

Neutral Citation: 2004 NICA 48

Ref: **NICC5012**

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

Delivered: **6/7/04**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

**CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND**

(Complainant) Respondent;

and

JAMES KIRKBY ROULSTON

(Defendant) Appellant.

Before: Nicholson LJ, Campbell LJ and Gillen J

NICHOLSON LJ

Introduction

[1] This is an appeal by way of case stated from a decision of a Resident Magistrate made on 24 November 2003. The application for a case stated was made to Mr C M McKibbin sitting as a Magistrates' Court for the Petty Sessions District of Belfast. It referred to the Chief Constable of the Police Service of Northern Ireland as Complainant and to James Kirkby Roulston as Defendant. Pursuant to Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 the Defendant applied to Mr McKibbin to state a case for the opinion of the Court of Appeal on the following point of law:-

"Whether I was correct in law to accede to a prosecution request to list the Defendant's case for the holding of a preliminary inquiry in relation to 20 counts of making an indecent photograph or pseudo photograph of a child contrary to Article 3(1)(a) of the Protection of Children (Northern

Ireland) Order 1978 and in so doing reject the Defendant's application that the proceedings be stayed as an abuse of process?"

Mr McKibbin duly stated a case on this point of law for the opinion of the Court of Appeal.

[2] Mr Larkin QC and Mr Reel appeared for the Defendant and Mr Valentine appeared for the complainant. We are grateful to them for their skilful and well-presented written and oral arguments and for the skeleton argument of Mr McLean who appeared for the Complainant in the Magistrates' Court.

The Statutory and Factual Background

[3] The charges which faced the Defendant under the Protection of Children (Northern Ireland) Order 1978 and the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988 could only be instituted by or with the consent of the Director of Public Prosecutions for Northern Ireland (the DPP): see Article 3(2) of the 1978 Order and Article 15(4) of the 1988 Order. The Resident Magistrate found that "it would appear that on enquiries being made concerning the Director's consent it came to light that the original instructions to counsel that a guilty plea could be accepted in the Magistrates' Court was erroneous and no Director's consent to proceed summarily had in fact issued. It had in fact, it appears, always been intended to prosecute this matter on indictment."

[4] We have proceeded on the basis that the proceedings were not instituted summarily on foot of a consent by the DPP. The Resident Magistrate has made a finding from which it can be inferred that the DPP's consent was not obtained for the institution of proceedings and, therefore, we have concluded that there was no such consent.

[5] As we have proceeded on the basis outlined at [4] above, an issue arises as to whether the summary proceedings which involved pleas of guilty, a pre-sentence report and a plea in mitigation were null and void: see, for example, *R v Angel* [1968] 52 Cr App R 280.

[5] The Prosecution of Offences (Northern Ireland) Order 1972 deals with the consent given by the DPP at Article 7 of the Order. Article 7 reads:-

"7.-(1) In this Article -

'consent provision' means any [statutory provision], whether passed before or after the coming into operation of this Order whereby the

consent of the Attorney General [or the Director] is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for an offence; ...

[‘relevant consent provision’ means –

- (a) any enactment of the Parliament of Northern Ireland whereby the consent of the Attorney General is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for an offence;
- (b) any enactment of the Parliament of the United Kingdom whereby –
 - (i) in Northern Ireland, the consent of the Attorney General is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for an offence; but
 - (ii) in England and Wales, the consent of the Director of Public Prosecutions for England and Wales is required (whether by itself or as an alternative to the consent of any other authority or person) to the initiation or carrying on of proceedings for the like offence.]

(2) Unless the Attorney General otherwise directs, a [relevant consent provision] passed before the coming into operation of this Order shall be deemed to be complied with as respects the initiation after such coming into operation of proceedings for an offence to which it applies if the consent to the initiation or carrying on of those proceedings is given by the Director.

(3) Without prejudice to anything contained in a consent provision or in any other [statutory provision] a consent provision -

Sub-para (a) rep by 1975 c59 s14(5) sch 6 PtII

(b) shall be deemed to be complied with if the consent is produced to the court, in the case of an indictable offence, at any time before the indictment is presented or, in the case of an offence to be tried summarily, at any time before the plea of the accused person is taken.

(4) For the purposes of a consent provision it shall be sufficient to describe the offence to which the consent relates in general terms and -

(a) to describe or designate in ordinary language any property or place to which reference is made in the consent so as to identify with reasonable clearness that property or place in relation to the offence; and

(b) to describe or designate the accused person or any other person to whom reference is made in the consent in terms which are reasonably sufficient to enable him to be identified in relation to the offence, without necessarily stating his correct name, or his abode, style, degree or occupation.

(5) A consent required by a consent provision may be amended at any time before the arraignment of the accused person or, in the case of a summary trial, before the plea of the accused person is taken, and if at any subsequent stage of a trial it appears to the court that the consent is defective the court may afford the person or authority giving the consent the opportunity of making such amendments as the court may think necessary if the court is satisfied that such amendments can be made without injustice to the accused person.

(6) Any document purporting to be the consent, authorisation or direction of the Director or his deputy to or for the initiation or carrying on of

criminal proceedings or criminal proceedings in any particular form, and to be signed by the Director or his deputy, as the case may be, shall be admissible as prima facie evidence without further proof.”

An issue is raised as to whether the DPP’s consent can be implied by the conduct of the DPP’s representative at the original hearing before the Resident Magistrate although he is acting on behalf of the Chief Constable.

[6] Article 3(2) of the Protection of Children (Northern Ireland) Order 1978 provides:-

“Proceedings for an offence under paragraph (1) shall not be instituted except by or with the consent of the Director of Public Prosecutions for Northern Ireland.”

Article 15(4) of the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988 provides:-

“Proceedings for an offence under paragraph (1) shall not be instituted except by or with the consent of the Director of Public Prosecutions for Northern Ireland.”

[7] Mr Roulston faced four summary charges before the Resident Magistrate at Belfast Magistrate’s Court and on 17 June 2003 pleaded guilty to all four charges. Counsel, instructed by the DPP on behalf of the Chief Constable had been given written instructions by the Department of Public Prosecutions that pleas of guilty were acceptable and indicated same to the Resident Magistrate. The Resident Magistrate heard the pleas of guilty in open court and adjourned the case for pre-sentence reports before sentencing.

[8] The case was re-listed on 29 July 2003 for a plea in mitigation and sentence. After the plea but before sentence counsel instructed by the DPP, but, we have inferred, acting for the Chief Constable who was the Complainant, informed the Resident Magistrate that the consent of the DPP to the charges did not appear to have been obtained and asked for an adjournment in order to obtain the consent and this adjournment was granted without objection on behalf of the Defendant. The date for the further hearing was fixed for 9 September 2003.

[9] On 9 September 2003 counsel instructed by the DPP applied for an adjournment in order to enable Preliminary Inquiry papers to be prepared for trial on indictment on 20 counts under the 1978 Order in place of the four counts under the Orders of 1978 and 1988. Counsel for the Defendant objected to the adjournment on the grounds of abuse of process.

[10] The case was adjourned until 3 November 2003 in order that skeleton arguments about abuse of process could be presented to the Resident Magistrate and on 24 November 2003 he gave a ruling that it was not an abuse of process to proceed with committal proceedings. This ruling, described as a judgment, is attached to the case stated at (2): see paragraph 12 of the case stated.

The Arguments Advanced by the Parties on the Issue of Jurisdiction

[11] On behalf of the Defendant it was contended that there was jurisdiction to hear summarily the four charges against him. The DPP's representative had appeared before the Resident Magistrate and indicated, as he was expressly instructed in writing to do, that pleas to the four charges were acceptable to the DPP. If consent by the DPP was essential, then it could be implied by the words and conduct of his representative. Such consent did not require to be in writing. The statutory requirement that the DPP should give his consent to the institution of proceedings did not mean that he was entitled to decide whether the proceedings ought to be summary or by way of indictment. The consent was to the carrying on of the prosecution of the Defendant. Therefore the summary proceedings before the Resident Magistrate were valid and the pleas of guilty were validly made.

[12] On behalf of the Complainant it was submitted that the convictions on pleas of "guilty" were void because no consent for prosecution was given under the 1978 Order or the 1988 Order: see *R v Smyth* [1982] NI at 276F and *R v Downey* [1971] NI 224.

Our Conclusions

[13] The Resident Magistrate in his written "judgment" delivered on 24 November 2003 stated that "no Director's consent to proceed summarily had in fact issued". This is attached to the case stated and it is implicit in the case stated that the Resident Magistrate made such a finding. Accordingly the consent of the Director to the institution of charges at Petty Sessions was not forthcoming and the proceedings were a nullity and the conviction is void: *R v Angel* (1968) 52 Cr App R 280; *R v Downey* [1971] NI 224; *R v Smyth* [1982] NI at 276F. We are told that the Director has never given his consent in any case except in writing and, without determining the point, we consider that Article 7 of the 1972 Order might well be construed as requiring a consent to be in writing.

[14] It follows that we have no jurisdiction to hear this case stated. The challenge based on abuse of process should have been made to the Crown Court or by way of judicial review. However, we have been invited on behalf of the Defendant to reach a decision on the merits of the appeal to avoid

further delay. Our remarks must be treated as obiter dicta, not binding on the Crown Court. Nonetheless we trust that they will be of assistance.

Stay of Proceeding for Abuse of Process

[15] We accept that a court's jurisdiction to stay proceedings should be exercised carefully and sparingly and only for compelling reasons. These reasons include (a) a conclusion that because of delay or some factor such as manipulation of the prosecution process that fairness of the trial will or may be adversely affected, (b) where by reason of antecedent matters, although the Defendant could receive a fair trial it would be an abuse of process to put him on trial at all. These are "main strands or categories" and may overlap: see *Re DPP' Application* [1999] NI 106.

[16] It has been urged upon us that it is an abuse of process to change from summary proceedings to proceedings on indictment after a plea of guilty to four charges and to add 16 counts on committal and that there has been manipulation of the prosecution process so as to deprive the Defendant of protection provided by law or to take advantage of a technicality.

[17] We are satisfied that the Director was unaware of the charges until the file was placed before him on 6 October 2003; that the Director never gave an oral consent and that there were a series of errors in the DPP's office which could not properly be described as a manipulation of the prosecution process or the taking advantage of a technicality. The errors were, at worst, oversights. The Director never addressed the issue as to whether the proceedings should be brought summarily or by way of indictment until 6 October 2003 when he gave his consent in writing to the institution of proceedings on 20 counts (of an indictment) under the 1978 Act. There was no mala fides on the part of the Director or his staff.

[18] It has been further urged that unjustifiable delay on the part of the prosecutor has or will prejudice the Defendant in the preparation or conduct of his defence and that the combined effect of providing counsel with written instructions that the Defendant's pleas of guilty in the Magistrate's Court should be accepted, the adjournment of the proceedings in order to obtain the consent of the DPP, the discovery that the DPP had never considered the file, the fact that the Defendant was awaiting sentence and had co-operated in the provision of a pre-sentence report should have led the Director to decide that it would be unjust to proceed other than summarily and that in the particular circumstance the continued pursuit of the Defendant by way of indictment and the addition of further offences would undermine his human rights and should offend the court's sense of justice and propriety.

[19] In our view it was the initiative of the Defendant that led to a plea of guilty believing that he would suffer a lesser penalty than on indictment. It

was not a response to any offer by the DPP to accept pleas to four charges summarily. There is no reason why it should be disclosed to the Crown Court Judge that the Defendant pleaded guilty at an aborted hearing before the Magistrates' Court and, if he becomes aware of it, he should recuse himself and another Crown Court Judge should be substituted. Any evidence of admission of guilt contained in the pleas of guilty at the Magistrates' Court and any evidence contained in the pre-sentence report should not be placed before the Crown Court Judge and on the application of counsel for the defence, the Crown Court Judge, if he has seen the pre-sentence report should recuse himself and another Crown Court Judge should hear the case. This is on the assumption that the Defendant does not plead guilty before the Crown Court. The bringing of additional charges is not in itself an abuse of process: see *Richards v R* [1993] AC 217, *Kelly v DPP* [1996] 2 IR 596 and *R v Nisbet* [1972] 1 QB 37.

[20] The evidence against the Defendant consists of computers and discs seized in September 2002 and examined in January 2003 together with interviews under caution. There has been no undue delay and nothing has occurred that will prejudice the Defendant in the preparation or conduct of his defence.

[21] In our view the Crown Court Judge, if the Defendant is found guilty, is entitled to take into account as mitigating circumstance the fact that the Defendant expected to be sentenced at the Magistrates' Court and the additional stress and distress which the Defendant has suffered as a result of the errors in handling the prosecution. But that is a matter for him.

Our Conclusions on the Issue of Staying Proceedings

[22] We can find nothing in the matters referred to at [16] to [20] which would justify the Crown Court or a judge of the High Court on an application by way of judicial review to hold that there should be a stay of proceedings on the basis of an abuse of process.

The Case Stated

[23] As we have held that the proceedings before the Magistrates' Court were a nullity and that we do not have jurisdiction to hear the case stated, we do not answer the question for the opinion of the court.