Neutral Citation no. [2008] NICA 15 | *Ref:* **GIR7113**

Judgment: approved by the Court for handing down | *Delivered:* **11/03/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Complainant/Appellant;

-and-

FRANCIS LONG, THOMAS LONG AND AMANDA JOHNSTON

Defendants/Respondents.

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Campbell LJ, Higgins LJ and Girvan LJ

GIRVAN LJ

Introduction

[1] This is an appeal by way of case stated from a decision and order made by Mr McKibbin, ("the Resident Magistrate"), on 16 March 2007 in the Magistrates' Court for the Petty Sessions District of Belfast and Newtownabbey. He held that he did not have jurisdiction to hear three summonses issued against the three respondents in the case.

[2] Each respondent was charged with an obstruction offence under Article 20(1) of the Public Order (Northern Ireland) Act 1987. The Resident Magistrate recorded that –

(a) in each case the complaint was made to a lay magistrate on 3 March 2006.

(b) in the case of Amanda Johnston on 22 June 2006 a different lay magistrate signed and dated the summons to the defendant to answer the complaint requiring the defendant's attendance at Laganside Courthouse on 10 October 2006 for this purpose; and

(c) in the other two cases involving Francis Long and Thomas Long on 11 July 2006 a third lay magistrate signed and dated separate forms of summons to defendants to answer the complaints against them on the return date and place specified.

[3] None of the defendants appeared in person at the Magistrates' Court pursuant to the summonses although they had in fact received the documents purporting to be summonses. They were, however represented by counsel who argued that the alleged summonses were invalid. The defendants did not challenge the validity of the complaints as such and accepted that fresh properly signed summonses could still be issued provided that they were brought before and signed by the original lay magistrate who had received the complaints.

[4] The Resident Magistrate acceded to the defendants' argument that he should decline jurisdiction to hear the matter because no valid summonses had been issued. The Resident Magistrate's conclusion was that the law required that the same lay magistrate must receive the complaint and issue the relevant summons. It was clear that the summons had not been put before or signed by the original lay magistrate before whom the complaints had been made. While the summonses could be treated as fresh complaints such complaints would have fallen outside the statutory time limit of six months fixed for summary offences. Accordingly it would be necessary for the requisite summons to be authorised and issued by the original lay magistrate who received the complaint. The Resident Magistrate concluded that the defendants had not acquiesced in or accepted the jurisdiction of the court to hear the purported summonses.

Relevant statutory provisions

[5] Under article 18 of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") a complaint charging a summary offence shall be heard and determined by a court of summary jurisdiction. Article 20(1) provides:

> "Upon a complaint being made to a [lay magistrate] …. that a person has, or is suspected of having, committed a summary offence in respect of which a magistrates' court … has jurisdiction to hear a charge the [lay magistrate] may issue a summons directed to that person requiring him to appear before such court to answer to the complaint."

(The words in square brackets were substituted by section 10 of the Justice (Northern Ireland) Act 2002 for the earlier reference to a justice of the peace.)

[6] Under article 22(1) where the accused appears or is represented at the hearing of a complaint charging a summary offence the court shall state the substance of the complaint and ask whether the accused pleads guilty or not guilty. The court must then proceed to hear the evidence and representations, if any, made on behalf of the parties and convict the accused or dismiss the complaint. If the accused pleads guilty the court may convict him without hearing the evidence.

[7] Under article 23 where the accused fails to appear the court may adjourn the hearing or if satisfied that there are no sufficient grounds for adjournment or further adjournment may proceed in his absence. Under article 23(2) it is provided:

> "Where the accused has failed to appear in answer to a summons, the court shall not proceed in his absence unless it is proved that the summons was duly served upon him or that he is evading service."

The parties' contentions

[8] Mr McCloskey QC who appeared with Mr Valentine on behalf of the appellant argued the case on two alternative grounds. Firstly, he contended that on its true construction Article 20(1) did not require the same lay magistrate who received the complaint to decide the question whether a summons should be issued. Alternatively, he contended that a failure to observe the requirement that the same lay magistrate consider both the complaint and the question of issuing the summons did not deprive the court of jurisdiction to hear and determine the complaint. He argued that the courts did not now look only at the language of the statute but to the consequences of non-compliance to see whether the legislature could have intended that failure to comply would result in invalidity.

[9] Mr O'Donoghue QC who appeared with Mr Farrell on behalf of the respondent argued that the clear and proper construction of Article 20(1) was that it had to be the same lay magistrate who received the complaint who decided the question whether a summons should be issued. That latter question was a judicial act which required the exercise of a judicial discretion and the wording of the provision in referring to *the* lay magistrate clearly referred back to the same magistrate who received the complaint. He rejected Mr McCloskey's second line of attack, contending that it was clear that Parliament must have intended that no one could be summonsed before the court without judicial consideration. Parliament clearly intended that the same magistrate who received the complaint should sign the summons. In the absence of the summons being signed by the same person the court could not be satisfied that the complaint had been considered judicially before the

summons was issued. Parliament's intention must have been that in the absence of a summons properly issued there was no requirement to attend. If he did not attend article 23 made clear that the court could not proceed in his absence.

Discussion

[10] The respondents relied particularly on the case of Dixon v Wells [1890] 25 QBD 249. In that case a complaint had been made to two justices of a borough against the appellant for an offence involving the sale of unmerchantable food in breach of the Sale of Food and Drugs Act 1875. The summons was signed and issued pursuant to Jervis's Act by a justice who was different from the justice who had heard the complaint. The stipendiary magistrate held that the defect in the summons, if any, was cured by the appearance of the appellant. In an unreserved judgment the Divisional Court presided over by Lord Coleridge CJ held that the summons, having been signed and issued by a justice who had not heard the complaint, was invalid and that the defect was not cured by the appearance of the appellant as he appeared under protest. The provisions of Jervis's Act were imperative and not merely directory and since no summons had been duly served in accordance with the provision the magistrate did not have jurisdiction and the conviction was wrong.

[11] The relevant provision of Jervis's Act was section 1 which provided that where an information was laid before justices that a person had committed an offence within the relevant jurisdiction then "it shall be lawful for *such* justice or justices to issue his or their summons directed to such person" requiring him to appear before a justice of the peace to answer thereto.

[12] In Re Burns [1985] NI 279 warrants for the arrest of the applicant were issued in respect of complaints made to a justice of the peace for the purpose of obtaining extradition of the applicant from the Republic of Ireland. The police officer who made the complaint went to another justice of the peace to obtain fresh warrants and placed before him the original complaints. The justice of the peace then considered the complaints without signing them or being asked to sign them and then signed and issued new warrants. In that case Lord Lowry CJ in his judgment recorded that the Crown conceded, and that it was clear, that the justice to whom the complaint was made must be the same justice who issued the warrant. Lord Lowry cited as authority for the proposition the case of Dixon v Wells. It is clear that as the point was conceded there was no argument on the point that arises in the present appeal.

[13] Dixon v Wells and Re Burns appear at first sight to be clear authority in favour of a construction of Article 20(1) along the lines contended for by

the respondents. However the consideration of the authorities shows that the issue is not so clear cut.

[14] In Re McFarland (1987) NI 246 the Divisional Court comprising Lord Lowry CJ and MacDermott J made clear that what founded the jurisdiction of the magistrate to hear a complaint against a defendant is not the summons which brings the defendant before the court but the complaint itself. If the defendant is present or is represented and is not objecting to jurisdiction the magistrate has jurisdiction notwithstanding any defect in the summons.

[15] In R v Manchester Stipendiary Magistrate (Ex parte Hill) [1983] AC 328 the House of Lords had occasion to rule on issues relevant to the present appeal. The certified question of law of general public importance in that case was as to what constituted the laying of an information for the purposes of Section 104 of the Magistrates' Courts Act 1952 (subsequently Section 127 of the Magistrates' Court Act 1980).

[16] The House of Lords had to consider the correctness of an earlier decision of a Divisional Court in R v Gateshead Justices (Ex parte Tesco Stores) Limited [1981] QB 470. In the Gateshead judgment Donaldson LJ said:

> "An information is not laid within the meaning of the Magistrates' Court Act 1952 and is certainly not laid before a justice of the peace unless it is laid before and considered by either a justice of the peace or the clerk of the justices acting as a justice of the peace pursuant to the Justices Clerks Rules 1970 and, incidentally, no summons can be issued by any other person without a prior judicial consideration by that person of the information upon which the summons is based."

The Gateshead decision, if correct, established that:

(a) the information had to be personally considered by a justice of the peace or clerk; and

(b) only that person who considered the information could issue the summons after judicial consideration of the question.

If the reasoning in Gateshead was correct, subject to Mr McCloskey's second line of argument, it would establish that the summonses in the present instance were invalid.

[17] The House of Lords however did not agree with the reasoning in Gateshead. The reasoning of the House of Lords decision is to be found in the speech of Lord Roskill which established the following propositions:

(a) What magistrates' courts had jurisdiction to try summarily in a criminal matter was an information and in a civil matter a complaint. What is required to give them that jurisdiction to try summarily the matter is that the information or complaint has been laid before them. Their jurisdiction does not depend upon a summons or a warrant being issued (By way of interjection at this point it is to be noted that under the Northern Ireland legislation the different terminology of "information" and "complaint" has been dropped in favour of the single term "complaint" (see Re McFarland [1987] NI 246 at 255E-F).

(b) The laying of an information or the making of a complaint is a matter for the prosecution or complainant and it is a matter for them how it should be formulated.

(c) It is the prosecutor's duty if he wishes to prosecute to lay the information before the magistrate. That means procuring the delivery of the document to the person authorised to receive it on behalf of a magistrate. The acts of delivery and the receipt are ministerial and the magistrate or clerk may delegate to an appropriate subordinate authority to receive the information which the prosecutor delivers. It can be sensibly inferred that any member of the staff in the office of the clerk will have such an authority. Accordingly once received at the office of the clerk or the justices the information will have been laid or the complaint made.

(d) If a summons is required the information or complaint must be laid before a justice of the peace. The function of determining whether a summons should be issued is a judicial function which must be performed judicially and cannot be delegated.

[18] Lord Roskill dealt with the decision in Dixon v Wells [1890] 25 QBD 249 and the Divisional Courts reliance on it in Gateshead. He said:

> "My Lords, the Divisional Court in the Gateshead case supported its conclusion by reference to Dixon v Wells, a decision of the Divisional Court. Donaldson LJ said that it was there decided that a summons was invalid because the complaint was considered by two justices and a summons had been signed by a third who had not considered the complaint. The headnote undoubtedly makes it clear that this was the effect of the decision. But perusal of the judgment of Lord Coleridge CJ [1890] 25 QBD 249 at 256-257 shows that the true foundation for the decision was that the relevant statute pursuant to which the prosecution was launched required as a "condition precedent" – I

> borrow those words from the judgment of Lord Coleridge CJ – to a successful prosecution, charges to be made, the summons to be served and the hearing to take place, all within certain specified time limits. …. It follows that the passage in the judgment of the Divisional Court in the Gateshead case which I have quoted and which the Divisional Court in the present case treated as obiter, was, with all respect, wrong."

[19] In relation to the certified question in Ex parte Hill Lord Roskill said:

> "I would answer the certified question by saying: 'an information is laid for the purposes of section 127 of the Magistrates' Courts Act 1980 when it is received at the office of the clerk to the justices for the relevant area'. I would add that it is not necessary for the information to be personally received by a justice of the peace or by the clerk of the justices. It is enough that it is received by any member of the staff of the clerk to the justices, expressly or impliedly authorised to receive it, for onward transmission to a justice of the peace or to the clerk to the justices. The same applies to the making of a complaint."

[20] Applying the reasoning of the House of Lords in Ex parte Hill it becomes clear that the receipt of the complaint against the respondents was a ministerial and not a judicial act. The signature of the lay magistrate authenticated the receipt of the complaints but the lay magistrate was not required to exercise any judicial power in considering the complaint. The relevant judicial act which had to be carried out was that of the magistrate who had to decide whether a summons should be issued against the relevant respondent. In carrying out that judicial function the lay magistrate had to be satisfied that the complaints had been duly and timeously made (which was demonstrated by the authenticated complaints) and that it was appropriate that a summons should be issued. That necessitated considering whether the complaint alleged an offence or offences known to the law and that the relevant statutory provision relied on by the complainant was in force. The complaints having been made and not withdrawn, the lay magistrates deciding whether summonses should be issued were duly considering extant complaints and were properly carrying out a judicial function which fell to be exercised. If, as the House of Lords held, the receipt of the making of the complaints was ministerial in nature and the receipt thereof could be delegated the identity of the authenticating lay magistrate (who was not exercising judicial functions) was not essential to the validity of the judicial decision whether the summons should be issued. This points to the conclusion that there is no underlying rationale for requiring the same lay

magistrate who signs the complaint to make the judicial decision whether a summons should be issued.

[21] There is nothing to suggest that the lay magistrates who issued the summonses did not properly exercise their judicial functions or that they failed to address the proper questions which fell to be decided in determining whether it was appropriate to exercise the power of directing the issue of summonses. Indeed, since the complaints were duly made in time and the complaints alleged matters which if proved before the court gave rise to criminal offences there was no reason to justify refusal of the issue of summons. In the absence of evidence to the contrary one is entitled to presume that the lay magistrates did their duty by properly considering the matter put before them before signing and issuing the summons (cf Re McFarland [1987] NI 246 at 254A-B).

[22] There are, moreover, compelling practical reasons why it is unlikely that Parliament would have intended that only one person may receive the complaint (ministerially) and decide (judicially) whether a summons should be issued. There may be very good practical reasons such as intervening death, ill-health or justifiable absence why the original lay magistrate acting ministerially in authenticating the receipt of the complaint may be unable to decide whether a summons should be issued. In a case where, for example, the prosecution have laid a complaint at the very last possible moment and where a question has to be investigated as to whether a statutory provision is still in force it cannot have been the intention of Parliament that a summons could not be issued if in the meantime the lay magistrate who received the complaint was ill, dead or unavailable. In such an event if the respondent's arguments were correct the only solution would lie under Article 20(5) which empowers the Resident Magistrate to issue a warrant of arrest if "for any reason a person cannot be served with a summons". Such a course visits upon the defendant a loss of liberty and the ignominy of having a warrant served upon him in a situation where he has done nothing to evade service of a summons.

[23] While the fact that an inconvenience may flow as a necessary consequence of a legislative provision is not in itself a reason for failing to give effect to the statutory provision there is a principle of construction summed up in the Latin term *argumentum ab inconvenienti plurimum valet in lege*. In Shannon Realities v Ville de St. Michel [1924] AC 183 at 192 Lord Shaw said:

> "Where the words of a statute are clear, they must of course be followed but in their Lordships opinion where an alternative construction is equally open, that alternative is to be chosen which will be consistent with the smooth working of the system

> which the statute purports to be regulating and that alternative to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

The case of Southcombe v Guardians of Yeovil Union [1897] 1 QB 343 is an example of an application of this approach . In that case the Divisional Court had to consider a provision in the Vaccination Act 1867 which provided that if a vaccination officer gave information in writing to a justice of the peace that he had reason to believe a child under 14 had not been successfully vaccinated the justice of the peace might issue the parents with a summons to appear before him and if the justice found the child had not been vaccinated the justice could order vaccination within a certain time. In that case it was argued that section 31 of the Vaccination Act 1867 made it necessary that the same justice before whom the information was laid must not only sign the summons but hear and sign the order. The Divisional Court rejected the argument. Bruce J said:

> "It would entail very great inconvenience that the justice who issued the summons were the only justice who had jurisdiction to hear it; he might frequently be wholly unable to attend the hearing and if he were ill or dead on the return day it would be most unreasonable to insist upon a fresh application to another justice with a view to issuing of a fresh summons."

[24] In view of the conclusions reached in relation to the proper approach to the interpretation of article 20 the second line of argument raised by Mr McCloskey does not in fact arise.

[25] The Resident Magistrate concluded that he did not have jurisdiction to hear the matter on the basis of the existing purported summons. If the summonses had not been validly issued the Resident Magistrate was precluded from hearing and determining the complaints having regard to Article 23(2) which requires proof that the summons had been duly served. The Resident Magistrate did have jurisdiction to hear the complaints but he could not proceed with the hearing in the absence of the defendants until properly summonsed. The question as formulated in the case stated requires to be reformulated thus:

> "Whether I was correct in law in considering that I should not proceed to hear and determine the complaints against the defendants on the ground that it had not been proved that valid summonses had been duly served on them?"

We would answer that reformulated question "No" and remit the matter to the Resident Magistrate to hear and determine according to law on the basis that the defendants have been duly summonsed to appear before him.