Neutral Citation no. [2007] NIQB 3 | *Ref:* **KERF5717**

Judgment: approved by the Court for handing down | *Delivered:* **12/01/07**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS FOR JUDICIAL REVIEW

Before Kerr LCJ and Weatherup J

KERR LCJ

Introduction

[1] This is an application by the Director of Public Prosecutions for judicial review of the decision of Kenneth Nixon, a resident magistrate sitting at Belfast Magistrates' Court on 29 March 2006, refusing an application made by the prosecution that the case against one Jonathan le Mahieu be adjourned.

The background facts

[2] The defendant, Mr le Mahieu was arrested on 9 December 2004 in a flat at 14 Parkville Court, Belfast on a charge of having burgled the premises. He subsequently appeared on that charge at Belfast Magistrates' Court. The case was adjourned on a number of occasions while the prosecution papers were prepared. On several of these occasions the defendant failed to appear and on 17 February 2005 a bench warrant was issued for his arrest. He was later released on bail and again failed to appear and a second bench warrant had to be issued on 1 September 2005. He was again released on bail and again failed to appear in court on three further occasions. Eventually, however, the case was fixed for hearing on 29 March 2006.

[3] The prosecution case against the defendant was that late on the evening of 9 December 2004 he broke a window at the rear of 14 Parkville Court and thereby gained entry. When police were called to the scene they tried to gain admittance by knocking repeatedly on the front door. Although a male person (subsequently found to be the defendant) could be observed

within the premises, he did not answer the knocking at the door. When police finally gained admittance they discovered him hiding in a walk-in cupboard in the flat.

[4] One of the witnesses asked to attend on the date scheduled for the hearing of the case was Bernadette McGurk. She is the sister of Malachy Heatley who lived at the flat. He was in hospital on 9 December 2004. Mrs McGurk was due to give evidence that the defendant did not have permission to enter the premises or to take anything from them. It appears that the defendant's defence was to be that he had been given permission by Mr Heatley to enter the flat and to stay there for the night.

[5] On the morning of 29 March 2006, the prosecutor, Mr Paul Matier, arrived in court at 10.15am. When he failed to locate Mrs McGurk, he asked a police witness to find her. The case was passed at Mr Matier's request at 11am and again at 11.40am. There were other cases to be dealt with and Mr Matier simply indicated to the magistrate that the prosecution was waiting for a witness to arrive. At 11.45am the police officer whom Mr Matier had asked to locate Mrs McGurk informed him that she could not be found although her name had been paged on several occasions over the tannoy system that is in Laganside Courts where the trial was due to take place. The officer also told Mr Matier that police had gone to Mrs McGurk's home but had found no-one there. As it happens Mrs McGurk had been in a waiting room in the building since 9.30am but this was not discovered until much later.

[6] At 12.15pm the case was called for hearing. Mr Matier told the magistrate that he had to ask for an adjournment because a vital witness had not attended. According to Mr Matier the magistrate asked why the witness was not present and what was the explanation for her non-attendance. He replied that he was unable to explain why she was not present. The magistrate then said that he would not adjourn the case and asked whether the prosecutor intended to call witnesses. Mr Matier responded that he would not as an essential proof was missing whereupon the magistrate dismissed the charge against the defendant. In Mr Matier's estimation this exchange lasted no more than two minutes.

[7] In an affidavit filed in the proceedings Mr Nixon averred that he was unaware of the contents of the police statements because the charge was to be contested and these had not been agreed by the defence. He had therefore refrained from looking at them. The only document that he had seen was the charge sheet. Although he had presided on a number of remand hearings of the defendant before 29 March 2006, he had no recollection of any of these. He was not informed by the prosecutor of the history of the hearings and in particular of the failure of the defendant to attend for a number of these. Mr Nixon was unable to recollect whether he had been told that the prosecution was waiting for a witness to attend but remembered an application being

made to adjourn the hearing. He recalled asking for the reasons for the application and being told that an essential witness for the prosecution was not present. He remembered hearing a brief outline of the case and being informed that the issues were whether the defendant had entered the premises as a burglar and whether he had an intention to steal. He asked for an explanation of the witness's absence and was told that there was no explanation. He had not been told of Mrs McGurk having signed a form indicating her willingness to attend court nor was he given any information about efforts made to locate her. He asked the defendant's solicitor what his attitude to the application was and was informed that it was opposed. The magistrate refused the application and invited Mr Matier to call any evidence he wished. The prosecutor declined to call evidence; the defendant's solicitor applied for a dismissal of the charge and Mr Nixon duly dismissed it. He believed that the exchange would have lasted approximately four or five minutes.

The judicial review application

[8] The principal ground of challenge was that the magistrate ought to have carried out a proper inquiry into the need for an adjournment and the effect that the refusal of an adjournment would have had on the viability of the prosecution. If he had done so, it would have become clear (said Mr Maguire QC for the Director) that the prosecution could not proceed. It was clearly in the interests of justice that an opportunity be given to the prosecution to obtain the attendance of Mrs McGurk and the magistrate should have allowed the matter to be adjourned so that the reasons for her absence could be ascertained.

[9] For the magistrate Mr G A Simpson QC submitted that a decision whether to adjourn lay within the discretion of the magistrate and that this court should only interfere with the exercise of that discretion where there were very clear grounds for doing so. Where an adjournment was sought by the prosecution, the magistrate must consider both the interest of the defendant in getting the matter dealt with and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. Mr Simpson accepted that the magistrate should take appropriate account of the history of the case, and whether there have been earlier adjournments; at whose request they had been made and the reasons for them but he pointed out that prosecuting counsel had failed to inform the court of the true factual position and all relevant background matters, when making his application for an adjournment.

The relevant authorities

[10] In *Attorney General's reference (No 3 of 1999)* [2001] 2 AC 91, 118, in what has become a well known passage, Lord Steyn described the various interests at stake in criminal proceedings as follows: -

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

[11] All judges and magistrates need to keep this range of interests closely in mind whatever may be the decision as to the disposal of proceedings that they are called on to make. A conclusion, for instance, whether to accede to an application for an adjournment or whether to dismiss charges because of the absence of witnesses cannot properly be reached unless each of these interests (insofar as it may impinge on the decision) is taken into account and accorded appropriate weight.

[12] In *R v Enfield Magistrates' Court ex parte DPP* 153 JP 415, the Divisional Court in England and Wales (Parker LJ and Henry J) held that it was a breach of the rules of natural justice for justices to refuse an application by the prosecutor for an adjournment to enable his witnesses to attend the trial in circumstances where through no fault of their own the prosecution were unable to present their case. In that case the defendant, having agreed to be tried summarily, at first pleaded guilty but then, having taken advice on the suggestion of the justices, changed her plea. The prosecutor applied for an adjournment to enable his witnesses to attend. The application was refused and the justices dismissed the case.

[13] It is unsurprising that this decision was quashed for it cannot be right to refuse an application for an adjournment where there has been no fault on the part of the prosecuting authorities for the absence of witnesses and no compelling reason that the matter should not be adjourned. The case is significant in the present context principally because of its recognition that the question of the fault (or the lack of it) on the part of the prosecution in bringing about the state of affairs that a necessary witness is absent is plainly germane to the question whether an adjournment should be granted. In the present case, the resident magistrate had no basis on which he might reasonably have concluded that the prosecution was to blame for the absence of the witness.

[14] In *R v Birmingham Justices ex parte Lamb* [1983] 3 All ER 23, the Divisional Court (McNeill and Wolff JJ) stated that the discretion whether to adjourn cases must be exercised judicially. In deciding whether to accede to an application to adjourn made by the prosecution the magistrates were bound to take account of the interests of not only the defendant but also the prosecuting authorities.

[15] In *R v Neath and Port Talbot Justices ex parte DPP* [2000] 1 WLR 1376, the defendant was charged with indecently assaulting a neighbour at her home in the early hours of the morning of 27 June 1998. His defence was that he had been so drunk that he had entered the wrong house and mistaken his neighbour for his girlfriend. On 28 September 1998, the day fixed for the defendant's summary trial, the complainant was not present at court. The defendant's solicitor suggested that she had been aware of the hearing date and that she was absent because she did not wish to proceed with the case. The justices refused the prosecution's application for an adjournment. The prosecution offered no evidence and the case was dismissed. In fact the complainant had informed the police that she wished to proceed with the case but that on the hearing date she would be away on holiday. The Divisional Court (Simon Brown LJ and Blofeld J) held that the justices should not have relied on the assertion of the solicitor for the defence that the complainant did not wish to proceed and that they should have acceded to the application to adjourn.

[16] In *R v Portsmouth Crown Court ex parte DPP* [2003] EWHC 1079 Scott Baker LJ reviewed a number of authorities relating to prosecution mishaps which led to charges being dismissed. He referred in particular to the statement of Mann LJ in *R v Hendon Justices ex parte DPP* [1967] 1 QB 167 at 174C, where he said: -

> "… the duty of the court is to hear informations which are properly before it. The prosecution has a right to be heard and there is a public interest that, save in exceptional circumstances, it should be heard."

Conclusions

[17] In any case where the prosecution applies for an adjournment, it is the duty of the judge or magistrate to ensure that he or she has been sufficiently appraised of all relevant matters before reaching his decision. He or she is, of course, entitled to expect that the prosecutor will put such matters before him or her in a lucid and comprehensive fashion but he or she cannot be relieved of their obligation to obtain all material information by the default of the prosecutor.

[18] Having ensured that all relevant information is available to him, the magistrate must take into account the interests that are at stake in deciding whether to accede to an application to adjourn and have regard to the probable consequences of a refusal of such application.

[19] In the present case the magistrate made no inquiry of the prosecutor as to whether the witness had indicated a willingness to attend to give evidence. He asked merely whether there was an explanation for her failure to attend. He made no inquiry as to the steps taken by the police to ascertain Mrs McGurk's whereabouts. He did not ask if the defendant had contributed to adjournments in the past nor whether a short adjournment would have allowed the matter to proceed without substantial delay. He does not appear to have addressed the question whether the prosecution was in any way responsible for the non-attendance of the witness.

[20] One may take the view that the prosecutor should have volunteered this information to the magistrate but, as we have said, the failure of the prosecution to bring relevant material to the magistrate's attention cannot excuse an omission to seek it. All of the factors outlined in the preceding paragraph were plainly relevant to the decision whether to adjourn the prosecution. The magistrate's failure to make appropriate inquiry about these matters led inevitably to his not having all relevant material necessary for him to reach a proper conclusion on the application for an adjournment. We are confident that, if he had obtained that information, he would have acceded to the application.

[21] We therefore quashed the decision to refuse the adjournment and the dismissal of the charge that flowed inexorably from it and ordered that the matter proceed to trial before a different magistrate.