

Neutral Citation no. [2006] NICA 14

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

Delivered: 07/04/06

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

DIRECTOR OF PUBLIC PROSECUTIONS

Complainant/Appellant;

-and-

MC

Defendant/Respondent.

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of Mrs Bernadette Kelly RM in proceedings between the Director of Public Prosecutions and a young woman whom we shall refer to as MC. Because of her age, her identity should not be revealed.

[2] MC appeared before the Youth Court on 25 May 2005 on charges of assault of two young women, Anna Dargan and Kerry Lynn, in Belfast. An issue arose as to the admissibility of evidence to be given by Ms Dargan and Ms Lynn purporting to identify MC as one of those who attacked them. This identification took place while MC and another girl were in the rear of a police vehicle, having earlier been detained by a police patrol. It appears that the legal representatives of MC had indicated in advance of the hearing on 25

May that they would require the admissibility of the identification evidence to be determined in a *voire dire* hearing.

[3] In the Youth Court the resident magistrate normally sits with two lay magistrates, one male and one female. On learning of the suggestion that a *voire dire* hearing was required, however, Mrs Kelly decided that she should sit alone to deal with the dispute about the admissibility of the identification evidence. She has explained that she thought that this was appropriate since the issue concerned a matter of law. She informed counsel for the prosecution and the defence that it was her intention to sit alone and neither demurred. Having considered the written evidence that had been submitted and taken into account that there had been a breach of the Police and Criminal Evidence Codes of Practice (1996) Code D.2 the resident magistrate decided that the evidence should not be admitted.

[4] The resident magistrate now accepts that she should not have sat alone to deal with this issue. This is also accepted by the respondent to the appeal. Mrs Kelly has explained that she had considered the position analogous to that of a trial judge and a jury, with the lay panel being obliged to accept her rulings on legal issues. Since, conventionally issues such as this would be dealt with by the judge in the absence of the jury, she believed that it was appropriate for her to deal with the matter without the panel members being present.

Should the lay members have participated in the decision as to the admissibility of the identification evidence?

[5] The court before which MC appeared is a youth court. It is so entitled as a consequence of article 27 (1) of the Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 8) which provides: -

“27. - (1) A juvenile court (that is to say, a court of summary jurisdiction constituted in accordance with Schedule 2 to the Children and Young Persons Act (Northern Ireland) 1968) sitting for the purpose of hearing any charge against a child or for the purpose of exercising any other jurisdiction conferred on youth courts by or under this Order or any other statutory provision, may be known as a youth court.”

[6] Schedule 2 to the 1968 Act (dealing with the constitution of the juvenile court) provides, at paragraph 3: -

“Composition of juvenile court

3. - (1) Subject to the provisions of paragraph 4, a juvenile court shall be constituted of a resident magistrate, who shall be chairman, and two lay magistrates for the county court division which includes the petty sessions district or districts for which the court acts or any other county court division which adjoins that county court division, of whom one at least shall be a woman."

[7] Paragraph 4 of Schedule 2 provides that a juvenile court at which the chairman is present shall have power to act notwithstanding that any other member fails to attend and remain present during the sitting of the court but it is clear from paragraph 5 that if the lay magistrates are present, they should participate in all decisions of the court. It provides: -

"5. - (1) The decision of a juvenile court upon any matter before it shall be by a majority of the members and shall be pronounced by the chairman, or other member at the request of the chairman, and no other member of the court shall make any separate pronouncement thereon; but where the chairman and one other member only attend and remain present during the sitting of the court the decision of the court shall in the event of disagreement between the chairman and that other member be the decision of the chairman and shall be pronounced by the chairman.

(2) Where during or after the hearing and before the determination of any matter before a juvenile court it appears to the chairman that there is, or is likely to be, any difference of opinion between the members, he shall cause the deliberations of the court upon that matter to be conducted in private, and may if he thinks fit adjourn the case for that purpose."

[8] It is therefore abundantly clear that the decision on the admissibility of the identification evidence should have been taken by all three members of the panel. The ruling made by the resident magistrate was made without jurisdiction. It must therefore be quashed.

[9] On issues of law the lay members will normally accept the advice and direction of the resident magistrate although they are not bound to do so. In some respects the guidance given by a magistrate on issues of law is akin to that provided by a justices' clerk in England and Wales. The role of the clerk

is to advise on law, practice and procedure. Since the justices are the ultimate arbiters of both law and fact there is no obligation on them to adopt the clerk's advice on law, but it is accepted practice that they do so. In one fundamental aspect, of course, the role of the resident magistrate in a youth court in this jurisdiction is different from that of a justices' clerk in that he or she must not only provide guidance on issues of law but must also take part in decisions on those issues.

The proper approach to the identification evidence

[10] The question of how a magistrates' court should approach the admissibility of identification evidence was considered by this court in *DHSS v Rodgers* [1997] NI 101. In that case the defendant had been prosecuted for making a false statement in order to obtain unemployment benefit. The prosecution had relied on identification evidence given by an inspector of the Department of Health and Social Services. The issue arose as to the effect of article 66(8) of the Police and Criminal Evidence (Northern Ireland) Order 1989, which provided that a person other than a police officer charged with the duty of investigating offences contrary to the Social Security Administration (Northern Ireland) Act 1992 should 'have regard to any relevant provision' of the codes of practice on the admissibility in evidence of such identifications. The deputy magistrate considered that since the inspector had failed to adopt any of the methods specified in the relevant code her evidence of the identification was not admissible.

[11] At page 109 in a series of propositions Carswell LCJ set out the approach to be followed by the magistrates' court to the issue of identification. For present purposes the following of these are relevant: -

"4. Evidence of identification is necessarily relevant and is prima facie admissible. It should not be excluded unless the court exercises its discretion to do so under article 76 of the 1989 [PACE] Order the test being whether its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. This issue should not be determined solely by reference to the question whether the provisions of code D have been adopted or complied with, but by considering all the circumstances relating to the obtaining of the evidence. Exclusion of evidence is normally appropriate only in jury trial, and we consider that a magistrates' court should ordinarily admit all relevant evidence, giving it such weight as its reliability deserves. It does, however, retain a

discretion to exclude, which we suggest it should exercise only in exceptional cases, such as where the evidence has been obtained by seriously irregular or fraudulent means.

5. If the evidence is admitted, as in almost every case it should be, the court should take into account in assessing its weight such failures to comply with code D as affect its quality.

6. At the conclusion of the prosecution evidence the court should consider, in the light of the principles set out in *R v Turnbull* [1977] QB 224, whether a prima facie case has been established.”

[12] Article 76 of PACE provides the court with a general discretion to refuse to allow evidence to be given if it appears that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. At first sight, it might appear anomalous to suggest, as this court did in *Rodgers*, that the discretion should only be exercised in exceptional circumstances since the statute itself does not impose a requirement of exceptionality and if the conditions prerequisite to the exercise of the discretion are present, the court should not be deflected from exercising its discretion merely because the case could not be described as exceptional.

[13] The injunction contained in paragraph 4 of the passage from *Rodgers* that we have quoted is designed, we consider, to discourage magistrates from too ready a recourse to article 76 and reflects the circumstance that the magistrates’ court is the tribunal of both fact and law. The principal impact of article 76 is naturally on trial by a judge and jury where the judge cannot be privy to the jury’s deliberations as to the weight that they will attach to a potentially prejudicial item of evidence. The opportunity to ensure that evidence which is capable of affecting the fairness of the trial does not have that effect is more directly under the control of the magistrates who can give commensurate weight to the impugned evidence taking into account, for instance, the fact that it was obtained in breach of one of the codes under PACE.

[14] For these reasons in summary trials evidence should only be excluded in exceptional circumstances and normally all relevant evidence should be admitted, giving it such weight as its reliability deserves. By the same token it will not be appropriate to hold a *voire dire* in a magistrates’ court. This procedure is suitable only where it is necessary to reach a conclusion on whether the impugned evidence should be admitted on a ‘stand-alone’ basis.

As we have pointed out, that does not arise in summary trials where the degree of unfairness can – and should – be judged against the background of all relevant evidence. This was the conclusion reached by the House of Lords in *Reg v Sang* [1980] AC where at page 432 Lord Diplock said, “Let me take first the summary offence prosecuted before magistrates where there is no practical distinction between a trial and a “trial within a trial.” At 441 Viscount Dilhorne said: -

“Where the trial is with a jury, the judge can hear argument and decide whether or not to exercise his discretion in the absence of the jury. In a trial in a magistrates’ court this is not possible. When considering the admissibility of any evidence, the magistrates must know what evidence it is proposed to tender. If they decide that it is inadmissible, they will ignore it in reaching their conclusion.”

Disposal

[15] The first question posed in the case stated is “Was I wrong in law, as I now accept, to determine that lay members of the youth panel are arbiters of fact (albeit that they should follow directions on points of law from the chair)?” We consider that the question should not have been framed in this way. The sub-clause asserting that lay magistrates should follow directions on points of law from the chairman is a superfluous addition and should not have been included. It is, in any event, not correct to suggest that lay magistrates must always accept directions on points of law from the chairman. We shall re-phrase the question to read “Was I wrong in law to sit without the other members of the panel of the Youth Court to determine the admissibility of the proffered identification evidence?” We answer that question in the affirmative and remit the case for hearing by a different panel of the Youth Court who should apply the legal principles as they have been explained in this judgment. We do not consider it necessary to address the other questions posed in the case stated.