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

*Delivered: 21/12/2018*

IN THE CROWN COURT SITTING AT BELFAST

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R

-v-

FRANCIS DEVLIN

R

-v-

BRENDAN McKEE

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**COLTON J**

[1] The defendant, Francis Devlin, has been returned to the Crown Court for trial on indictment following a purported transfer of his case under the provisions of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1998 (“the Order”).

[2] The defendant argues that this purported transfer was unlawful and that as a result this court lacks jurisdiction to deal with the proceedings.

[3] He applies for an order dismissing the proceedings or alternatively staying the proceedings for want of jurisdiction. He is joined in the application by Brendan McKee who makes the same case in respect of the transfer. I propose to refer to the defendant Devlin throughout the remainder of this ruling for convenience, but the ruling relates to each defendant.

**Background**

[4] A decision has been made to prosecute the defendants and 36 other individuals after an investigation conducted by HMRC known as “Op Concentric”.

[5] The PPS decided that the case is one of such complexity that it should be transferred to the Crown Court under the provisions of the Order.

[6] The procedure to be adopted by the PPS was set out in an e-mail to the defendant’s solicitors on 11 June 2018. In accordance with that procedure each

defendant was served with a summons (issued on 8 June 2018) to attend Belfast Magistrates' Court on 26 June 2018. By agreement, and in ease of the defendant, he was not required to attend on 26 June 2018. He was represented by his solicitor who appeared before the District Judge on that date. As agreed the solicitor consented to an adjournment of the summons, applied for and was granted legal aid.

[7] The summons was adjourned to facilitate the service of the transfer notice under the Order.

[8] Transfer to the Crown Court occurred on 2 August 2018. The case has been under the management of the Crown Court since then and there have been a number of reviews of the case.

[9] On 28 November 2018 the defendant challenged the lawfulness of the transfer procedure and the court received written submissions supplemented by oral submissions on 14 and 18 December. I am obliged to counsel for those submissions. Mr McCollum QC led Mr Magee for the PPS. Mr Hutton appeared for the defendant Devlin and Mr Devine for the defendant McKee.

### **Legal context**

[10] The jurisdiction to transfer a case of this nature is contained in Article 3 of the Order.

[11] The defendant raises no issue as to the satisfaction of the jurisdictional thresholds in Article 3.

[12] Neither does the defendant challenge the use of a summons in the normal way as a prelude to a transfer notice – see R v Marks [2011] NICC 2.

[13] The defendant's case is that a condition precedent to the exercise of that jurisdiction has not been fulfilled – namely that a person must first be "charged" with an indictable offence – see Article 3(1)(a) of the Order. There is no dispute that the act of charging a defendant occurs when there is an official notification to a defendant that he has committed that offence. This was effected in this case by the service of the summons to which I have referred.

[14] In short form the defendant says that the summons issued in this case was an "anonymous" summons in that it did not identify the complainant and is therefore void and invalid.

[15] At the time of bringing the application the defendant did not have sight of the complaint preceding the summons but on the presumption that it was likewise anonymous it was also void and invalid.

## The complaint

[16] Rule 6(1) of the Magistrates' Courts Rules (Northern Ireland) 1984 provides:

“6.-(1) Every complaint, summons, warrant or other document made or issued for the purpose of, or in connection with, any proceedings before a Magistrates' Court for an offence shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms, and gives such particulars as may be necessary for giving reasonable information as to the nature of the charge.”

Rule 7 provides:

“7.-(1) A complaint may be made by the complainant in person or by his solicitor or by any other person authorised in that behalf.”

[17] The complaint in this case was submitted by the PPS by sending it electronically to the court under what is known as the Causeway Case Management System.

[18] The court has been provided with a copy or screenshot of the complaint.

[19] It was issued on 6 June 2018 by Mr Graham Cardwell of the PPS.

[20] It identifies the defendant.

[21] It describes the specific offence with which he is charged and gives particulars of the nature of the charge.

[22] The PPS is entitled to make such a complaint as a person authorised by HMRC - as confirmed by correspondence from Steve Tracey, Assistant Director, Organised Crime Northern Ireland, HMRC, dated 17 December 2018.

[23] In any event the PPS has the power to initiate a complaint in its own right under section 31(2) of the Justice (Northern Ireland) Act 2002 which provides:

“(2) The Director may institute, and have the conduct of, criminal proceedings in any other case where it appears appropriate for him to do so.”

[24] I am therefore satisfied that a valid complaint has been laid in this case.

## **The summons**

[25] That being so, the PPS has the power to issue a summons pursuant to section 93(3) of the Justice Act (Northern Ireland) 2015 which provides:

“(3) Where a Public Prosecutor has made a complaint to a lay magistrate that a person has, or is suspected of having committed an indictable offence ... the Public Prosecutor may issue a summons requiring that person to appear before a Magistrates' Court.”

[26] That power was exercised by the Public Prosecutor in this case with the issue of a summons on 8 June 2018 requiring the defendant to attend at the Magistrates' Court in Belfast on 26 June 2018 as set out above.

[27] It is the validity of this summons which is the key issue in this application.

[28] The summons refers to both Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981 and section 93 of the Justice Act (Northern Ireland) 2015 but it is clear that section 93 is the relevant authority for the summons that was in fact issued.

[29] In addition to Rule 6(1) of the Rules which I have already referred, Rule 8 is also relevant.

[30] It provides:

### **“Form of summons**

8.-(1) Every summons shall be signed by the person who issues it. ...

(6) The name and address of the complainant and the name and, where possible, the user or last-known address of the person summoned shall be stated in the summons.”

[31] The summons in this case complies with Rule 6 and Rule 8(1).

[32] The resolution of this application turns on whether it complies with 8(6).

[33] The summons describes the complainant as:

“Assistant Director  
HM Revenue and Customs  
Criminal Investigation

Carne House  
20 Corry Place  
Belfast  
BT3 9HY"

[34] The defendant says that this is an anonymous complaint and relies on the authority of Cunningham v Livingstone, an unreported decision of the Court of Appeal in this jurisdiction in which Lord Lowry CJ gave judgment in December 1981.

[35] In that case a TV licence complaint was issued in which the complainant was described as "Executive Officer, Television Licence Inquiry Office, Belfast."

[36] Lord Lowry in the judgment of the court said that "to omit the name and address of the complainant was contrary to Rule 9(5) of the Magistrates' Courts Rules (Northern Ireland) 1974 and the Justice of the Peace ought not to have been and when asked ought to have refused to issue a summons in that form."

[37] The annotations in Valentine's All The Law of Northern Ireland on Rule 8(6) of the Rules states on the basis of this authority that a summons in the name of an anonymous complainant is void.

[38] In the course of his judgment Lord Lowry says that "if the respondent had not attended the Magistrates' Court, all proceedings against her there would have been ineffective for lack of a proper summons."

[39] In the Cunningham case the proceedings were nonetheless deemed in order because the defendant was present at the court, the summons contained a statement of the charge and the complainant was present to conduct the proceedings.

[40] Is this an anonymous complaint?

[41] Mr McCollum says not. He says "the Assistant Director" of HMRC Criminal Investigation at the relevant address in Belfast is an identifiable person. It is not a generic title such as the "Executive Officer" in Cunningham or Thames Valley Police in the case of Rubin v DPP [1990] 2 QB to which I will refer later. It is more akin to the example suggested by Lord Lowry in Cunningham that the licence authority could name "the Secretary for the Home Department".

[42] He refers me to the letter of 17 December confirming that the PPS had authority of HMRC to make a complaint and issue a summons on its behalf which is signed by a named individual, Steve Tracey, as Assistant Director.

[43] In particular he relies on the authority of Rubin.

[44] In that case under the Thames Valley Police (Amalgamation) Order 1968 various police areas were amalgamated on 1 April 1968 so as to constitute a combined police area to be known as "Thames Valley Police Area" and the combined police force for the area was established to be known as the "Thames Valley Constabulary". On 15 December 1986 an information was preferred, purportedly laid by "Thames Valley Police", specifying the commission by the defendant of an offence of speeding, contrary to section 17(4) of the Road Traffic Regulation Act 1984. The defendant was duly summoned to appear before the Justices and at the hearing he submitted, as a preliminary point of law, that the information was not valid because there was no such body as the Thames Valley Police and no single person was named as the informant, and that he had accordingly suffered injustice. The Justices rejected the submission whereupon the defendant pleaded guilty and was convicted.

[45] The defendant's appeal was dismissed.

[46] The key part of the judgment is contained at page 90 paragraph E in the judgment of Watkins LJ as follows:

"Unquestionably the defendant is entitled to know the identity of who it is who accuses him of an offence and that person must have authority to lay an information. Within the Thames Valley Constabulary, two persons at least had the authority; the chief constable and the person who caught the defendant speeding. Unfortunately, because of some maladministration, due possibly to the use of computers for laying informations, the essential requirement, surely well known to the chief constable, that the information should reveal the identity of the informant was not conformed to on the material occasion. The identity of the actual informant was masked by the title used for him, namely 'Thames Valley Police'.

But no one could have been in doubt that it was a police officer who had in fact laid the information. This is not a case in which any challenge could have been mounted to his authority to prosecute - no such thing is suggested. The actual identity of the person could, if needs be, easily have been revealed.

Where, in my judgment, the erroneous title is given in information, as here, to a person who has a right to prosecute and no one is misled as to the status of that person, such an error does not have the effect of

rendering the information invalid. The paramount considerations are the authority to prosecute and the right to know the prosecutor. As to the former there can be in the present case no doubt. As to the latter, it was clear that a police officer was prosecuting. All that was lacking was his easily ascertainable name.

I would dismiss this appeal but in so doing advise that no matter what sophisticated aids are used for laying informations, care should be taken to ensure that modern technology be not allowed to cause departure from what should be, and I feel sure is, customary police practice, which is to lay information by a named person.”

[47] The prosecution say that in this case the paramount considerations are met. There can be no doubt about the authority to prosecute and the complainant was an Assistant Director of HMRC.

[48] The prosecution say that in fact in this case they are in a stronger position than in Rubin. In this case a specific office has been identified rather than a general description as in Thames Valley Police. No issue can conceivably arise as to the authority of HMRC to make a complaint and there is no way in which the defendant could in any way have been misled as to the complainant. The complainant was aware this was a HMRC investigation. He was interviewed by HMRC. The procedure was explained to his solicitor in advance.

[49] Mr Hutton counters that unlike Rubin the Assistant Director, HMRC was not easily identified. In his supplementary note responding to Mr McCollum’s submissions he points out that efforts by the defendant to investigate whether the role of Assistant Director, Criminal Investigation as outlined in the summons exists proved extremely problematic. The defendant has had recourse to the on-line document “Senior posts in HMRC’s organisation structure: 31 March 2016 – Updated 10 December 2018” and conducted word searches on that document. A word search for the term “Assistant Director” turns up 31 “hits” or “roles” outlined in the document. None of these Assistant Directors are in the “Criminal Investigation Unit”. The majority are in the Large Business unit. A word search for “criminal investigation” shows 8 “hits” or 8 “posts” listed as regards that unit. These posts included a Director and various Deputy Directors but no Assistant. Furthermore, the document does not indicate any Assistant Director with particular Northern Ireland responsibilities. One “Deputy Director Scotland and Northern Ireland” is listed as working in the Large Business unit.

[50] In any event he says that the approach adopted in the Cunningham case is to be preferred. Whether the defendant was misled or whether there is any prejudice to him is irrelevant to the issue of the court’s jurisdiction. In particular he refers to

the well-known decision in the House of Lords in the case of R v Clarke [2008] UKHL 8 which dealt with an unsigned indictment.

[51] It was held in that case that when it had enacted sections 1 and 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 Parliament had intended the consequence, if a bill of indictment was preferred but not signed by the Proper Officer, to be that the bill should not become an indictment unless and until it was duly signed. Parliament had intended the consequence, if there were a bill of indictment but no indictment, to be that there could be no valid trial on indictment if there was no indictment. The answer to those questions remain the same now. The duty of the court was to apply the law, which was sometimes technical; it might be thought that if the State exercises coercive power to put a citizen on trial for serious crime a certain degree of formality was not out of place. In the instant case, the duty in question had been easy to perform. Moreover, the late signing of the amended bill could not validate an invalid trial almost concluded. Accordingly, the defendant's appeal was allowed and the convictions were quashed. However, the decision in Clarke has to be seen in light of the recent decision of the Court of Appeal in England and Wales in the case of R v Matthew Raymond Johnson [2018] EWCA Crim 2485.

[52] In that case there were significant procedural errors in Crown Court proceedings where defendants were put in charge of a jury which returned a verdict of guilty on counts contained in an indictment which had been uploaded electronically by the prosecution under the Crown Court Digital Case System. It was only after conviction that a court official realised that the form of indictment used at trial differed from the indictment on which the applicant had been arraigned, in particular, by adding one or more counts on which the jury had returned a guilty verdict but in respect of which the applicant had not entered a plea. No application had been made to amend the indictment and the defendants had not been re-arraigned.

[53] In Johnson the defendant relied on the approach of the House of Lords in R v Clarke to invalid indictments and proceedings based on them.

[54] The Court of Appeal was able to distinguish Johnson from the facts in Clarke because the 1933 Act referred to in Clarke had been amended with retrospective effect by the Coroners and Justice Act 2009.

[55] However, in the judgment of the court Sir Brian Leveson signalled a significant change of approach to issues of this type at paragraph [39] where he says:

“The Modern Approach to Nullity

39. In R v Malachi Lloyd Williams [2017] EWCA Crim 281 this court rejected the argument that the indictment on which the applicant was tried was a



nullity because counts relating to separate incidents had been mis-joined in that indictment. The court recognised that the point would not arise in future due to the introduction of Crim PR 10.2(4), but nevertheless expressed the following general view in relation to technical arguments that indictments or proceedings were a nullity (per Lord Thomas of Cwmgiedd CJ at [33]);

‘We would hope that in the future the court would take the view that the highly technical law in relation to nullity is an outdated concept that should no longer prevail, that a modern approach should be taken, which is to decide on the fairness of the trial, the prejudice to a defendant and the safety of the conviction.’

These observations were cited with broad endorsement in connection with a different procedural irregularity in R v Stromberg [2018] 2 Cr App R (5) (per Lord Burnett of Maldon CJ at [35]).”

[56] Whilst I accept that the matter is arguable I consider that naming a complainant as “Assistant Director” HMRC, Criminal Investigation, Carne House, 20 Corry Place, Belfast is a sufficient identification to comply with Rule 8(6).

[57] Naming the complainant in this way is manifestly stronger in terms of identifying that person than “Executive Officer” or “Thames Valley Police” – although not as clear as “the Secretary of State for the Home Department”.

[58] In considering this issue it is important to remember the principle underpinning the rule. As per Rubin, the paramount considerations are the authority to prosecute and the right to know the prosecutor – both of which are clearly established in these proceedings.

[59] However, if I am wrong about this I consider that any defect in this summons has been cured by what took place at the Magistrates’ Court on 26 June 2018. Prior to that date the defendant’s solicitors were given notice of the proceedings to be adopted and were in receipt of the summons which is now challenged.

[60] As Lord Lowry noted in Re McFarland’s Application [1987] NI 246:

“If within the time limited for making a complaint (normally six months for summary proceedings),

either the charge against the defendant is read out or recited in the presence of the magistrate or a summons containing the averments and information that would be expected in a complaint is before the magistrate, that is, available to the magistrate sitting to adjudicate in or out of Petty Sessions and in either case:

- (a) The hearing proceeds, the defendant being then present or being represented and not objecting to the jurisdiction; or
- (b) The hearing is adjourned without objection to the jurisdiction, the defendant or his representative (whether then present or not) having applied for or agreed to an adjournment,

Then the proceedings are in order with regard to the complaint.”

[61] On this basis I consider that a valid complaint was led before the magistrate and that a valid charge has been laid. As per Lord Lowry “the proceedings are in order with regard to the complaint”. As occurred in Cunningham, although the circumstances were different, any defect has been remedied by the defendant submitting to the jurisdiction of the court via his solicitor and agreeing to the adjournment on 28 June 2018.

[62] The defendant has submitted to the jurisdiction of the court. The defendant has been validly charged and the transfer notice was properly issued.

[63] It cannot be right that the defendant’s solicitors could remain mute at the adjournment hearing and then subsequently challenge the validity of the complaint on the basis of an alleged anonymous complainant. I make no criticism of defendant’s solicitors in this regard as it is clear that if any issue had been raised at the hearing it would have been easily and readily remedied by the applications of Articles 154 and 155 of the Magistrates’ Courts (Northern Ireland) Order 1981 which provide:

“154.–(1) No objection shall be allowed in any proceedings before a magistrates' court to any complaint, summons, warrant, process, notice of application or appeal or other document for any alleged defect in substance or in form or for variation between any complaint, summons, warrant, process notice or other document and the evidence adduced

on the part of the complainant, plaintiff, applicant or appellant at the hearing, unless the defect or variance appears to have misled the other party to the proceeding.

(2) Without prejudice to the generality of Article 161 or 163, where a party to the proceeding has been misled by such defect or variance as is mentioned in paragraph (1) the court may, if necessary and upon such terms as it thinks fit, adjourn the proceedings.

#### **Amendment of complaint or other documents**

155. A Magistrates' Court may during any proceeding upon such terms as it thinks fit, make any amendment in any complaint, summons, warrant, process, notice of application or appeal or other document which is necessary for the purpose of raising the real questions at issue and arriving at a just decision."

[64] It cannot be correct that a defendant who appears in answer to a summons (via his legal representatives) in the circumstances of this case can seek to argue that the summons was defective after the transfer has taken place.

#### **Conclusion**

[65] I have concluded that a valid charge was laid before the Magistrate, the defendant was validly charged and the subsequent transfer notice was properly issued giving the Crown Court jurisdiction to deal with the proceedings.

[66] The applications are therefore refused.