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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES' COURT'S (NORTHERN IRELAND) ORDER 1981

Between

EUGENE MARTIN O'BOYLE

Appellant/Defendant

and

THE PUBLIC PROSECUTION SERVICE

Respondent/Complainant

Before Higgins LJ, Girvan LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by way of case stated by District Judge Alcorn in respect of a decision taken by the learned District Judge in respect of a preliminary issue raised at Antrim Magistrates' Court on 4 December 2012. On 13 September 2013 the learned District Judge stated the following question of law for the opinion of this court:

> "Was I correct in law to refuse an application for a ruling that the amendment of the Magistrates' Courts (Northern Ireland) Order 1981 effected by paragraph 11(*b*) of Schedule 5 to the Criminal Justice (Northern Ireland) Order 1996 (by which it was provided that the indictable offence of common assault was triable summarily with the consent of the accused) is unlawful being *inter alia* incompatible with the rights of the accused under Article 7 ECHR?"

[2] Mr Donal Sayers conducted the appeal on behalf the appellant while the Public Prosecution Service ("the respondent") was represented by Mr Ciaran Murphy QC and Mr Robin Steer. The court is indebted to both sets of counsel for their carefully constructed skeleton arguments and their helpful oral submissions.

The Background Facts

[3] On 28 August 2012 the appellant appeared before Antrim Magistrates' Court to answer three charges grounded upon offences alleged to have occurred on 4 August 2012 which may be summarised as follows:

(i) Possession of an offensive weapon in a public place, namely a knife, contrary to Article 22(1) of the Public Order (Northern Ireland) Order 1987 ("the 1987 Order").

(ii) Assault on a Lorna Boyd, contrary to Section 42 of the Offences against the Person Act 1861 ("the 1861 Act").

(iii) Assault on a Maria Lavery, contrary to Section 42 of the 1861 Act.

[4] On the same date, 28 August 2012, the respondent preferred a fourth charge against the appellant, namely, that on 4 August 2012 the appellant had assaulted Lorna Boyd, contrary to Section 47 of the 1861 Act. When this further charge was preferred the respondent applied for and was granted leave to withdraw the charge of assault contrary to Section 42 of the 1861 Act in respect of Lorna Boyd. The appellant did not oppose the application by the respondent to substitute the charges and, in due course, he received and signed a written waiver in respect of a notice under Article 45 of the Magistrates' Courts Order (Northern Ireland) 1981 ("the 1981 Order"). The Section 47 assault charge was laid by the respondent to cover the aggravating feature alleged to have been constituted by the respondent's use of the knife in relation to the alleged assault on Lorna Boyd.

[5] On 9 October 2012, by way of preliminary issue, the appellant challenged the legality of the charge of assault contrary to Section 47 of the 1861 Act upon the ground that, as a consequence of the amendment of the 1981 Act by Schedule 5 to the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order") the charges contrary to Section 42 and Section 47 of the 1861 Act were both summary offences consisting of the same essential legal elements but that each carried a different penalty. The appellant argued that such an outcome was inconsistent with the requirement of Article 7 ECHR that law should be clear and accessible in accordance

with the decision in Kokkinakis v Greece [1994] 17 EHRR 397. In such circumstances, in reliance upon Section 4(5) of the Human Rights Act 1998 ("the 1998 Act"), the appellant sought a declaration of incompatibility.

The District Judge's Decision

[6] The decision of the learned District Judge (MC) has been helpfully set out in paragraphs 14-16 of the case stated in the following terms:

> "[14] I ruled that, by virtue of Section 4(5) of the Human Rights Act 1998, the Magistrates' Court did not have any power to declare any statutory provision incompatible with the Human Rights Act.
>
> [15] I said that as I read the 1996 Order it, by virtue of Article 58(1) and Schedule 5 thereof, amended the 1981 Order by inserting into Schedule 2 of the 1981 Order '(indictable offences triable summarily upon consent of the accused)' a new sub-hyphen paragraph in the following terms:
>
> - '(via) Section 47 (assault occasioning actual bodily harm and common assault).'
>
> The effect of this new provision was to enable either of the offences specified in Section 47 of the 1861 Act to be tried summarily upon the consent of the accused. I considered this to be a procedural provision which was to the benefit of an accused person who was thereby given the option of electing for summary trial in the Magistrates' Court if he chose to do so. The accused did not have to elect if he did not want to. It seemed to me that the amendment extended the rights of an accused person beyond the rights of which an accused had hitherto to the amendment being made.
>
> [16] I could not see any possible reason to conclude that the 1996 Order, and the relevant part of it in particular, was incompatible with the rights of an accused under Article 7 of the European Convention on Human Rights and accordingly I declined to so rule."

The relevant legislative history

[7] In England and Wales, prior to 1828, common assaults were common law offences triable only on indictment but a change was affected by Section 27 of the Offences against the Person Act 1828 which provided:

> "And Whereas it is expedient that a summary Power of Punishing Persons for Common Assaults and Batteries should be provided under the Limitations hereinafter mentioned; Be it therefore enacted, That where any Person shall unlawfully assault or beat any other person …"

In Ireland, the same position applied and a similar provision was enacted in the same terms by Section 36 of the Offences Against the Person (Ireland) Act 1829 10 GEO 4c.34 ("the 1829 Act"). The side note to that section referred to "Summary Punishment for Common Assaults".

[8] Section 42 of the 1861 Act, as substituted by Section 23 of the Criminal Justice Act (Northern Ireland) 1953 in respect of penalty, provided for the summary prosecution of common assault. Section 51 of the Justice Act (Northern Ireland) 2011 increased the term of imprisonment from 3 months to 6 months. As amended Section 42 of the 1861 Act provides:

> "Any person who unlawfully assaults or beats any other person shall be guilty of an offence under this section and shall, upon complaint by or on behalf of the party aggrieved or by a police officer or constable, be liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 3 in addition to any costs which the court may order him to pay."

The side note to Section 42 as originally drafted provided that:

> "Persons committing any Common Assault or Battery may be imprisoned or compelled by Two Magistrates to pay Fine and Costs not exceeding £5."

[9] Under the heading "These provisions not to apply in certain cases" Section 46 of the 1861 as currently enacted states that if justices are of the opinion that a matter should be tried by indictment they shall abstain from adjudication stating in terms:

> "Provided that in case the justices shall be of opinion that the same is, from any circumstances, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereon, and shall deal with the case in all

respects in the same manner as if they had no authority finally to hear and determine the same:

Provided also, that nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein, or accruing therefrom, or as to any bankruptcy or insolvency or any execution under the process of any court of justice."

[10] Section 47 of the 1861 Act as presently enacted deals with conviction on indictment for offences of assault occasioning actual bodily harm and common assault in the following terms:

> "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to imprisonment for a term not exceeding 7 years or to be fined or both; and whosoever shall be convicted upon indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years or to be fined or both."

[11] Article 45(1) of the 1981 Order provides that:

> "Where –
>
> (a) an adult is charged before a resident magistrate (whether sitting as a court of summary jurisdiction or out of Petty Sessions under Article 18(2)) with an indictable offence specified in Schedule 2; and
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> (b) the magistrate, at any time, having regard to –
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> (i) any statement or representation made in the presence of the accused by or on behalf of the prosecution or the accused;
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> (ii) the nature of the offence;
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> (iii) the absence of circumstances which would render the offence one of a serious character; and

(iv) all the other circumstances of the case (including the adequacy of the punishment which the court has power to impose);

thinks it expedient to deal summarily with the charge; and

(c) the accused, subject to paragraph (2) having been given at least 24 hours notice in writing of his right to be tried by a jury, consents to be dealt with summarily;

the magistrate may, subject to the provisions of this Article and Article 46, deal summarily with the charge and convict and sentence the accused whether upon the charge being read to him he pleads guilty or not guilty to the charge."

[12] Schedule 2 to the 1981 Order provided for certain indictable offences to be tried summarily upon consent of the accused and specified at paragraph 1 "Offences under Sections 20, 27 or 47 of the Offences against the Person Act 1861". Article 58(1) and paragraph 11(b) of Schedule 5 to the Criminal Justice (Northern Ireland) Order 1996 made the following amendment to Schedule 2:

"11. In Schedule 2 (Indictable offences which may be dealt with summarily upon consent of the accused) –

(a) …;

(b) in paragraph 5 (offences under the Offences against the Person Act 1861) after sub-paragraph (a)(vi) insert –

"(via) Section 47 (assault occasioning actual bodily harm and common assault);"

[13] Article 7 of the European Convention on Human Rights ("ECHR") provides:

"No punishment without law

1. No-one shall be held guilty of any criminal offence on account of act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

> 2. This article shall not prejudice the trial and punishment of any person for any act or omission, which, at the time when it was committed, was criminal according to the general principles of law recognised by several nations."

The Submissions of the Parties

[14] On behalf of the appellant Mr Sayers argued that Section 42 of the 1861 Act, as substituted by Section 23(1) of the Criminal Justice Act 1953, constituted a statutory summary offence and also an indictable offence contrary to Common Law with sentence prescribed by Section 47 of the 1861 Act. He further submitted that both the summary and indictable offences covered cases of technical assault and battery having an identical *actus reus* and *mens rea*. However, he further submitted that since the Section 42 offence carried a maximum penalty of 6 months' imprisonment and/or a level 3 fine while the indictable offence contrary to Section 47, tried summarily, carried a maximum penalty of 12 months' imprisonment and/or a fine there was a breach of the requirement embodied by Article 7 ECHR that law should be clear, accessible and foreseeable.

[15] By way of response Mr Murphy submitted that the offence of common assault was originally triable only on indictment and that Section 42 of the 1861 Act did not create a new, separate statutory offence but simply continued a procedural power allowing less serious common assaults to be triable summarily.

Authorities

[16] In R v Harrow Justices ex parte Osaseri [1985] 1 QB 589 May LJ, who delivered the leading judgment, confirmed that, prior to 1828, all common assaults were triable only on indictment and that Section 27 of the Act of 1828 did not create a new offence but merely prescribed a procedure by which some, though not very serious, assaults could be tried summarily. He considered that Section 42 of the Act of 1861 clearly re-enacted Section 27 of the Act of 1828, with limited amendments, and that, as such, as a matter of construction, it was a procedural section and did not create any new or separate offence. He expressed that view at p 597G:

> "In 1861 common assault was in general still triable only on indictment; as in 1828, Section 42 of the Act of 1861 enabled summary trial of some common assaults in some circumstances."

After a consideration of the phraseology of Lord Diplock in R v Courtie [1984] A.C.463 May LJ went on to express the opinion that Section 47 of the 1861 Act had made statutory and prescribed a penalty for the previously existing common law

offence of common assault. The reasoning of May LJ was subsequently followed by Mann LJ in DPP v Taylor and Little [1991] 1 QB 645.

[17] The approach based upon the existence of one common law offence of assault that may be tried summarily or, alternatively, on indictment, depending upon the circumstances of the particular case, has also found favour in Ireland – see The State (at the Prosecution of Dermott Clancy) v Hubert C Wine [1980] IR 228.

Discussion

[18] In our view the historical background clearly supports the existence of a single common law offence of common assault originally triable only on indictment in respect of which the potential factual spectrum was so wide that Parliament recognised that, in some cases, a summary procedure would be more appropriate. The original limitation of the summary procedure to complaints by the "Party aggrieved" is quite consistent with a desire not to burden trials on indictment with relatively minor assaults.

[19] We consider that such an approach is also consistent with logic. If Section 42 of the 1861 Act had created a statutory summary offence there would have been no need to provide in Section 46 for circumstances in which the justices should abstain from any adjudication if they considered the offence to be a fit subject for a prosecution on indictment. Such an option would simply not have arisen. The intention was to permit less serious charges to be tried summarily subject to judicial supervision. Similar supervision was provided for in order to enable indictable common assaults to be tried summarily, subject to the consent of the accused. Ultimately, the accused in this case faced two charges of common assault, one of which was significantly more serious than the other insofar as it involved the use of a knife. Consequently, that offence had the potential to attract a more substantial sentence. The background circumstances to the two offences were linked. The effect of proceeding summarily in accordance with Section 42 of the 1861 Act and, with the consent of the accused, dealing with the second offence at the same time and venue was very much in favour of the accused. In our view that procedural approach, including the consequent powers of sentencing, was fully and clearly set out in the relevant legislation, understood by all parties and their representatives and did not in any respect infringe the provisions of Article 7.

[20] Accordingly, we propose to answer the question raised in the case stated:
"Yes."