

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GERARD McDONNELL
FOR JUDICIAL REVIEW

BEFORE KERR LCJ AND WEATHERUP J

WEATHERUP J

The application

[1] This is an application for judicial review of two decisions. First, the decision of a police constable of the Police Service of Northern Ireland to arrest the applicant on 30 June 2005 under Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) and secondly, the decision of Mr Hamill RM at Belfast Magistrates' Court on 30 June 2005 to accept jurisdiction in respect of charges preferred against the applicant under section 20 of the Offences Against the Person Act 1861 and to remand the applicant on bail to appear at Belfast Magistrates' Court. Mr Larkin QC appeared for the applicant and Mr Maguire appeared for the respondent.

The background

[2] On 18 June 2004 Detective Constable Wilkinson arrested the applicant and three other persons under Article 26 of PACE further to a report of an assault on the warden of a hostel in Donegal Street, Belfast. After interview the applicant was released on police bail to report to a police station on 30 June 2004, having been in custody for some 11 hours. On 30 June 2004 the applicant was further interviewed and again released on police bail to report to the police station on 16 July 2004. Prior to 16 July 2004 the applicant was informed through his solicitor by telephone that he was no longer required to attend at the police station on that date but should attend on 19 August 2004

for an identification parade. The telephone call was followed up by a letter from D C Wilkinson to the applicant dated 16 July 2004 confirming that he was not required to answer bail on 16 July 2004 but was required to attend the police station on 19 August 2004 for the purposes of an identification parade. The identification parade was arranged at the request of the applicant and his solicitor. The applicant attended the police station on 19 August 2004 but an identification parade did not take place on that date or on any of four later dates when the applicant attended in September and October 2004. It appears that there was no further contact between the police and the applicant.

[3] On 18 March 2005 the Public Prosecution Service directed a prosecution against the applicant for the offence of causing grievous bodily harm with intent contrary to Section 18 of the Offences against the Person Act 1861 arising of the events of 18 June 2004. Further to the direction of 18 March 2005 the PPS issued to police, for service on the applicant, committal papers in respect of the charge. The papers included a statement of complaint, a list of witnesses, copy statements of witnesses, copy list of exhibits, copy written exhibits and a notice of intention to request the Court to conduct a preliminary enquiry. In addition the police received a summons for service on the applicant returnable for 18 April 2005. Rule 11(4) of the Magistrates Courts Rules (NI) 1984 requires personal service of the summons.

[4] DC Wilkinson left the committal papers with the applicant's solicitor and attempted to serve the summons on the applicant, but without success. The applicant did not attend Belfast Magistrates' Court on 18 April 2005 and the case was adjourned to 9 May 2005. DC Wilkinson made further attempts to serve the summons on the applicant without success. DC Wilkinson then sought advice from the PPS and by letter dated 18 May 2005 the PPS advised DC Wilkinson that the applicant should be arrested and charged and it would then be possible to serve committal papers on the applicant and secure his attendance at Court.

[5] Having made enquiries with the Department of Health and Social Services DC Wilkinson obtained a further address for the applicant and on 30 June 2005, at that address, she arrested the applicant under Article 26 of PACE in relation to the incident of 18 June 2004. The applicant was taken to the police station and charged with inflicting grievous bodily harm contrary to Section 20 the Offences against the Person Act 1861.

[6] After being charged the applicant was taken to Belfast Magistrates' Court. The applicant states in his affidavit that at Belfast Magistrates' Court Mr Hamill RM received representations from the applicant's solicitor to the effect that the applicant's arrest had been unlawful as it was an attempt to circumvent the requirement for personal service of a summons issued against the applicant. However the charge was read to the applicant and DC Wilkinson gave evidence that the applicant could be connected to the charge.

There being no objection to bail the applicant was released on bail to appear at Belfast Magistrates' Court.

The applicant's grounds for judicial review.

[7] The applicant's grounds for judicial review are -

- (a) the decision of the Police Service of Northern Ireland to arrest the applicant on 30 June 2005 was unlawful in that no power exists providing for the arrest without warrant of a person in respect of whom a summons alleging an indictable offence has been issued;
- (b) the decision of the PSNI to arrest the applicant in the absence of fresh evidence was unlawful and in breach of Article 48 of PACE;
- (c) the decision of the PSNI to arrest the applicant was in breach of Section 6 of the Human Rights Act 1998 in that the arrest was in breach of the applicant's rights under Article 5 and Article 8 of the European Convention on Human Rights;
- (d) the decision of Belfast Magistrates' Court to accept jurisdiction was unlawful and in breach of Section 6 of the Human Rights Act 1998 in that the applicant had been arrested unlawfully and in breach of his rights under Article 5 and Article 8 of the European Convention;
- (e) the decision of Belfast Magistrates' Court to accept jurisdiction in the case was unlawful in that the arrest and charging of the applicant amounted to an abuse of process engaged in to circumvent the requirement of personal service of a summons alleging an arrestable offence previously issued in respect of the applicant.

Powers of arrest under Article 26 of PACE and Article 20 of the 1981 Order.

[8] Article 26 of PACE provides for the general power of a constable to arrest without warrant for an arrestable offences, and that is the power that the constable purported to exercise on 30 June 2005. The applicant contends that any arrest of the applicant ought to have been effected under Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981 and that in the circumstances it was unlawful for Article 26 to be invoked. The applicant does not dispute that, taking the arrest of 30 June 2005 in isolation, DC Wilkinson was otherwise capable of satisfying the conditions for the arrest without warrant of the applicant under Article 26 of PACE in respect of the incident of 18 June 2004. On the other hand the respondent contends that the existence of

Article 20(4) of the 1981 Order does not nullify the exercise of the power under Article 26 of PACE where it otherwise applies on the facts of a particular case. Further the respondent contends that there is nothing in the provisions of PACE to inhibit the exercise of the power of arrest under Article 26 and that the power was validly exercised.

[9] There was power to obtain a warrant to arrest the applicant by virtue of Article 20(4) of the 1981 Order, but that power was not exercised. Article 20 of the Magistrates' Courts (NI) Order 1981 provides for the issue of a summons to an accused or a warrant for his arrest.

(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.

(2) Where a justice of the peace for any county court division issues a summons under paragraph (1) directed to a person requiring him to appear before a magistrates' court for that county court division, the justice may, upon a complaint being made to him that the person in respect of whom the summons has been issued has, or is suspected of having, committed in another county court division a summary offence, issue a summons directed to that person requiring him to appear before that court to answer to the complaint.

(3) 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 an indictable offence into which a magistrates' court for that county court division has jurisdiction to conduct a preliminary investigation or a preliminary inquiry the justice may either issue a summons requiring him to appear before such magistrates' court or issue a warrant to arrest that person and bring him before such court.

(4) Where the offence charged in the complaint is an indictable offence, a warrant under this Article may be issued by a justice of the peace at any time notwithstanding that a summons has previously been issued and whether before or after the time

mentioned in such summons for the appearance of the person summoned.

(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 summoned.

(5) Where a resident magistrate is satisfied that a person suspected of having committed a summary offence cannot for any reason be served with a summons, he may issue a warrant for the arrest of that person notwithstanding that a summons has not been first issued.

Article 48(10) of PACE

[10] The applicant's grounds of Judicial Review rely on Article 48 of PACE as a basis for the arrest of the applicant being invalid. Article 48 provides for bail after arrest. A person who is released on bail shall be subject to a duty to appear before a Magistrates' Court as directed or to attend a police station as directed either on the date of the next petty sessions or a date not later than 28 days (Article 48(1) and (2)). A person released on bail subject to a duty to attend at a police station may be re-arrested without warrant "if new evidence justifying a further arrest has come to light since his release" (Article 48(10)). Accordingly if the applicant was on bail subject to a duty to attend a police station the power of arrest without a warrant was conditional on the existence of new evidence.

[11] As the argument proceeded at the hearing Counsel for the applicant accepted that the applicant was not on police bail when he was arrested on 30 June 2005. He had been granted police bail on 18 June 2004 but he was released from police bail by the letter of 16 July 2004. Notice in writing to a person on police bail may provide that attendance at the police station is not required. In the present case the applicant's subsequent attendance at the police station in relation to arrangements for an identification parade was voluntary. At the time of his arrest on 30 June 2005 the applicant was not a person released on bail subject to a duty to attend at a police station and Article 48(10) did not apply.

Article 42(7) of PACE.

[13] The respondent relies on Article 42 of PACE which provides for limits on periods of detention without charge. Subject to authorisation of continued detention by a police superintendent and warrants of further detention from a magistrate a person shall not be kept in police detention for more than 24 hours without being charged (Article 42(1)). Again subject to authorisation of continued detention or warrants for further detention a person who “at the expiry of” 24 hours in police detention has not been charged shall be released at that time either on bail or without bail (Article 42(5)).

[14] Article 42(7) provides that “a person released under paragraph (5) shall not be re-arrested without warrant for the offence for which he was previously arrested unless new evidence justifying a further arrest has come to light since his release.” The respondent contends that the form of wording indicates that a person released without charge before the expiry of 24 hours may be arrested without a warrant in the absence of new evidence. Further the respondent contends that if Article 42 applies to those released before the expiry of 24 hours there was new evidence justifying the arrest of the applicant.

[15] By way of contrast with Article 42(5) the respondent refers to Article 43 which deals with authorisation of continued detention by a police superintendent up to 36 hours. Unless he has been charged or a warrant for his further detention is obtained the detained person must be released “not later than” 36 hours. A person so released shall not be re-arrested without a warrant “unless new evidence justifying a further arrest has come to light since his release.” (Article 43(10)). Further, warrants for further detention may be obtained from a Magistrates’ Court under Article 44 and unless the detained person is charged he shall be released “upon or before the expiry of the warrant” (Article 44(17)). A person so released shall not be re-arrested without warrant “unless new evidence justifying a further arrest has come to light since his release” (Article 44(18)). The respondent contrasts the application of Article 42(7) to a person released “at the expiry of” 24 hours, with the application of Article 44 (18) to those released “upon or before” the expiry of the warrant.

[16] The applicant was not a person released under Article 42(5) on 18 June 2004 as he was not released at the expiry of 24 hours. Accordingly Article 42(7) did not apply to restrict a rearrest to cases where new evidence had come to light. Of course the power to rearrest in any circumstances must be exercised for proper purposes, a matter to which we will return in relation to the circumstances of this case. We do not propose to address without further argument the application of Article 43 to a rearrest after extension of detention by a police superintendent.

[17] The respondent contends that in any event a further arrest was justified in that there were two items of new evidence that had come to light since the applicant's release on 18 June 2004. First the respondent contends that the applicant was engaged in evasion of service of the summons and his actions in that regard amounted to new evidence justifying a further arrest. We do not accept that argument. We are satisfied that the "new evidence" must relate to the offence of which the applicant is suspected and the evasion of service of the summons is not capable of amounting to new evidence for this purpose.

[18] Secondly the respondent contends that new evidence arose from the receipt of a forensic report. The contents of the forensic report did amount to new evidence but the arrest of the applicant on 30 June 2005 was not prompted by the receipt of that new evidence. To be valid under the rearrest provisions relating to new evidence, it would have been necessary that the applicant's subsequent arrest took place because the police had obtained new evidence. It is clear that this was not the reason for his re-arrest. That arrest was for the express purpose of charging the applicant and securing his attendance at Court when it had not proved possible to serve the summons requiring his attendance at Court. For these reasons the second arrest of the applicant cannot be deemed to have taken place under the provisions relating to arrest without warrant in cases of new evidence, as provided by Article 42(7).

[19] The finding that the respondent is not entitled to rely on new evidence as a basis for the arrest of the applicant also applies to Article 48(10). If, contrary to the conclusion stated earlier, the applicant was on bail and liable to report to a police station when he was arrested on 30 June 2005, we are satisfied that the respondent is not entitled to rely on Article 48 (10), as the new evidence was not the basis of the arrest on that date.

Arrest for the purpose of charging.

[20] The respondent contends that on 30 June 2005 the Applicant was arrested for the purpose of charging. It was contended on behalf of the applicant that he had been "charged" under section 18 of the 1861 Act by the issue of the complaint and therefore that there was no power to arrest for the purpose of charging on 30 June 2005. The applicant had been released without charge further to his arrest on 18 June 2004. Further to the direction of the PPS the summons had issued further to the complaint of causing grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 requiring the applicant to appear at Belfast Magistrates' Court. The summons had not been served personally on the applicant as required by the rules. Nor had the applicant appeared at Belfast Magistrates' Court either personally or by his solicitor, nor had he accepted jurisdiction of Belfast

Magistrates' Court in respect of the complaint, nor had a charge been preferred at the Court. Neither the issue of the complaint nor the issue of the summons amounted to the charging of the applicant. The applicant had not been charged with an offence arising from the incident of 18 March 2004 prior to his arrest on 30 June 2005.

Arrest under Article 26.

[21] Arrest under Article 26 of PACE may be for the purpose of investigation and/or charging. The Custody Record states that the detention of the applicant was authorised by the Custody Officer for the purpose of charging. The applicant was then processed and charged and appeared before the Resident Magistrate. We are satisfied that the applicant was arrested for the purpose of charging and was so charged on the day of his arrest on 30 June 2005.

[22] At the time of the applicant's arrest for the purpose of charging he was not on bail arising out of his first arrest. He had not at that time been charged as a result of the first arrest. He had not at that time been served with a summons in respect of the complaint. The first arrest on 18 June 2004 had been in respect of the same events and the circumstances still applied to justify an arrest on 30 June 2005 in respect of those events. We have not been referred to nor have we identified any authority that would prohibit a rearrest where the circumstances otherwise permitted arrest and any statutory restrictions on arrest and rearrest did not apply.

[23] Further we are satisfied that in the present case a warrant could have been issued for the arrest of the applicant under Article 20(4) of the 1981 Order. Upon a complaint being made of an indictable offence a Justice of the Peace may either issue a summons requiring the appearance of the defendant before a Magistrates' Court or issue a warrant to arrest that defendant and bring him before a Magistrates' Court. Article 20(4) provides that with an indictable offence a warrant may be issued at any time notwithstanding that a summons has previously been issued. The existence of the power to obtain such a warrant does not nullify the existence of the power of arrest under Article 26 of PACE. We have not been referred to any circumstance that would amount to an inhibition on the application of Article 26 in the present case.

[24] Of course the exercise of the power of arrest under Article 26 must be for proper purposes. In the present case it was exercised for the proper purpose of charging the applicant who had not previously been charged.

Proceedings before the Magistrates' Court.

[25] The applicant further challenges the decision of the Resident Magistrate to accept jurisdiction, first of all because it is contended that the arrest was unlawful for the reasons discussed above and secondly because of alleged abuse of process in circumventing the requirement for personal service of the summons. The first matter is disposed of by the finding above that the arrest of the applicant was not unlawful. As to the alleged avoidance of the requirement for personal service, that was a matter raised before the RM. In McAuley's Application [2004] NI 298 the Divisional Court considered the duty of the Resident Magistrate. Kerr LCJ at p. 307c stated -

“The magistrates' court is therefore empowered to - and should, where required to - examine whether there is a reasonable suspicion grounding the arrest of the detained person; whether there is a proper basis for charging him with the offence on which his remand is sought; and whether there has been procedural due process. Since the defendant must be brought before the magistrates' court and the magistrates' court must, where necessary, examine fully the basis for the arrest and detention of the accused person and since an application for bail pending trial may be made at any time and will be dealt with promptly, we do not consider that there has been any breach of art 5(3) of the convention.”

[26] The applicant's affidavit states that when he appeared before the RM on 30 June 2005 representations were made by his solicitor and the point was made that the arrest of the applicant was unlawful as an attempt to circumvent the requirement for personal service of the summons. The affidavit continues that nonetheless the RM permitted the charge to be read. There is no evidence that the RM did not consider the representations made by the applicant's solicitor. Clearly he rejected the representations made on behalf of the applicant. In the light of the finding above that, in the circumstances, DC Wilkinson was entitled to arrest the applicant under Article 26 of PACE, we are satisfied that the RM was entitled to accept jurisdiction in the case against the applicant.

[27] Accordingly we are not satisfied that any of the applicant's grounds has been established and the application for Judicial Review is dismissed.