant was clearly relevant to the question whether there would be unfairness in the trial process if the case proceeded.

[17] Mr Valentine pointed out (again in reliance on *A-G's Reference (No 1 of 1990)*) that even if the right to a fair trial within a reasonable time under article 6 of ECHR was breached, it did not follow that the remedy must be a stay of prosecution. The ECtHR had accepted that remedies other than a stay of proceedings were available such as a reduction in the sentence or, in event of an accused person being acquitted, an award of costs against the prosecution. It was only where the trial would be rendered irredeemably unfair that a stay of proceedings would be justified.

Conclusions

[18] The magistrate found that the complaint was made in order to buy time and that there had been excessive delay. We do not consider, however, that these findings inevitably lead to the conclusion that there has been an abuse of process, much less that the proceedings must be stayed. In the *Wong* case it was not suggested that in every instance where no decision to prosecute had been taken, the laying of an information would inevitably

amount to an abuse of process. What the court held was that such a situation *could* warrant a finding of abuse of process. At page 887 Donaldson LJ said: -

> "For my part, I think that it is open to justices to conclude that it is an abuse of the process of the court for a prosecutor to lay an information when he has not reached a decision to prosecute. The process of laying an information is, I think, assumed by Parliament to be the first stage in a continuous process of bringing a prosecution. Section 104 of the 1952 Act is designed to ensure that prosecutions shall be brought within a reasonable time. That purpose is wholly frustrated if it is possible for a prosecutor to obtain summonses and then, in his own good time and at his convenience, serve them. Of course there may be delays in service of the summonses due perhaps to the evasiveness of the defendant. There may be delays due to administrative reasons which are excusable, but that is not so in this case."

[19] Having referred to this passage, this court in *Shields v Devenney* [2005] NICA 4 said: -

> "It is clear from this passage that it was not contemplated that the failure to decide whether to prosecute within the stipulated period would lead ineluctably to a stay of proceedings. On the contrary, it is obvious that the court was influenced to the view that a stay could be granted because of the particular circumstances of the case, specifically the failure of the prosecuting authorities to confront the question whether to prosecute and to artificially extend the period available to them to make a decision that led the court to conclude that a stay could be appropriate."

[20] It is misconceived to suggest that the extension of the period for issuing proceedings by the device of laying a complaint just before the expiry of the time limited for doing so will in all circumstances constitute an abuse of process. As Donaldson LJ said in *Wong* there may be delays due to excusable administrative reasons. An examination of the particular circumstances of the case holds the key to this question. Of course, if the prosecuting authorities neglect to assemble the evidence in a timely fashion and lay the complaint just before the expiry date simply to cover their inexcusable default, that will amount to abuse of process. But where, through no fault of the prosecutor, material vital to the decision whether to proceed with criminal charges is not

available before the time limit expires, the laying of a complaint within time and the preferring of charges subsequently may be an entirely legitimate way of proceeding.

[21] The magistrate did not say in terms that there had been an abuse of process in this case. His statement that there was no acceptable reason for making the complaint outside "a continuous prosecution process" and no reason for the delay thereafter might be taken as a conclusion on his part that there had been abuse of process but we would recommend that before such a conclusion is reached, it would normally be necessary for magistrates to examine closely the reasons given for taking the course of laying a complaint. If reasonable efforts have been made to obtain the evidence necessary to sustain a prosecution but, through no fault of the prosecuting authorities, this has not been forthcoming, we consider that the laying of the complaint in order to keep alive the possibility of a prosecution should not give rise to an abuse of process.

[22] Of course, even if the laying of the complaint can be justified, subsequent delay on the part of the prosecution can give rise to a freestanding abuse of process. The laying of the complaint cannot be regarded by prosecutors as an exemption from the obligation to act expeditiously thereafter. On the contrary, where it has been necessary to lay the complaint before a final decision to prosecute has been taken, the need to act speedily is enhanced. The magistrate appears to have concluded that the delay after the complaint was laid was inexcusable but it is not clear whether he regarded this as being the fault of the prosecution or of the agencies on whom they depended for the necessary evidence. Mr Valentine has asserted that "something was happening" at all stages of the case but we are far from persuaded that due diligence was shown at every juncture to obtain the necessary evidence and we will proceed on the basis that there was unnecessary delay after the complaint was laid.

[23] The fact that there was delay is not, of necessity, determinative of the issue whether proceedings should be stayed. As this court said in *Molloy*, the decision whether to stay the proceedings must depend on the court's evaluation of the effect that the delay will have on the fairness of the proceedings. At page 85 of the judgment Carswell LCJ said: -

> "In our opinion … resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory jurisdiction may nevertheless be regarded as an abuse of the process of the court if, but only if, it operates to affect adversely the fairness of the trial. It is necessary in every case to look at the circumstances of the case, and it lies within the discretion of the court to decide whether the

> procedure operates against the interests of the defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in *Ex p Bennett* (at 63) that it is to be 'most sparingly exercised' and that of Viscount Dilhorne in *DPP v Humphrys* [1977] AC 1 at 26, that it should be exercised only 'in the most exceptional circumstances'."

[24] Obviously, the question of possible prejudice to the accused person if the trial is allowed to proceed is central to the issue and we did not understand Mr Devlin to suggest otherwise. Absence of prejudice will not necessarily be fatal to an application to stay the proceedings, however. There may be cases where the delay has been so gross and the nature of the proceedings against the defendant so trivial that it would be wrong to allow the matter to proceed in the sense that it would be unfair that the trial should take place. Again, the particular circumstances of the case are crucial.

[25] In the present case the delay has been substantial but it is not, in our estimation, entirely unexplained. No prejudice will accrue to the appellant so far as being able to present such defence as is available to him is concerned. We consider that the particular facts of this case do not warrant a stay of the prosecution.

[26] The re-formulated question proposed by the parties does not, in our opinion, properly reflect the findings made by the magistrate. It proceeds on the premise that he did not consider other matters apart from the question of actual or inferred prejudice in deciding whether to stay the proceedings. We are not satisfied that this was the exclusive consideration that prompted the magistrate's decision. In any event, we are satisfied that if he had considered the matter in the round (as, on the authority of *A-G's Reference (No 1 of 1990)* he was required to do) only one course was open to him and that was to dismiss the application for a stay.

[27] We shall therefore substitute for the questions posed in the case stated the simple question, "Was I correct in law in dismissing the application for a stay of the proceedings", answer that question in the affirmative and dismiss the appeal.