Neutral Citation No. (2002) NICA 3

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

Ref:	CARC3552
Delivered:	11/01/02

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

FOYLE, CARLINGFORD AND IRISH LIGHTS COMMISSION

(Applicant) Respondent

and

PAULA McGILLION

(Respondent) Appellant

CARSWELL LCJ

This is an appeal by way of case stated from a decision of a resident magistrate Mr ATG White, sitting as a magistrates' court for the petty sessions district of Strabane on 11 January 2001, by which he made orders for the forfeiture of two boats in pursuance of the powers contained in Part VII of the Foyle Fisheries Act (Northern Ireland) 1952, as amended. The issue posed by the case stated concerned the standard of proof to be applied by the court when deciding on forfeiture, but a preliminary issue was fully argued relating to the time for service of a copy of the case stated upon the appellant.

The Foyle Fisheries Act (Northern Ireland) 1952 (the Act) established the Foyle Fisheries Commission, conferring on it the functions of managing

the fishing rights in the Lough and River Foyle and its tributary the River Faughan. The functions of that body are now exercisable by the Foyle, Carlingford and Irish Lights Commission (in this judgment referred to as the Commission), by virtue of Article 21 of the North/South Co-Operation (Implementation Bodies) (Northern Ireland) Order 1999, and the Foyle Fisheries Commission itself has been dissolved. Under the provisions of the Act the methods of fishing and the times and the stretches of water on which it is permitted are controlled and it is made an offence to fish by other means, at other times and in other parts of the rivers subject to the Act. Part VII of the Act gives power to the Commission to appoint inspectors and river watchers. Section 63(1)(*f*), as amended by the Foyle Fisheries (Amendment) Act (Northern Ireland) 1962, empowers a member or officer of the Commission or member of the Royal Ulster Constabulary to take, remove and detain in his custody any fishing engine, boat, vehicle or article liable or believed to be liable to forfeiture under the Fisheries Acts or the 1952 Act. Section 64 of the Act, as substituted by the 1962 Act, provides, so far as material, as follows:

> "64. Where a person, in exercise of powers conferred on him by this Part, seizes in Northern Ireland, any boat or fishing engine, he shall, as soon as may be, apply to a court of summary jurisdiction sitting for the petty sessions district in which it was seized for an order for its disposal under this section and thereupon the following provisions shall have effect:-
>
> (a) if, in the case of a boat, the court finds that, at the time of its seizure, it had been, was being, or was about to be, used for a

purpose which under this Act is unlawful, the court shall order it to be forfeited."

The facts found by the learned resident magistrate which grounded the forfeiture applications are contained in paragraphs 10 to 19 of the case stated:

"10. On 17 July 2000, a Temporary River watcher, who was acting in the exercise of powers conferred on him by Part VII of the Act, came across a small brown plywood hand made boat, 6 feet long, about 40 metres from the bank of the River Foyle.

11. There were a large number of salmon scales in the boat and the boat was damp. The scales had been deposited within the previous 48 hours.

12. On 21 July 2000, a District Inspector, who was acting in the exercise of powers conferred on him by Part VII of the Act, came across a small black plywood boat, 6 feet long, behind flood banking, around 10 metres from the River Foyle, on the same stretch as the brown boat had been found.

13. There were salmon scales in the boat, which had been deposited between 6 and 12 hours previously.

14. No fishing for, or taking, Salmon was permitted on the stretch of the River Foyle beside which the boats were found.

15. While, at the times the boats were found, fishing with nets was permitted on a parallel stretch of the river, neither boat was suitable for net fishing, and neither had a number on it, corresponding with a licence number for such fishing, as required.

16. While there were areas of the river on which it would have been possible to fish legally from the two boats, they were some considerable distance away, and the nature

and size of the two boats was such that it would have been inadvisable to travel such distances in them.

17. The two boats were of a type often used for illegal fishing on the River Foyle.

18. On the river, roughly opposite the position where the black boat was found on 21 July 2000, an illegal net was recovered on the same date, with two dead salmon in it.

19. Both boats were seized on the grounds that they were believed to have been used for unlawful fishing for salmon."

By notices each dated 30 October 2000, issued pursuant to Article 76 of the Magistrates' Courts (Northern Ireland) Order 1981 (the 1981 Order), the Commission gave notice of its intention to apply for orders of forfeiture in respect of the boats, ownership of which was claimed by the appellant. The applications came on for hearing at Strabane Magistrates' Court on 11 January 2001. At the outset of the hearing the magistrate asked for submissions on the standard of proof. No authorities were cited to him, and he held that the applicable standard was proof on the balance of probabilities, on the ground that the applications were civil in nature, since they did not allege any criminal offence against the appellant. He then heard evidence and found the case proved on each application. He held that he was satisfied on the balance of probabilities that each boat at the time of its seizure had been used for a purpose which was unlawful under the Act, namely, unlawful fishing for or taking salmon. He went on to hold, perhaps rather generously to the

appellant, that he would not have been so satisfied if he had applied the standard of proof beyond reasonable doubt.

By requisition dated 22 January 2001 the appellant's solicitors applied to the magistrate to state a case on a point of law and the magistrate stated and signed a case on 29 March 2001. The question of law contained in paragraph 22 of the case was the following:

> "Was I correct in law in holding that the standard of proof, on an application for forfeiture of a boat under Section 64 of the Foyle Fisheries Act (Northern Ireland) 1952 as amended by Section 7 of the Foyle Fisheries (Amendment) Act (Northern Ireland) 1962, is proof on the balance of probabilities?"

The procedure then to be followed by an appellant is set out in Article 146(9) of the Magistrates' Courts (Northern Ireland) Order 1981:

> "146.-(9) Within fourteen days from the date on which the clerk of petty sessions dispatches the case stated to the applicant (such date to be stamped by the clerk of petty sessions on the front of the case stated), the applicant shall transmit the case stated to the Court of Appeal and serve on the other party a copy of the case stated with the date of transmission endorsed on it."

The appellant's solicitors duly transmitted the case to the Court of Appeal, but failed to serve a copy on the respondent until some considerable time later, on 9 July 2001. The preliminary point argued was whether the consequence of this failure was that the appeal could not be entertained by the court. Mr Tannahill for the respondent Commission submitted that the point was settled by the binding authority of the previous decisions of this court in *Dolan v O'Hara* [1975] NI 125 and *Pigs Marketing Board (Northern*

Ireland) v Redmond [1978] NI 73, in which it was held that the requirement was mandatory and not merely directory. Mr McCann argued on behalf of the appellant that it was open to the court now to reach a different conclusion on the mandatory nature of the requirement. He also submitted that construction of the requirement as mandatory was inconsistent with the terms of Article 6(1) of the European Convention on Human Rights and that the court was accordingly bound under the Human Rights Act 1998 to review that construction and conclude that the requirement was merely directory.

In *Dolan v O'Hara* and *Pigs Marketing Board (Northern Ireland) v Redmond* the provision construed was section 146(8) of the Magistrates' Courts Act (Northern Ireland) 1964, which in all material respects was identical to Article 146(9) of the 1981 Order. The decision in each case was based squarely on the ground that all the requirements of section 146(8) were imperative and had to be observed if the Court of Appeal was to acquire the statutory jurisdiction to hear and determine a case stated: see the judgment of Lowry LCJ in the *Pigs Marketing Board* case at page 79G. These decisions are binding upon us and we are obliged by the doctrine of precedent to follow them. There is accordingly no room for reconsideration of the conclusion reached in those cases on the ground that the modern approach to construction of such provisions tends to be more flexible, as argued by Mr McCann in reliance on more recent English cases, and that persuasive authority to the contrary may be found in *Hughes (Inspector of Taxes) v Viner* [1985] 3 All ER 40.

Mr McCann went on to argue, however, that if the terms of Article 146(9) are construed as mandatory, this would be unfair to an appellant where no prejudice has been caused to the respondent, and would accordingly constitute a breach of Article 6(1) of the European Convention on Human Rights. He relied upon the decision of the European Court of Human Rights in *Delcourt v Belgium* (1970) 1 EHRR 355 at paragraph 25 as authority for the proposition that where domestic law provides for a right of appeal the appeal proceedings will be treated as an extension of the trial process and will accordingly be subject to the provisions of Article 6. He cited *Société Levage Prestations v France* (1996) 24 EHRR 351, in which the Court held at paragraph 40 of its decision, following *Ashingdane v United Kingdom* (1985) 7 EHRR 528, that in order to conform with the requirements of Article 6 limitations placed upon an appeal must not restrict or reduce a person's access in such a way that the "very essence" of the right of appeal is impaired, that the limitations must have a reasonable aim and that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Counsel submitted that this court is therefore bound to return to the question of construction of Article 146(9) and interpret it in such a way as to avoid a breach of Article 6(1) of the Convention.

Mr Tannahill for the respondent referred to two decisions of the European Court of Human Rights, *Stubbings v United Kingdom* (1996) 23 EHRR 213 and 68/1991/320/392 *Hennings v Germany*. In the former case it was held that a provision for limitation of actions was not in breach of Article

6(1), since it did not remove access, pursued a legitimate aim and was proportionate. In *Hennings v Germany* the applicant had failed to file a request for reinstatement of his case to object to a penal order, because he had omitted to collect his mail from the local post office, where it had been left when there was no one to receive it at his house. It was held that the authorities could not be held responsible for barring his access to the court when he failed to take the necessary steps to ensure receipt of his mail, which would have enabled him to comply with the time-limits laid down by German law.

These two cases seem to us to be distinguishable from the present situation. The requirement contained in Article 146(9) could not be said to impair the very essence of the right to appeal. The case stated is to be transmitted to the Court of Appeal within 14 days of being dispatched by the clerk of petty sessions to the applicant. Within the same time he is to serve a copy on the other party. Its clear object is to prevent possible delays in the process of appealing by way of case stated. That is in our opinion a legitimate aim. We do not find it possible, however, to accept that there is a reasonable relationship of proportionality when the applicant is altogether barred from presenting his appeal because he fails for a period to serve a copy of the case on the other party, even though no prejudice has accrued to that party. We consider that this would constitute a breach of Article 6(1) of the Convention. It is incumbent upon us by virtue of section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way that is compatible with the Convention rights. This can be done by construing Article 146(9) as directory

rather than mandatory, contrary to the previous case-law, whose binding authority is overridden by the 1998 Act.

We would therefore hold that we should now interpret Article 146(9) as directory rather than mandatory. When one does so, and it appears that no prejudice was caused to the respondent by the delay in serving upon it a copy of the case, then it seems clear to us that we ought to extend the time for taking that step and allow the appeal to proceed.

We can now turn to the substantive issue raised by the case stated, the standard of proof to be applied in determining whether the boats should be forfeited. The appellant relied upon the decision of this court in *R v Fenton* [2001] NI 65, in which we held that the criminal standard of proof beyond reasonable doubt is to be applied in forfeiture of money found in the possession of a person convicted of offences against the Misuse of Drugs Act 1971. At pages 68-9 of the report we set out other instances where it has been held that the standard of proof in determining whether a confiscation order should be made is the criminal standard, and pointed to the contrast with section 2(8) of the Drug Trafficking Act 1994, where there is a specific statutory reference to the civil standard of proof on the balance of probabilities.

Counsel for the Commission relied on several arguments in support of his contention that Parliament intended the standard of proof to be that applicable to civil matters, proof on the balance of probabilities. His main plank was the difficulty which would face the Commission in proving beyond

reasonable doubt in seizure cases that the equipment in question had been, was being or was about to be used for an unlawful purpose. Such items are commonly found in circumstances which are highly suspicious but lacking in clear proof of the purpose of their use. Secondly, counsel pointed to the fact that Article 76 of the Magistrates' Courts (Northern Ireland) Order 1981, governing appeals and applications, constitutes a self-contained Part VII of the Order and is not comprised within Part V, which relates to criminal jurisdiction and procedure. Finally, he sought to draw a contrast with section 75 of the Act, which provides that when a person is convicted of an offence against the Act there is to be compulsory forfeiture of equipment by means of which the offence was committed. He argued that because forfeiture under section 64 is discretionary and not compulsory a lower standard of proof is applicable.

We do not find the second and third of these arguments compelling. We do not obtain any assistance from the fact that Article 76 of the 1981 Order is contained in a separate Part from that dealing with criminal jurisdiction and procedure. Part V covers prosecutions against individuals for a variety of offences with which the magistrates' courts may deal. Appeals and applications fall naturally into a different category, which is also distinct from civil proceedings upon complaint, governed by Part VIII of the 1981 Order, and we do not find anything significant in the fact that they are not included in Part V. We are unable to conclude from that fact that the civil standard of proof is to be applied in all applications brought pursuant to Article 76. It

seems to us that the standard will depend on the context of the particular application.

Nor in our view is the supposed contrast with section 75 apposite. Where a person is convicted, his unlawful activities have been established beyond reasonable doubt, and in consequence it is provided that his equipment must be forfeited. Where equipment is seized but no one is apprehended for an offence under the Act, then it is necessary for the Commission to establish the unlawful nature of the purpose of its use. The fact that it is automatically forfeited under section 75 does not in our view indicate anything about the standard of proof where an unlawful purpose has to be established under section 64.

The respondent's first argument, based on practical considerations, has some force, but in order for it to be accepted we consider that it has to have the support of other reasons why Parliament may be said to have intended that the standard of proof should be that applicable to civil rather than criminal proceedings. Some such reasons may be found, and we must now examine them to ascertain their strength.

The first is based on the wording of section 64 of the Act. In section 64(a) the word used of the court's determination is "finds", which may be contrasted with the phrase "is satisfied" in the Misuse of Drugs Act 1971. It may be argued that "finds" applies more naturally to a determination on the balance of probabilities than to proof beyond reasonable doubt. We do not

regard that as a strongly compelling argument on its own, but it may give some support to other arguments on which the respondent can rely.

Secondly, the forfeiture of a boat is not confined to situations where a specific person has committed a criminal offence, which is the case under the Misuse of Drugs Act 1971. It is to be noted that under section 75 of the 1952 Act, as amended by the 1962 Act, where a person is convicted of an offence against the Act, there is automatic forfeiture of any fish illegally taken by him and of any boat or fishing engine or thing by means or in respect of which the offence is committed. Section 64 covers a range of situations going well beyond that situation. The boat may have been used for an unlawful purpose by a person other than its owner, and the identity of that person may never be established. The section provides for forfeiture, not only where the boat has been used for an unlawful purpose at some time before its seizure or where it is being used for such purpose at the time of seizure, but also where it is about to be so used. That is a point of distinction from a case like *R v Fenton*, where the forfeiture on which the court had to rule was of money found in the possession of the person just convicted of a drugs offence.

There are 19th century authorities on the nature of actions for penalties, such as *Attorney General v Radloff* (1854) 10 Exch 84 and *Attorney General v Bradlaugh* (1885) 14 QBD 667, but we do not derive much assistance from them. In the former case the primary reason for the conclusion of two of the four judges (strongly supported by Brett MR in *Attorney General v Bradlaugh)* that it was a civil proceeding was because the Attorney General could have

recovered the penalty in an action for debt. In *Attorney General v Bradlaugh* the determining factor appears to have been that no criminal sanctions were provided for in the legislation governing sitting or voting in Parliament without having taken the necessary oath. In neither case does the reasoning offer much guidance for us in the present appeal.

More help may perhaps be obtained from the decision of Hilbery J in *Commissioners of Customs and Excise v Sokolow's Trustee* [1954] 2 QB 336. In that case certain securities or certificates of title to securities were imported into the United Kingdom without the permission of the Treasury, contrary to exchange control legislation. They were seized by the customs authorities and notice was given to the owner. He had become bankrupt and his trustee claimed the items. The Commissioners issued proceedings for their forfeiture and condemnation. The issue arose whether the proceedings constituted a suit for an offence within the meaning of section 257 of the Customs Consolidation Act 1876. After discussing the legislation, the judge said at page 344:

> "In such circumstances is such an action a suit for an offence under the Customs Act? In my view it is not. It is a suit to determine the legality of the seizure. It may be true that the fact that the goods were goods the import of which was restricted or forbidden and that they were seized are matters which must be proved unless, as in this case, they are admitted; but the proceedings are not for the offence which led to the seizure; they are proceedings to establish that the seizure which followed the offence has resulted in the Customs authorities having a good title to the goods, and therefore one which they could pass to a purchaser of the goods from them."

It is true that Hilbery J did not offer any opinion on the standard of proof to be adopted if the unlawful importation of the goods had to be proved, but there is some implication from the terms of his judgment that it would be the standard applicable to civil proceedings.

Under the fisheries legislation with which we are concerned an authorised person may take, remove and detain any boat etc liable or believed to be liable to forfeiture under the Fisheries Acts or the 1952 Act. He may exercise that power and the article may be forfeited if it had been, was being, or was about to be used for a purpose unlawful under the Act. It is not linked to the conviction of any specific person nor is it necessary for the Commission to prove that an offence had taken place. The forfeited article may, by virtue of section 78, be sold or otherwise disposed of as the Government Department concerned thinks fit or returned to the owner. This provision would appear more appropriate to civil proceedings than to a criminal type of forfeiture, where it is not envisaged that the article might be returned.

These features seem to us to point to the conclusion that the proceedings are civil in nature and that Parliament intended that the standard of proof should be the civil standard of proof on the balance of probabilities. We therefore hold that the learned resident magistrate was correct in applying that standard. We answer in the affirmative the question posed in the case stated and dismiss the appeal.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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(Applicants) Respondents

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(Respondent) Appellant

———

J U D G M E N T O F

CARSWELL LCJ
