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Judgment: approved by the Court for handing down | *Delivered:* **02/02/2006**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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CHIEF CONSTABLE OF POLICE SERVICE OF NORTHERN IRELAND

Complainant/Respondent;

-and-

LO

Defendant/Appellant.

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Before Kerr LCJ, Nicholson LJ and Sheil LJ

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a magistrate sitting at Strabane on 27 August 2004 whereby he found that the respondent, LO, had no case to answer on a charge of breach of a non-molestation order and on charges of assaulting the first complainant JH occasioning her actual bodily harm and common assault on the second complainant CK.

The facts

[2] In the case stated the magistrate set out a number of factual findings. We consider that the following are relevant to the issues that arise on this appeal:-

1. On 2 November 2003 at about 10.30pm the respondent entered premises in Strabane, County Tyrone where JH was residing with her daughter A. The respondent was JH's partner and he is the father of A. (Although this is not referred to in the case stated, it is common case that the premises in question are a women's refuge.)

2. MMcC, who was another resident of the refuge, gave evidence that she saw the respondent try to get through a door that led to the living room in the refuge and CK blocked his passage. She saw the respondent struggling with her. She was unable to say who had started the struggle.

3. MMcC went to the door where the struggle was taking place and the respondent struck her on the face. She followed him into the living room and saw him struggling with JH in an attempt to take A from her. She tried to pull the respondent off JH and he struck her (MMcC) again.

4. After this MMcC went to telephone police and, as she was doing so, she was again assaulted by the respondent who was by this time carrying the baby, A.

5. At 11.10pm a police officer, Constable Wilson, went to the refuge. He saw MMcC had a swelling on the side of her face, JH had a cut above her ear but CK appeared to be uninjured. While he was present the respondent telephoned JH a number of times. The constable also spoke to the respondent on the telephone and he sounded agitated and emotional. His speech was slurred.

6. Another police officer, Constable McConville, entered a house elsewhere in Strabane at 3.25am on 3 November 2003 and found the respondent with the baby asleep in his arms. The respondent was agitated and smelt of alcohol.

7. In relation to the breach of the non-molestation charge, the magistrate found that there was an extant and valid order in favour of JH at the time of the alleged offence. MMcC had testified that the respondent was a regular visitor to the refuge.

The respondent's interviews

[3] Although the magistrate did not refer to them in the case stated, evidence was given of the interviews of the respondent. In these he had admitted that he may have struck both JH and CK but either denied that he had done so deliberately or implied that he had not intended to. His arms

had been flailing during the fracas in the refuge and he appeared to suggest that he may have made inadvertent contact with them in this way.

[4] The respondent was questioned about the non-molestation order. He accepted that he knew of its existence and when it was put to him that he had been in breach of the order on the evening of 2 November 2003, he agreed that he had been. Notwithstanding this, the magistrate found that it would be procedurally improper to regard the order as binding on the respondent, since he had flouted it in the past with the apparent acquiescence of JH, which he considered amounted to a 'waiver'. We cannot accept that this finding was open to the magistrate on the evidence that had been presented. The fact that the respondent had visited the refuge frequently before 2 November 2003 cannot invalidate the order. Nor can the fact that JH had chosen not to enforce it.

The failure of JH and CK to give evidence

[5] Neither JH nor CK gave evidence. The prosecution does not appear to have offered any explanation for this and it is clear that both witnesses had made statements that were material to the issue of the respondent's guilt. His solicitor informed the magistrate (apparently without objection from the prosecution) that JH and the respondent had reconciled and that they were engaged to be married. No evidence to support this statement was given.

[6] In deciding whether to accede to an application for a direction the magistrate was clearly entitled to take into account the failure of two principal witnesses to give evidence. He was bound to eschew speculation as to why they had failed to do so, however, and he should not have permitted the respondent's solicitor to proffer an explanation that was unsupported by evidence. The decision on whether to accede to the application for a direction should have been taken solely on the basis of the magistrate's assessment of the evidence that had in fact been given, not on any supposition as to why it had not been.

The decision that there was no case to answer

[7] The reasons that the magistrate decided to accede to an application for a direction are not entirely easy to ascertain from the case stated. He suggested that the evidence of MMcC was not reliable in relation to the charges of assault but in his outline of the facts of the case it appears that he had accepted her account of what had happened in the refuge on the night of 2 November 2003. We believe that what the magistrate may have meant was that her evidence was not sufficient to raise a *prima facie* case against the respondent on those counts. But this was not the only evidence against him. The respondent had admitted that he may have struck (albeit inadvertently) both JH and CK. He had also accepted that he had struggled with both.

[8] The magistrate referred to the absence of medical reports about injury to JH and CK but we do not consider that this is a basis for granting a direction. In the first place the charge in relation to CK was common assault and medical evidence was not required. So far as JH was concerned, even if he had concluded that there was not sufficient evidence to support a charge of assault occasioning actual bodily harm, he was obliged to consider whether the evidence could have sustained a charge of common assault. Had he done so, we consider that he was bound to have decided that there was sufficient evidence to allow the prosecution to continue. In any event, it is clear that there was evidence from Constable Wilson of an injury to JH.

[9] In relation to the breach of the non-molestation order, as we have already observed, the magistrate's decision that the respondent was entitled to regard this as being no longer valid is at odds with the admission made by him that he knew that it continued to exist and that he was in breach of it. The reference to JH having 'waived' the order is not explained and for the reasons that we have given we do not consider that this conclusion was correct in law. Finally, the statement that it would be procedurally unfair to regard the order as having continuing validity is likewise unexplained and is, in our view, unsustainable.

The approach to be taken by a magistrate to a submission of no case to answer

[10] For the respondent Mr McCann argued that in a submission of no case to answer before a magistrate a different approach to that in an indictable trial was warranted. He based this submission on the decision of Lord Lowry CJ in *R v Hassan and others* [1973] NIJB. In that case the accused were members of the Royal Ulster Constabulary charged with assaulting an arrested person at Omagh Police Station and causing him actual bodily harm. The complainant had testified that he had been assaulted so it was not a case in which the case could be made that there was no evidence against the accused. The learned judge found that his evidence was so inconsistent and self-contradictory and so much in conflict with previous statements made by him or with certain indisputable facts that he could not conceive that any reasonable jury properly directed could be satisfied to any standard of proof, much less be satisfied beyond reasonable doubt, that any of the accused was guilty of any of the charges in the indictment.

[11] This formulation by Lord Lowry is consonant with the test outlined in what is commonly referred to as 'the second limb of *Galbraith* - (*R v Galbraith* [[1981] 2 All ER 1060). In that case Lord Lane CJ set out the principle that a judge should withdraw the case from the jury where he came to the conclusion that the prosecution evidence, taken at its highest, was such that a properly directed jury could not properly convict on it. The Court of Appeal in *Galbraith* was careful to confine the principle in this way and warned that,

where there was evidence whose reliability fell to be assessed by the jury, it would not be right to stop the case, whatever view the judge had formed of it. At page 1062, Lord Lane CJ said: -

> "Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[12] Lord Lowry declared that he entirely accepted the principle as stated by Lord Lane in *Galbraith* (see page 2 of the report) but at a later point in his judgment he turned to consider the position where the judge was the tribunal of fact as well as of law and said: -

> "I now come to deal with the point that, like magistrates hearing a complaint, the Court here is also the tribunal of fact. I would refer first to a note of the practice in England which is found in Archbold 40th edition at paragraph 575a and in the corresponding part of the 7th Supplement and which is reported at [1962] 1 All ER 448:
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> > 'A submission that there is no case to answer may properly be made and upheld:
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> > (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
> >
> > Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case

> to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.'

The comment in the 7th supplement is as follows:

> 'In their summary jurisdiction magistrates are judges both of facts and law. It is therefore submitted that even where at the close of the prosecution case, or later, there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted, or for any other reason.'

I respectfully agree with and adopt that practice note and the commentary of the learned editors of Archbold.

> My own impression is therefore important in a further way which would not be relevant in a trial held with a jury: if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution, there can be no justification for allowing the trial to continue."

[13] Mr McCann suggested that this passage signalled a third basis (beyond the two adumbrated in *Galbraith*) on which a tribunal of fact might stop the trial. In our judgment the exercise on which a magistrate or judge sitting without a jury must embark in order to decide that the case should not be allowed to proceed involves precisely the same type of approach as that suggested by Lord Lane in the second limb of *Galbraith* but with the modification that the judge is not required to assess whether a properly

directed jury could not properly convict on the evidence as it stood at the time that an application for a direction was made to him because, being in effect the jury, the judge can address that issue in terms of whether he could ever be convinced of the accused's guilt. Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in *Hassan*, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

[14] The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in *Galbraith*. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict.

[15] This issue was considered by this court in *R v Armstrong* (1991 unreported). In that case Hutton LCJ referring to *Hassan*, pointed out that Lord Lowry had accepted the correctness of the principles enunciated by Lord Lane in *Galbraith*. He then dealt with the proper approach to be taken by a judge sitting alone to the question of when it was right to stop the case. On this subject he said: -

> "Therefore the basic principle which a judge, trying a case without a jury, should apply in deciding whether to grant an application for a direction remains that stated by Jones LJ in delivering the judgment of this court in *R v Wilson* (1975) NI 210 at 213:
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> > 'All the prosecution has to do is to establish a prima facie case, to adopt the expression used by Lowry LCJ in *Rea's* case. That is the only test to be applied by the trial judge at that stage of the case. Thereafter whether or not the accused gives, or calls, any evidence, when all the evidence is given the judge, as the tribunal of fact in a non-jury case, must view the whole case and weigh the

> evidence and consider whether or not he is satisfied that the Crown has proved the case against the accused beyond a reasonable doubt.
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> We want to make it clear that nothing we have said is to be taken as detracting from the judge's inherent power to stop a case and direct an acquittal if he feels, as may happen in certain types of case, that it is just not proper to let the case go to the jury. We do not seek to enumerate the types of cases in which such a course may be appropriate but we respectfully agree with Lord Parker when he said that when such a situation arises, and it can only arise rarely, it is preferable for the judge to take the responsibility of himself directing an acquittal rather than, as is sometimes done, inviting the jury to return a verdict of not guilty, see *R v Young* [1964] 2 All ER 480, in the context of a criminal trial without a jury this would involve the trial judge exercising his right to stop the case at whatever stage may seem appropriate to him.'
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> In *R v Hassan* Lord Lowry was not departing from the principle stated in *R v Wilson*, he merely exercised the inherent power of the judge (recognised by Jones LJ) to stop a case because he considered that the main Crown witness, upon whose evidence the Crown case was based, was completely unworthy of belief."

[16] The 'inherent power of the judge to stop a case' referred to in the judgment of Jones LJ in *Wilson* should only be exercised where he has concluded that the evidence could never be deemed sufficient to support a conviction. The exercise of that power therefore will not arise except where the second limb of *Galbraith* would apply, although, in theory, it can be invoked by the judge at any stage of the trial. It is unlikely to occur, however, other than at the direction stage when an assessment of the strength of the evidence against the accused may most conveniently be made.

Conclusions

[17] In our judgment there was clearly evidence sufficient to allow this case to proceed beyond the direction stage. On no view of the facts could the magistrate have properly reached the conclusion that the evidence could not support a finding of guilt. There was evidence that had not been challenged that the respondent had struggled with both JH and CK; that he had admitted that he may have struck both in the struggle; that he had removed the child from JH; and that he had been in breach of a valid, subsisting non-molestation order. The magistrate referred in the case stated to the possibility that the respondent was acting in self defence but this issue had not featured throughout the trial or in the interviews of the respondent.

[18] We therefore conclude that the magistrate was wrong not to have allowed the case against the respondent to proceed and we remit it to him to deal with it according to law and the guidance provided by this judgment.