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Judgment: approved by the Court for handing down | *Delivered:* **12/12/06**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

(Complainant) Respondent;

-and-

JOHN McGOWAN

(Defendant) Appellant.

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CAMPBELL LJ

[1] This is an appeal by case stated from a decision of Strabane Magistrates' Court on 18th October 2005 on a point of law taken by the defendant and appellant ("the defendant"). It concerned the validity of a summons charging the defendant with permitting the consumption of intoxicating liquor on licensed premises other than during permitted hours contrary to article 41(1) (a) (ii) and 41(2) of the Licensing Order (NI) 1996.

The facts

[2] On a complaint being made to her on 21 March 2005 a justice of the peace signed and issued a summons requiring the defendant to appear at Strabane Magistrates' Court on 19 May 2005.

[3] As the first summons had not been returned by the police to the Public Prosecution Service with particulars of service by 19 May 2005 the Public Prosecution Service did not enter the case in the court list for hearing on that date.

[4] The officer in charge of the case in the Public Prosecution Service proceeded on the basis that the first summons had not been served and arranged for a second summons, based on the complaint of 21 March 2005, to be signed and issued by a lay magistrate on 3 June 2005.

[5] This second summons, which was served on the defendant on 13 June 2005, required him to attend before the magistrates' court sitting in Strabane on 28 July 2005.

[6] Following the issue of the second summons on 3 June 2005 the Public Prosecution Service received an affidavit, sworn on 12 May 2005, from the police officer responsible for the service of the first summons which had been issued on 21 March 2005. In this affidavit the officer stated that the first summons was served by him on the defendant on 6 May 2005.

[7] The solicitor, who appeared on behalf of the defendant at the magistrates' court on 28 July 2005, applied for an adjournment to permit him to take instructions from his client. On 4 August 2005 the solicitor applied for a further adjournment as his client was engaged in discussion with the Chief Superintendent with a view to having the case adjourned for six months to allow his licensed premises to be monitored.

[8] On 1 September 2005 when the prosecution proceeded with its case, based on the second summons, the solicitor for the defendant raised an issue as to the validity of the summons. The Resident Magistrate heard the arguments presented on behalf of the parties and ruled that the second summons had been issued under article 20 (4A) of the Magistrates' Courts (Northern Ireland) 1981 and was valid. The question for this Court is: was he correct?

The legislation

[9] Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981 includes the following;

> "(1) Upon a complaint being made to a justice of the peace for any county court division that a person has, or is suspected of having, committed a summary offence in respect of which a magistrates' court for that county court division has jurisdiction to hear a charge the justice may issue a summons directed to that person requiring him to appear before such court to answer to the complaint…
>
> 20(4A) Where a justice of the peace for any county court division is satisfied that a summons issued

> under paragraph (1) by him or another justice of the peace for the same county court division has not been served, he may, without a complaint being made to him, re-issue the summons extending the time for the appearance of the person summonsed."

Section 10 of the Justice (Northern Ireland) Act 2002 which provides for the transfer of the functions of justices of the peace to lay magistrates states;

> "(1) Subject as follows, the functions of justices of the peace (including their functions as members of a court) are transferred to lay magistrates.
>
> (2) A lay magistrate sitting out of petty sessions may not exercise any function conferred or imposed on a magistrates' court in relation to the conduct of proceedings for an offence, apart from a function to which subsection (3) applies.
>
> (3) This subsection applies to—
>
> (a) any function of issuing a warrant or summons,"

Article 154 of the Magistrates' Courts (Northern Ireland) Order 1981 provides that;

> "154. - (1) No objection shall be allowed in any proceedings before a magistrates' court to any complaint, summons, warrant, process, notice of application or appeal or other document for any alleged defect in substance or in form or for variation between any complaint, summons, warrant, process notice or other document and the evidence adduced on the part of the complainant, plaintiff, applicant or appellant at the hearing, unless the defect or variance appears to have misled the other party to the proceeding.
>
> (2) Without prejudice to the generality of Article 161 or 163, where a party to the proceeding has been misled by such defect or variance as is mentioned in paragraph (1) the court may, if necessary and upon such terms as it thinks fit, adjourn the proceedings."

The case for the defendant and the respondent

[10] Mr McCann, appeared for the defendant on the appeal, and submitted that the second summons was a "fresh" summons and as it had been issued without a complaint being made to the lay magistrate within the period of six months from the time when the offence was alleged to have been committed on 24 October 2004, as required by article 19(1) (a) of the Magistrates' Courts Order, it was a nullity. In the alternative, he argued that the lay magistrate had purported to issue the second summons under article 20(4A) of the Magistrates' Courts Order when it did not apply as the first summons, issued on 21 March 2005, had in fact been served. If, as was the position, it had been served the lay magistrate could not have been satisfied that it had not been and therefore he lacked jurisdiction to issue the second summons.

[11] Article 20(4A) was inserted by article 25 of the Criminal Justice (Northern Ireland) Order 2003 and Mr McCann relied on the heading prefixed to article 25, which reads "Amendment of summons before it is served," as limiting the application of article 20(4A). The heading to a section may be used to explain ambiguous words but as Lord Goddard stated in *R v Surrey (North- Eastern Area) Assessment Committee* [1948] 1K.B. 29

> "…the law is quite clear that you cannot use such headings to give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning."

If, contrary to his argument, the application of article 20 (4A) is not confined to those cases where the first summons has not in fact been served Mr McCann suggested that "satisfied" denotes a high standard of proof. In support of this submission he referred to *R v Dyer* [2003] NICC 12, a decision of Hart J. when Recorder of Belfast. There an application was made for the issue of a duplicate bench warrant, the original having been lost or mislaid. The judge referred to the prosecution as having to lead such evidence as would enable him to be satisfied that it was appropriate to issue a duplicate warrant and to produce a certificate from the office of the Crown Court that the warrant had not been returned executed or withdrawn. Mr McCann relied also on *R v Liverpool City Justices ex parte Grogan* (1991) JP 155 at 450. Section 129(1) of the Magistrates' Courts Act 1980 provided that if a magistrates' court was satisfied that a person remanded was unable by reason of accident or illness to be brought before a court at the expiration of the period for which he was remanded the court may, in his absence, remand him for a further time. Bingham LJ accepted that "satisfied" is to be understood as imposing a high test. He added that a magistrates' court could only be satisfied if it were given solid grounds upon which it could reasonably found a reliable opinion.

[12] Mr Valentine, who appeared on behalf of the Public Prosecution Service, submitted that the Resident Magistrate was entitled to presume, in the absence of evidence to the contrary, that the lay magistrate had satisfied himself before issuing the second summons, that the first summons had not been served. He referred to a passage in the speech of Lord Diplock in R *v I.R.C., Ex p. Rossminster* [1980] A.C. 952 at 1009 where he said;

> "In the instant case the search warrant did not purport to be issued by the circuit judge under any common law or prerogative power but pursuant to section 20C(1) of the Taxes Management Act 1970, alone. That sub-section makes it a condition precedent to the issue of the warrant that the circuit judge should himself be satisfied by information upon oath that facts exist which constitute reasonable ground for suspecting that an offence involving some sort of fraud in connection with or in relation to tax has been committed, and also for suspecting that evidence of the offence is to be found on the premises in respect of which the warrant to search is sought. It is not, in my view, open to your Lordships to approach the instant case on the assumption that the Common Sergeant did not satisfy himself on both these matters, or to imagine circumstances which might have led him to commit so grave a dereliction of his judicial duties. The presumption is that he acted lawfully and properly; and it is only fair to him to say that, in my view, there is nothing in the evidence before your Lordships to suggest the contrary; nor indeed have the respondents themselves so contended."

We were referred also to the judgment of Lord Lowry C.J. in *Re Burns' Application* [1985] N.I. 279 at p. 283 where he said;

> "When procedural steps are good on their face it can be cogently argued that there is a presumption of regularity; but this does not apply when one know what actually happened."

[13] As there was no material differences between the first and second summons other than those that were necessary Mr Valentine invited the Court to take the view that the second summons was not a fresh one and, relying on article 154(2) of the Magistrate's Courts Order, that the defendant would not have been misled by any variation introduced by the second summons.

[14] If the Court did not accept his main submission Mr Valentine advanced as an alternative that if the lay magistrate was in error in issuing the second summons the defendant had accepted jurisdiction. The complaint was made within the six month period and the defendant did not appear to dispute the issue of the summons. In *Minister of Agriculture v McGeough and Fitpatrick* [[1955]N.I. it was held that where a defendant was present the magistrate had jurisdiction and no insuperable difficulty was caused by reason of the insufficiency of service. In *Reg. v Home Sec., Ex p Jeyeanthan* [2000] 1W.L.R. 354 at 362 Lord Woolf M.R. in considering the consequences of non-compliance with a procedural requirement suggested (at p 362) that three questions were likely to arise;

> "1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)
>
> 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case ? (The discretionary question.)
>
> 3. If it is not capable of being waived or is not waived then what is the consequence of non-compliance? (The consequences question.)"

[15] Mr Valentine suggested that the reason why the issue of a summons must be based on a complaint made to a lay magistrate is to provide protection from those with vexatious purpose and to make the defendant aware of the proceedings. In the instant case a complaint was made within six months of the offence charged, giving the Resident Magistrate jurisdiction provided that the defendant had due to notice of the proceedings. That he had received notice was demonstrated by service of the second summons upon him and the appearance of a solicitor on his behalf without any suggestion of prejudice.

[16] In his reply Mr McCann said that as it was not stated on the face of the second summons that it was issued under article 20(4A) of the Magistrates' Courts Order it should be treated as a fresh summons.

Conclusion

[17] The decision to issue a summons is judicial and not merely administrative – *Reg. v. Brentford Justices, Ex parte Catlin* [1975] QB 455. In our view the Resident Magistrate was entitled to assume, in the absence of evidence to the contrary, that the lay magistrate had acted correctly. This is in

accordance with the maxim *omnia praesumuntur legitime facta donec probetur in contrarium.*

[18] There was no evidence to the contrary as it was subsequent to the lay magistrate being satisfied on the evidence before him, that the first summons had not been served that it came to the notice of the prosecution that it had been. The fact that it had been served when the lay magistrate made his decision does not mean that he acted incorrectly in reaching his decision so as to displace the presumption.

[19] We do not accept that when the second summons was issued under article 20(4 A) of the Magistrates' Courts (Northern Ireland) Order 1981 there was any requirement for this to appear on the face of the summons. As the article makes clear it is a re-issue of the first summons that is authorised.

[20] This disposes of the appeal but we add a comment about *R v Liverpool City Justices, ex parte Grogan* and the standard of proof. The submission of counsel in that case, accepted by Bingham L.J., was to the effect that although "satisfied" was a strong test it was not so strong as to require proof beyond reasonable doubt. *Ex parte Grogan* was a case involving the liberty of the applicant and the standard of proof can vary according to the consequences of the decision for the parties. We should not be taken therefore as accepting that the standard of proof required before a lay magistrate may be "satisfied" under article 20 (4 A) is a high one. As Lord Nicholls of Birkenhead said in *In re H (Minors)* [1996]AC 563 at 586 when considering the standard of proof where the court had to be "satisfied" under the Children Act 1989 before making a care or supervision order involving a child "The balance of probability standard means that a court is satisfied an event occurred …" We consider that under article 20 (4A) the standard of proof is the ordinary civil standard of balance of probability.

[21] The question posed by the Resident Magistrate "Was I correct in holding that the second summons had been validly issued in accordance with article 20(4A) of the Magistrates' Courts (Northern Ireland) Order 1981" is therefore answered in the affirmative and the appeal is dismissed.