

Neutral Citation no. [2002] NICA 47

Ref: CARC3794

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

Delivered: 15/11/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

MARK ANTHONY McCREA

Appellant

and

CHIEF INSPECTOR FB NOLAN

Respondent

CARSWELL LCJ

[1] This is an appeal by way of case stated from a decision given by His Honour Judge Foote QC on 26 September 2001 in Strabane County Court in the Division of Fermanagh and Tyrone on an appeal brought by the appellant against an order made on 23 February 2001 in Strabane Magistrates' Court. By that order the appellant, a witness in a prosecution for assault brought against three other persons, was bound over in the sum of £200.00 to keep the peace and be of good behaviour for a period of 18 months. He appealed to the county court, but the judge affirmed the resident magistrate's order. The complainant in the magistrates' court has been joined as respondent in order to provide a *legitimus contradictor*, in accordance with the procedure suggested by the Divisional Court in *Re Hughes' Application* [1986] NI 13.

[2] The following facts were found by the judge:

“(a) The Appellant had made various allegations of assault against the defendants on diverse dates in August 2000. All allegations of assault were admitted at interview, however the matter had proceeded as a contest and the defendants had made the case that they had been provoked verbally by the injured party,

Mark Anthony McCrea, the present Appellant. The Appellant was summonsed and called as a police prosecution witness and gave evidence when called.

- (b) On hearing the contest on 23rd February 2001 the Resident Magistrate convicted the three defendants and ordered each of them to be bound over to keep the peace in the sum of £100 for a period of 12 months.
- (c) In giving judgement however the Resident Magistrate ordered that the injured party, the present Appellant, Mark Anthony McCrea be bound over in the sum of £200 for 18 months for 'provoking trouble' with regard to the defendants. The conditions of the recognisance ordered to be entered into were that he was to keep the peace, he was not to approach the defendants, he was not to speak to them and he was not to make any reference to the defendants' father 'being a murderer'.
- (d) During his hearing of the evidence of the injured party, the Resident Magistrate did not advise him that he might be incriminating himself, nor in disposing of the case was he offered the possibility of legal advice.
- (e) The Resident Magistrate indicated at the close of hearing that he intended to require the Appellant to enter into a recognisance to be bound over and asked whether he consent or not. The Appellant so consented.
- (f) Police were of the view that the binding over orders had had the desired effect and that the situation between the relevant parties had calmed down considerably since the making of the orders, with no further incidents of note."

[3] The power of a magistrates' court to bind over persons is contained in Article 127 of the Magistrates' Courts (Northern Ireland) Order 1981, which provides:

"127.-(1) Subject to this Article, a magistrates' court may order a person to enter into a recognizance to keep the peace or to be of good behaviour or to keep the peace and be of good behaviour -

(a) upon a complaint that such person should be called upon to show cause why he should not be ordered to be so bound; or

(b) upon convicting a person of an offence and in lieu of or in addition to any sentence which the court may lawfully impose; or

(c) in the case of a person present before such court without any formal application to the court to make such order.

(2) The period during which a person may be ordered to be bound by a recognizance under paragraph (1) shall not exceed two years.

(3) A complaint under paragraph (1)(a) may be laid before a justice of the peace where the person against whom the complaint is made resides or is found or is believed to be within the jurisdiction of such justice or where the conduct to which the complaint relates has occurred or is expected to occur within that jurisdiction.

(4) Subject to paragraph (3), a summons to the person against whom such complaint is made or a warrant for his arrest (whether in the first instance or in default of appearance) may in all respects be issued as if the complaint were one alleging the commission of a summary offence.

(5) Without prejudice to Article 18(4) -

(a) proceedings upon the hearing of a complaint under this Article shall be conducted, and

(b) the person against whom the complaint is made and such witnesses as he may call may give evidence and be cross-examined,

in the same manner as in proceedings for a summary offence and the court may remand such person, whether in custody or on bail, for the same period and subject to the same conditions as in such last-mentioned proceedings.

(6) Any order against such person for the payment of costs made in proceedings under this Article shall be enforceable in the same manner as an order for the payment of a sum adjudged to be paid by a conviction of a magistrates' court.

(7) If any person ordered to enter into a recognizance by a magistrates' court under this Article fails to comply with the order, the court may commit him to prison for a period not exceeding six months or until he complies with the order, whichever is the shorter.

(8) Nothing in this Article shall derogate from the provisions of section 76(2) of the Children and Young Persons Act (Northern Ireland) 1968 or section 7(1) of the Probation Act (Northern Ireland) 1950 or any other enactment authorising a magistrates' court to require a person to give security for good behaviour or for keeping the peace."

[4] It was contended before the judge on appeal that the resident magistrate's order constituted a breach of Article 6 of the European Convention on Human Rights and was in consequence an unlawful act by a public authority within the meaning of the Human Rights Act 1998. Counsel for the appellant on appeal before us based his argument on two grounds. He argued first that in binding the appellant over the magistrate had failed to observe the proper principles laid down in *Re Hughes' Application* [1986] NI 13. He then sought to adduce an argument similar to that advanced to the county court judge. For the reasons which will appear we did not find it necessary to hear argument on the second issue or to base our decision on it.

[5] The judge ruled against the appellant, for the reasons which he set out in paragraph 6 of the case stated:

“I was of the opinion that the making of the order was certainly an exercise of a valid statutory power under Article 127(1)(c) and that the Resident Magistrate had exercised his discretion appropriately. I was of the opinion further that in my experience these powers are generally used conservatively, even-handedly and proportionately by Resident Magistrates and I placed reliance on the fact that the Appellant had consented to being bound over. I did not consider that the exercise of the power constituted a determination of a criminal charge in which the Appellant’s rights to a fair trial had been breached and I accordingly dismissed the appeal with no order as to costs.”

[6] The questions posed in the case stated were the following:

“1. Was the court correct in law in holding that the hearing in the lower court and the order of the Resident Magistrate in the court below was not unlawful and in breach of Article 6 of the European Convention on Human Rights and Section 6 of the Human Rights Act 1998 by virtue of the fact that the hearing before the Resident Magistrate offended the requirement that a defendant to a ‘criminal charge’ was to have the charge determined by an independent, impartial tribunal, and/or in the alternative by virtue of the fact that the hearing before the Resident Magistrate did not respect the Defendant’s right to silence as was contended by the Appellant.

2. Was the court correct in law, in all the circumstances in affirming the order of the lower court on the grounds that the hearing of the lower court and the order of the Resident Magistrate were not unlawful and were not in breach of Article 6 of the European Convention on Human Rights and Section 6 of the Human Rights Act 1998.”

[7] In *Re Hughes’ Application* the Divisional Court examined the procedure which should be followed by a court which is considering binding over a witness who has given evidence in proceedings before it, a robust form of

preventive justice which can be of useful service if correctly applied. In its judgment the court pointed to the necessity, both in principle as a matter of elementary justice and supported by authority, that before a witness is bound over the court should inform him what it has in mind to do and give him an opportunity to deal with the proposal. It said in the course of the judgment at pages 19-20:

“We consider that the requirement to inform the person to be bound over what the court has in mind connotes giving him such explanation as is reasonably necessary for him to understand what it proposes to do and how it will effect him. The appropriate analogy might be the requirement contained in section 18(3) of the Treatment of Offenders Act (Northern Ireland) 1968, relating to the imposition of a suspended sentence, that his liability shall be explained to the offender ‘in ordinary language’.”

[8] The conclusion reached by the Divisional Court, which commended itself to this court in the present appeal, was set out at pages 20-21 of the judgment:

“We are reluctant to attempt to lay down comprehensive rules for magistrates to follow in such cases. We think it better to state the principles to be applied, and to leave it to the courts to deal with the multifarious situations which may arise, applying their experience and good sense in the interests of fairness. In our view a court contemplating binding over a witness or complainant should give him an opportunity of dealing with the proposal in such manner as confers on him a just measure of protection of his interests. It has to be borne in mind that we are dealing now with the standard which has to be observed in order to satisfy the requirements of natural justice. We consider that we cannot and should not attempt to be more specific or to lay down a code of practice for magistrates to follow.

In some cases it may be desirable that the person should have the opportunity of obtaining legal representation and should be offered legal aid. The practice described by the resident magistrate in this case as being his customary practice may

well be a wise and sensible one for many, or even most, cases of this type, when one bears in mind that, as Stephen Brown LJ said in *R v Crown Court at Swindon, ex parte Pawittar Singh* [1984] 1 All ER 941, 943c, it is a serious step to take [to] bind over a witness, and certainly rare in the graver types of offence. We do not, however, wish to lay down that practice as a hard and fast requirement of natural justice which must be followed in every case. The court is obliged to give the person who is to be bound over an opportunity to deal with the proposal by expressing his own reasons why he should not be bound over. If it appears to the court when considering the matter that legal representation or the opportunity of legal aid may be need in order to enable him effectively to present those reasons, then it will be right for the court to offer him such assistance.”

[9] On the facts found in the case stated in the present appeal the resident magistrate did no more than ask the appellant if he consented to be bound over, which was an essential prerequisite: see the Law Commission’s Report No 222, *Binding Over*, paragraph 4.50. When the appellant received no further explanation of the procedure or the consequences, and was given no opportunity to make representations to the court, we could not accept that he gave his consent freely and genuinely. We regard the procedure adopted as having been deficient and consider that the appellant would have been entitled to obtain an order on judicial review setting aside the binding over order, as in *Re Hughes’ Application*.

[10] It was submitted on behalf of the respondent, however, that any defects in the procedure before the magistrates’ court had been cured when the appellant brought an appeal to the county court. He then had sufficient information about the procedure and a full opportunity to make representations and seek to persuade the court that he should not have been bound over. The difficulty in the way of accepting this proposition is that the county court judge rejected the submission based on the Convention but did not go into the substance of the appeal. He did not receive any evidence or consider whether in the circumstances of the case before him the appellant should or should not have been bound over. In our opinion it cannot be said that he had sufficient material on which to hold that the resident magistrate had exercised his discretion appropriately. We accordingly consider that the procedural defects were not cured by the appeal.

[11] We therefore shall allow the appeal on the ground that the requirements of domestic law relating to binding over have not been

complied with. We would not regard it as an appropriate case to remit to the county court judge for further consideration and shall set aside the order binding the appellant over. The appellant presented in his skeleton argument a substantial argument to the effect that the proceedings in the courts below were in breach of the appellant's rights conferred by Article 6 of the Convention, an argument which was adumbrated in paragraphs 5.16 to 5.18 of the Law Commission's Report No 222. It may be necessary at some time for the court to consider the possible impact of Article 6 on the binding over of witnesses, but it is not necessary in the present case and we are not to be taken to express any opinion on the issue.

[12] We do not propose to answer the first question posed in the case stated. We shall answer the second question in part, in the following terms:

"2. The court was not correct in law in holding that the resident magistrate in the circumstances of the case exercised lawfully the power of binding over a witness contained in Article 127(1)(c) of the Magistrates' Courts (Northern Ireland) Order 1981".