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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY WAY OF CASE STATED

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BETWEEN:

JAMES McNAMARA

Defendant/ Appellant;

-and-

PUBLIC PROSECUTION SERVICE

Respondent.

_____

Before: Stephens LJ and Treacy LJ

TREACY LJ ***(Delivering the Judgment of the Court)***

Introduction

[1] District Judge Watters ("the DJ") has stated a case for the opinion of the Court of Appeal which raises the issue of whether she had the power, following the appellant's election and plea of guilty, to refuse jurisdiction and attempt to commit him to the Crown Court.

Factual Background

[2] The appellant was arrested on 7 April 2017 in relation to numerous offences and taken to Musgrave Street PSNI Custody Suite. On 8 April 2017 he was charged with 22 offences and brought to Lisburn Magistrates' Court.

[3] The appellant was formally charged with 22 offences including 3 burglary charges, 2 charges of handling stolen goods, a charge of taking and driving away a motor vehicle and 3 other motoring offences, 4 charges of going equipped for

burglary or theft, 1 charge of using a false instrument, 2 charges of attempted theft, 4 charges of theft and 2 charges of criminal damage.

[4] At the initial remand hearing at Lisburn Magistrates' Court, 2 charges of burglary of a dwelling were withdrawn by the Public Prosecution Service (PPS).

[5] The appellant was refused bail on 8 April 2017 by District Judge Henderson on the ground of the likelihood of re-offending. He was remanded to HMP Maghaberry to appear by video link on the 21 April 2017 and appeared again on the 8 May 2017 when he was further remanded to 5 June 2017.

[6] Following the appearance on 8 May 2017 the appellant's solicitors applied to the Magistrates' Court to bring his remand date forward to 15 May 2017 to have the appellant arraigned and sentenced.

[7] On 15 May 2017 the appellant appeared by video link and the defence applied to the DJ to have the appellant arraigned for the 20 offences. The appellant was put on his 'election and plea' for the indictable triable summarily (ITS) offences. The appellant consented to be dealt with summarily and he entered guilty pleas. The defence solicitor entered guilty pleas to the remaining hybrid offences and the appellant waived his right to a Pre-Sentence Report via his solicitor.

[8] The DJ then heard the facts which were read out by the PPS prosecutor. These are set out at para 4 of the Case Stated.

[9] After hearing the facts the DJ formed the view that the offences coupled with the appellant's record meant that this was too serious a matter for the Magistrates' Court, given that the maximum sentence in the Magistrates' Court under the Theft Act (Northern Ireland) 1969 is 12 months. Although the maximum sentence for an offence of criminal damage under the Criminal Damage (Northern Ireland) Order 1977 is 2 years these charges were viewed as ancillary to the thefts and therefore those offences should not in the DJ's view attract a greater sentence than the theft or attempted theft charges.

[10] The DJ had not heard the facts prior to the appellant being arraigned. The only paperwork she had was the charge sheet. She was not provided with any file or statements prior to the arraignment. The DJ informed the parties of her concern that she believed her powers were insufficient to deal with the case and adjourned the matter to afford both the prosecution and the defence time to address her on her power to refuse jurisdiction in the Magistrates' Court.

[11] The DJ subsequently heard arguments from the prosecution and defence both of whom contended that the matter should remain in the Magistrates' Court. The DJ received a letter from Roger Davison, Assistant Director, Head of Belfast and Eastern Region Prosecution Service, contending that once a defendant had been

convicted the power to reconsider a decision to deal summarily with Theft Act offences lapsed by virtue of Article 46(2) of the Magistrates' Court (NI) Order 1981.

[12] At paragraph 10 of the Case Stated the DJ states that the first opportunity to make an informed decision as to whether the case should remain in the Magistrates' Court was after she had heard the facts. She had no other opportunity to assess the case in the absence of the papers. The DJ states that in criminal cases in the Magistrates' Court the full facts of a case are not outlined in open court until a plea of guilty is entered. Accordingly, notwithstanding the Prosecution and Defence being in agreement on the legal position, the DJ refused jurisdiction and further remanded the appellant for Preliminary Inquiry papers to be prepared.

The Question

[13] District Judge Watters has stated the following question for the opinion of the Court of Appeal:

> "Was I correct in law that I had the power to refuse jurisdiction under Article 46(1) of the Magistrates' Courts (NI) Order 1981 in the circumstances whereby the Appellant had elected for summary prosecution and had entered guilty pleas to the offences before the Court?"

Discussion

[14] In Northern Ireland the Magistrates' Court is concerned with the following categories of offence: summary only offences, hybrid offences, indictable triable summarily offences (which are the subject of this case stated) and indictable only offences.

[15] The power of the Magistrates' Court to deal summarily with certain indictable offences, specified under Schedule 2, arises from Article 45 of the Magistrates' Courts (NI) Order 1981 ("the 1981 Order").

[16] We agree with the appellant that before analysing that provision it is helpful to examine Article 29 of the 1981 Order. This is the provision which regulates the right of a defendant to elect for jury trial for certain summary offences. It also regulates the situation where, under an enactment, the prosecution is entitled to claim that the accused shall be tried by a jury.

Article 29(2) provides:

> "Where under paragraph (1) or any other enactment a person charged with a summary offence is entitled to claim to be tried by a jury, his

> claim shall be of no effect unless he appears in person and make it *before* he pleads to the charge; and, where under the enactment the prosecution is entitled to claim that the accused shall be tried by a jury, the claim shall be of no effect unless it is made *before* the accused pleads to the charge."

And Article 29(3):

> "A magistrates' court before which a person is charged with a summary offence for which he may claim to be tried by a jury shall, *before* asking him whether he pleads guilty, inform him of his right and, if the court thinks it desirable for the information of the accused, tell him to which court he would be committed for trial and explain what is meant by being tried summarily; and shall then ask him whether he wishes, instead of being tried summarily, to be tried by a jury."

[17] Although Article 29 is not in play in the present proceedings it illustrates the importance of the sequence in which the 'election' and the 'plea' must occur. Under this provision the forum must be determined before the defendant pleads guilty or not guilty.

[18] Similarly in the case of 'hybrid offences' this sequencing is important. The appellant draws particular attention to the effect of a guilty plea having been taken and entered onto the Order Book. We were referred to the commentary in Valentine: All the laws of Northern Ireland (2017) – Part V Criminal Jurisdiction and Procedure (Article 16-61), with reference to Hybrid offences, where it is stated:

> "It has been held that the prosecutor can elect for indictment or summary trial at any time until before conviction or acquittal: *Kelly v DPP* [1996] 2 IR 596; but that is not so if Art. 29(2) applies: '... where under any enactment the prosecution is entitled to claim that the accused shall be tried by a jury, the claim shall be of no effect unless it is made before the accused pleads to the charge'."

[19] We turn now to Article 45 ('Summary trial of certain indictable offences') of the 1981 Order, which provides:

> "45.(1) 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

(b) The magistrate, at any time, having regard to –

(i) Any statement or representation made in the presence of the accused by or on behalf of the prosecution or the accused;

(ii) The nature of the offence;

(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 twenty four 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."

[20] Schedule 2, entitled 'Indictable Offences Which May Be Dealt With Summarily Upon Consent Of The Accused', specifies the various indictable offences which can be dealt with in the Magistrates' Court. Paragraph 20 of Schedule 2 relates to Theft Act (Northern Ireland) 1969 offences and offences such as theft and attempted theft may be dealt with in the Magistrates' Court.

[21] The powers of the Magistrates' Court in dealing summarily with such indictable offences are governed by Article 46 which provides:

> "46.-(1) A resident magistrate may assume the power to deal with an offence summarily under Article 45 at any stage of the proceedings whether any evidence shall then have been given or not and, where such power is assumed, the provisions of any enactment (including this Order) for the time being in force relating to summary offences shall (subject to the succeeding provisions of this Article and to Magistrates' Courts Rules) apply as if the offence were a summary offence and not an indictable offence.
>
> (2) Notwithstanding that a magistrate has decided to deal summarily with an offence specified in Schedule 2 and that the accused has consented to be dealt with summarily, the magistrate *may reconsider his decision at any time prior to his determination to convict and sentence the accused, and, if satisfied that it is expedient to do* so, he may decide, instead of dealing with the offence summarily, to commit the accused for trial and in such event depositions shall be taken or, as the case may require, a preliminary inquiry shall be conducted, and the offence dealt with in all respects as if the magistrate had not decided to deal with it summarily."

[22] Rule 45(4) of The Magistrates' Courts Rules (Northern Ireland) 1984 provides that:

> "(4) The district judge (magistrates' court) shall, *after deciding that it is expedient to deal with the case summarily*, cause the charge to be read to the accused and, if he considers it desirable, explain the meaning of the case being dealt with summarily and of committing an accused for trial by jury at the Crown Court. Such explanations shall include a statement as to the Crown Court at which the accused may be tried and the circumstances in which a trial at the Crown Court may be heard by a judge sitting without a jury."

[23] Rule 45(5) states:

> "(5) The district judge (magistrates' court) shall next address the accused as follows - 'Do you wish to be tried at the Crown Court, or do you consent to the case being dealt with summarily?' and if the accused consents to be dealt with summarily, the district judge (magistrate's court) shall ask him "Do you plead guilty or not guilty?."

[24] The provisions set out above provide a clear statutory sequence. Thus where:

(i) an adult is charged with an indictable offence specified in Schedule and
(ii) the district judge, *having regard to the matters set out in Article 45(1)(b),* thinks it expedient to deal summarily with the charges; and
(iii) in accordance with Article 45(1)(c), the accused consents to be dealt with summarily,

the district judge *may*, subject to the provisions of Article 45 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.

[25] In short the District Judge must first apprise himself or herself of the case having regard to the matters set out in Article 45(1)(b)(i)-(iv) and, having done so, decide whether he thinks it expedient to deal summarily with the charge. After deciding that it is expedient to deal with the case summarily the accused, following the requisite notice in writing of his right to be tried by a jury (Article 45(1)(c)), must consent to the matter being dealt with summarily. If the accused so consents the District Judge must then ask him "do you plead guilty or not guilty" (Rule 45(5)).

[26] In purported adherence to the statutory scheme the appellant was put on his election and plea. He consented to be dealt with summarily and formally entered his unequivocal guilty pleas in court. Having then heard the facts the DJ formed the view that the offences coupled with his record made the matter too serious for summary trial given the maximum sentence available in the Magistrates' Court. On this basis, and notwithstanding that the prosecution and the defence both agreed that she had no power to reconsider her decision to deal with the matter summarily after the pleas had been entered, the DJ refused jurisdiction and remanded the appellant for Preliminary Inquiry papers to be prepared. The question is whether she had the power under Article 46(1) to refuse jurisdiction.

[27] In Criminal Practice and Procedure in the Magistrates' Court of Northern Ireland (JF O'Neill, 2013) it states at para 2.27:

> "Under Article 46(2) of the [1981 Order] a District Judge may reconsider their decision to deal summarily with an offence under Schedule 2 at any time *prior to convicting a defendant*.
>
> …
>
> *Once a defendant is convicted, the power under Article 46(2) lapses* (although note the power of a District Judge to commit a convicted defendant to the Crown Court for confiscation proceedings (see paragraph 5.49))."

[28] To similar effect in All the Laws of Northern Ireland (2017) - Part V Criminal Jurisdiction and Procedure (Art. 16-61) - 'Summary trial of certain indictable offences (Arts.45-46)' - the legal commentary by Valentine on the power of the District Judge (Magistrates) in dealing with such indictable offences states:

> "*... Once the magistrate has pronounced a finding of guilt or accepted a plea of guilty he cannot reconsider his decision to try summarily,* but this is without prejudice to the power to allow a defendant to withdraw his plea of guilty at any time before sentence: *R v Dudley JJ ex p Gillard* [1986] AC 442."

[29] R v Dudley JJ ex p Gillard [1986] AC 442 was an appeal from the Divisional Court to the House of Lords. Although that case was concerned with a different statutory regime in a different jurisdiction – Section 38 of the Magistrates' Court Act 1980 – the decision is of considerable assistance in the present case. The point of law certified in that case was in the following terms:

> "In the case of an offence triable summarily or on indictment, where a magistrates' court has allowed an accused to elect summary trial and he has pleaded guilty and his plea has been accepted can the court thereafter commit the case for trial on indictment?"

[30] The House of Lords unanimously answered in the question in the negative.

[31] Lord Bridge of Harwich stated (at 453A and 4530):

> "He is entitled in that situation to take comfort from the knowledge that he has chosen a course which limits the punishment to which he is liable for an offence which he admits having committed."

And

> "An accused who is still contesting his guilt, if the mode of trial by which his guilt or innocence will be decided is changed, can have no comparable grievance to that which I have described as fully justified on the part of the accused who has admitted his guilt."

And (at 454A and 453C):

> "I venture to repeat an observation of my own relating to Section 19 of the Magistrates' Courts Act 1952, which was substantially to the same effect as section 19 of the Act, expressed in a judgment in the Divisional Court in Reg. v Tower Bridge Magistrates, Ex parte Osman [1971] 1 WLR 1109, 1112:
>
> 'Before they can assume jurisdiction to try an indictable offence summarily, whatever the plea is to be, magistrates have a plain duty under section 19 to make sufficient inquiry into the facts of the case to satisfy themselves that, so far as those facts are concerned, their powers of punishment are adequate'."

[32] In Re McFarland [2000] NI 403 Carswell LCJ delivering the judgment of the Divisional Court at p408, letters a-c, unequivocally stated:

> "… the magistrate misapprehended the extent of his powers. Under art 46(2) of the Magistrates Court (NI) Order 1981… he could have decided to commit the applicant for trial at any time before his determination to convict and sentence him (this being one of the offences specified in Sch 2 to the Order). *He could not, however, have continued to hear the evidence and convicted the applicant, then referred the case to the Crown Court for sentence. Once he had decided the issue of guilt he would have had to proceed to impose sentence himself,* being limited to the statutory maximum of 12 months."

[33] We consider that it is clear from the express terms of art 46(2) of the 1981 Order that once the issue of guilt has been determined it is not open to a District Judge to reconsider a decision to deal with Schedule 2 offences summarily. The authorities and commentaries referred to above reinforce what, in our view, is

already plain from the express terms of the statutory provision. The prosecution and the defence were correct to have submitted to the District Judge that she did not have the power to refuse jurisdiction under art 46(1) of the 1981 Order.

[34] District Judges have a plain duty to make sufficient enquiry into the facts of the case to satisfy themselves that, so far as the facts are concerned, their powers of punishment are adequate. Article 45(1)(b)(i)-(iv) of the 1981 Order requires them to have regard to the matters set out therein before they decide that it is expedient to deal summarily with the charge. The duty of sufficient inquiry must be discharged prior to conviction otherwise the power to reconsider the decision to deal with the matter summarily will have lapsed by virtue of Article 46(2). The prosecution has an obligation to bring any relevant matters to the attention of the District Judge so that she can discharge her obligation to make sufficient enquiry.

Conclusion

[35] The question posed by the District Judge is:

> "Was I correct in law that I had the power to refuse jurisdiction under Article 46(1) of the Magistrates' Courts (NI) Order 1981 in the circumstances whereby the Appellant had elected for summary prosecution and had entered guilty pleas to the offences before the Court?"

In light of the analysis set out above the answer to this question is "No".