

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

Delivered:	6/6/08
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

Applicant;

-v-

EMMA LOUISE JAMISON

Respondent.

CAMPBELL LJ

[1] On 15 May 2008 the court dismissed an application by the prosecution under article 16(4) of the Criminal Justice (Northern Ireland) Order 2004 for leave to appeal in respect of a ruling by the judge in proceedings on indictment against the respondent, on the ground that it did not have jurisdiction. We now give the reasons for this decision.

The Background facts

[2] On 1 October 2007 the respondent, who is a police officer, appeared before the Crown Court sitting in Antrim charged with the following offences;

(i) perverting the course of justice, contrary to common law, namely falsifying the date on a Statement of Witness Form 55/9 to the intent that another would believe that Dean Freeman had produced his driving documents to Coleraine Police Station within the requisite period of seven days from the date of issue of a Fixed Penalty Notice which was issued on 19th November, 2005;

(ii) misconduct in public office, contrary to common law, namely that on a date unknown between 18th November, 2005 and 2nd December, 2005 in the County Court Division of Antrim the defendant, being an acting police officer, wilfully neglected to perform her duty and wilfully misconducted herself to such a

degree as to amount to an abuse of the public's trust in that she processed a Fixed Penalty Notice issued to Dean Freeman in such a way as to mislead another that Dean Freeman had produced his driving documents at Coleraine Police Station within the requisite period of seven days;

(iii) perverting the course of public justice, contrary to common law, namely that she contacted the owner of a property which had sustained damage as the result of a criminal act and told him that the damage would be paid for if he dropped the charges.

[3] A jury was sworn and the judge adjourned the proceedings to the following day to enable the respondent's legal advisers to examine records that had been made available by the prosecution. The records were handed over to the respondent's legal advisers by the investigating police officer and he remained at the court house in order that the records could be returned to him for safe keeping when the examination, which was taking place in a consultation room, had been completed. It was alleged that while he was waiting for the books to be returned the officer had listened from outside the consultation room to the discussion taking place within. This was brought to the attention of the trial judge and he heard the evidence of the witnesses and decided that there had been a deliberate violation of the respondent's legal professional privilege. The judge was unable to establish how much had been overheard and therefore the extent of any prejudice that the respondent may have suffered however, he regarded it as a very serious and unlawful breach. Having considered the remedies that were available in a reserved ruling given on 18 October 2007 he decided that the proceedings should be stayed.

[4] The prosecution, being dissatisfied with this ruling, informed the judge that it was intended to appeal and having done so counsel added the following;

"The issue, your Honour, the prosecution are well aware of the rest of the provisions of that article, in particular, clause (8) and (9)."

[5] This reference was to paragraphs (8) and (9) of article 17 of the Criminal Justice (Northern Ireland) Order 2004 which provide:

"(8) The prosecution may not inform the court in accordance with paragraph (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in paragraph (9) is fulfilled.

- (9) Those conditions are -
 - (a) that leave to appeal to the Court of Appeal is not obtained; and
 - (b) that the appeal is abandoned before it is determined by the Court of Appeal.”

[6] The importance for the defendant of compliance with article 17(8) is seen in article 17 (12) which states:

“Where the prosecution has informed the court of its agreement under paragraph (8) and either of the conditions mentioned in paragraph (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.”

[7] The wording of these provisions is clear and they act as a deterrent against unmerited appeals being brought by the prosecution. The fact that the refusal of leave to appeal by the trial judge may result in an acquittal will encourage the prosecution to reflect before informing the court that it intends to appeal.

[8] The reference by counsel to the prosecution being aware of paragraphs 17 (8) and (9) cannot, in our view, be construed as an agreement by the prosecution that in respect of each of the offences concerned the defendant should be acquitted if either of the conditions mentioned in paragraph (9) was fulfilled. Nor does the undertaking given in the notice of application for leave of the court issued on 23 October 2007 suffice as it does not comply with the requirement in article 17(8) that it be given at or before the time when the court was informed of the intention to appeal.

[9] It is necessary therefore to consider the effect of the failure to inform the court in accordance with paragraph 17 (8). This is a criminal statute dealing with jurisdiction and procedure which may result in a ruling ordering an acquittal being reversed and is to be strictly construed. The Order introduced a much wider right of appeal by the prosecution than that which had existed previously and it is subject to the limitations that leave is required and to the acceptance by the prosecution that if leave is refused or the appeal abandoned there is to be an acquittal. In the absence of such an agreement the prosecution does not have a right of appeal under the Order.

[10] It has been pointed out that article 17 (8) could give rise to the anomaly that a person who has not been arraigned may be acquitted since an appeal can be brought against a ruling at “an applicable time” in relation to a trial on

indictment and “an applicable time” is defined in article 17 (13) as any time whether *before* or after the commencement of the trial. We do not consider that this indicates that ‘acquittal’ is to be given a meaning other than its ordinary meaning when construing the Order.

[11] We were referred in the course of the argument to a decision of the Court of Appeal (Criminal Division) in *R v Y* [2008] 2 All ER 484 where Hughes LJ in delivering the judgment of the court said of s.58 of the Criminal Justice Act 2003 (article 17 of the 2004 Order being in identical terms):

“19. We accept that the new section 58 right of appeal, which is in force, must be construed strictly. It is a significant shift of rights towards the Crown as against an individual.

20. For s 58 the critical condition which must be met before any appeal can be launched is that contained in s 58 (8). In effect the Crown is bound to accept, as the price of bringing an interlocutory appeal under s58, the consequence that if it fails the Defendant must be acquitted (as well as the possibility that this Court may order such acquittal on the grounds that it is necessary in the interests of justice to do so).

... It is no doubt true that the Crown will not ordinarily embark on an appeal against a ruling which requires the giving of the s 58(8) undertaking, unless the ruling, if effective, will bring the case to an end.”

[12] Shortly after we ruled that there was no jurisdiction to hear an appeal by the prosecution in the present case the Court of Appeal (Criminal Division) gave judgment in *R v A* [2008] EWCA Crim 1034. This appeal was brought under the Courts-Martial (Prosecution Appeals) Order 2006; SI 2006 No 1786. Article 4(8) of the Order is identical to section 58(8) Criminal Justice Act 2003. Hughes LJ delivering the judgment said:

“...whatever may be the precise Parliamentary history, we are unable to see how these statutory provisions can be read as meaning anything other than that there is no right of appeal unless the undertaking is given to the court of trial at the time of the announcement of the intention to appeal. The Order, with s 58 of the Criminal Justice Act 2003, represents a major departure from the former law. The Crown is given a right of appeal in relation to

trial on indictment for the first time. Moreover, it is given a right of interlocutory appeal. The new right is given on strict terms. It may be that the new right could have been as effectively controlled if the statute and order had provided that whether or not an undertaking in the terms of article 4(8) was given in open court, any appeal was to be on terms that if leave were refused, or the appeal abandoned, or it failed in due course, acquittal should follow. Or it may be that alternative form of control would not be so effective. What is clear is that alternative form of control is not what has been enacted. The words 'may not...unless, at or before that time' must be given their effect. They require the giving of the undertaking in open court at the time of invocation of the right of appeal and they say that the prosecution "may not" inform the court it intends to appeal, unless this is done. The object is clearly to require the Crown to commit itself from the outset. Nor can we see any proper basis of construction under which what is in section 58(8)/Article 4(8) can be read differently according to whether the ruling under challenge is ipso facto fatal to the prosecution or one in relation to which the Crown chooses to give the acquittal agreement. There would, moreover, be considerable scope for argument about which category some rulings fall into. On these grounds alone, we are unable to see that we have any jurisdiction to hear the appeal against either ruling."

[13] In the course of his judgment Hughes LJ added that the court "was not asked to consider whether it must be given in any particular form, and have not done so; it may well be that it can be given in shorthand or by reference to the statute; given, however, it must be, and that must happen at or before the time of invoking the right of appeal." Although the Order does not prescribe the form in which the agreement is to be given by the prosecution we consider that it must be given in unequivocal terms making it clear to the judge that the prosecution has so agreed in relation to each offence.

[14] Counsel for the respondent raised a further issue of a preliminary nature. Under rule 10 of the Criminal Appeal (Prosecution Appeals) Rules (Northern Ireland) 2005 as amended by the Criminal Appeal (Prosecution Appeals) (Amendment) Rules (Northern Ireland) 2006 rule 10A provides that an application for leave under article 16(4) to appeal *may* be heard by a single judge. Where the single judge has refused an application the party making the application may have it determined by the Court. In the present case the

matter was not heard by a single judge and came directly to the Court. We do not accept that because a single judge is empowered to hear such an application it cannot be made directly to the Court. Jurisdiction to hear the application remains with the Court even where a single judge is given the same jurisdiction.

[15] For the reasons we have given the court having no jurisdiction the application by the prosecution was dismissed.