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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY FN
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF 27 OCTOBER 2020 TAKEN BY A DISTRICT JUDGE AT BELFAST MAGISTRATES COURT

AND IN THE MATTER OF A DECISION OF 3 DECEMBER 2020 TAKEN BY THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

Mr D Hutton KC with Mr A Moriarty (instructed by Madden Finucane, Solicitors) for the Applicant
Dr T McGleenan KC with Mr P Henry (instructed by the Public Prosecution Service) for the first Respondent
Mr T McCleave BL (instructed by the Departmental Solicitor's Office) for the Second Respondent

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Before: Treacy LJ and O'Hara J

<u>O'HARA J</u> (*delivering the judgment of the court*)

Introduction

[1] This application for judicial review culminated in an outcome which was largely agreed and which the court is content to endorse. The circumstances are unusual and unlikely to be repeated. Nonetheless, it is important to record what happened, where things went wrong and how they are to be corrected. We are indebted to counsel for their submissions and for their co-operative approach.

[2] The applicant has been anonymised as FN because he has already been punished for the offence which is the subject of these proceedings. The relevant

events occurred more than a decade ago. In the opinion of the court, it is inappropriate and unnecessary to identify him and thereby open the door to a fresh round of publicity for what was criminal conduct on a comparatively minor scale. In addition, it should be noted that this ruling affects a number of other individuals who find themselves in similar circumstances.

Background

[3] The applicant was prosecuted for a single act of indecent assault against a female, contrary to Section 52 of the Offences against the Person Act 1861. The offence was committed in 2008 and a summons was issued in 2010. The applicant pleaded guilty before a District Judge later in 2010. His punishment was a conditional discharge and a requirement to sign the Sex Offenders' Register for 18 months.

[4] So far as the applicant, and indeed his victim, were concerned the matter rested there until 2020. However, it came to light in 2018 that as a result of a change in the law in 2009 (i.e. between the date of the offending and the date of the prosecution) there was a concern about the process which had been followed in 2010. Specifically, the issue was whether in 2010 the applicant should have been prosecuted before a District Judge or whether he could only be prosecuted in the Crown Court. That issue arose because an apparent change in the law in 2009 reversed the long-established practice that, as with many other criminal offences, a case could be brought either in the Magistrates' Court or in the Crown Court with the choice of forum typically depending on how serious the circumstances of the case were.

[5] In September 2020, the applicant was informed in a letter from the Public Prosecution Service ("the PPS") that it was obliged to have the case listed before a District Judge to have the conviction rescinded i.e. set aside. The victim of the applicant's offence was similarly advised. The letter continued by stating that if the application was successful, all of the affected cases would be reviewed to consider whether there should be a fresh prosecution in any of them in the Crown Court. As it turned out the applicant's case is one of 15 across Northern Ireland in which offenders were prosecuted in a District Judge's court when, as a result of the 2009 change in the law, it may be that they should have been prosecuted in the Crown Court.

[6] It is to be noted that it cannot only have been defendants such as this applicant who were concerned about the events in 2020. For each defendant there is a victim or, perhaps, more than one victim. It is not difficult to imagine the dismay victims must have felt on learning that disturbing events from more than 10 years earlier were being resurrected. That is a matter which was acknowledged and was of specific concern to the PPS.

[7] The applications to rescind the convictions in all 15 cases were brought before a District Judge. Each of the 15 former defendants were put on notice of the application and were free to make submissions to the judge as to why he should not follow the course proposed by the PPS. None did so. The PPS application was not opposed. On 27 October 2020, having considered the legal basis for the application, which was opened to him in detail, the District Judge quashed each of the convictions and sentences. In doing so, he relied on Article 158A of the Magistrates' Courts (NI) Order 1981 which allows District Judges to reopen cases in order to rectify mistakes in certain circumstances.

[8] The next step for the PPS was to consider whether to prosecute any, or all, of the 15 defendants in the Crown Court. In the applicant's case (and in two others) a decision was taken that the case should proceed to trial. That decision was notified to the applicant by letter dated 2 December 2020.

[9] The December 2020 decision to prosecute the applicant for his offending in 2008 prompted a reconsideration by the applicant of the series of events outlined above. That reconsideration led to this application for judicial review in which the fundamental contention is that the 2010 conviction should not have been rescinded by the District Judge in 2020. The contentions which have been advanced to this court could have been but were not raised before the District Judge in 2020. Accordingly, this court is in an entirely different position to the District Judge who heard no opposition to the application to rescind the convictions.

The legal mistake

[10] The applicant was prosecuted for indecent assault, contrary to section 52 of the Offences against the Person Act 1861. There is no dispute that until 2 February 2009 that offence could be tried summarily i.e. before a District Judge in the Magistrates' Court even though it could also be tried in the Crown Court. The provision which permitted that option is Article 45 of the 1981 Order which states:

> "(1) Where—
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> (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—
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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;
>
> (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.

(2) The requirement of the notice mentioned in paragraph (1)(c) may be waived in writing by the accused.

(3) A resident magistrate shall not deal summarily under this Article with any offence without the consent of the prosecution. …"

[11] It is apparent from this paragraph that for the offence to be prosecuted summarily, four conditions must be satisfied:

(a) The offence must be listed in Schedule 2 of the 1981 Order.

(b) The defendant is put on notice and consents.

(c) The prosecution consents.

(d) The court agrees, having taken into account the factors in Article 45(1)(b).

[12] In 2008, changes were made to the law relating to sex offences in Northern Ireland which largely replicated similar changes in England & Wales. This was achieved through the Sexual Offences (NI) Order 2008. Among the changes

were the introduction of a new offence of sexual assault, and the repeal of a number of offences including indecent assault and unlawful carnal knowledge.

[13] As is often the case, various parts of the 2008 Order took effect on different dates. For present purposes the relevant date is 2 February 2009, when the offences of indecent assault and unlawful carnal knowledge were repealed. But not only were they repealed, they were also removed from the list of indictable offences in Schedule 2 of the 1981 Order referred to in Article 45 – see paragraph 10 above.

[14] On the face of things, that meant that an offence of indecent assault committed in 2008 before the law changed could no longer be prosecuted before a District Judge even if all parties and the District Judge agreed that the case should be dealt with summarily. It now seemed that it must go to the Crown Court.

[15] Why, and how, did that happen? It is now agreed that it is beyond doubt that an error was made in the provisions of the 2008 Order, specifically in Schedule 1 to that Order which provided that the reference in Schedule 2 to the 1981 Order of the section 52 offence of indecent assault should be removed. The fact that a mistake was made has been publicly acknowledged, both by the Department of Justice in a 2021 report and by the then Minister for Justice in the Assembly in September 2020. From their statements and investigations, it is apparent that there was never any intention to make the change and remove the possibility of a summary prosecution. Nor would it have made sense to make such a change since the system, with its inbuilt safeguards, was working well. Other changes to the law were intended but not this one.

[16] In fact not only was an error made, but it was an error which was contrary to the public interest because it removed the discretion to allow some comparatively minor sexual offences to be dealt with before a District Judge rather than being taken to the Crown Court. As has already been indicated above, that discretion could only be exercised if both the prosecution and defendant agreed to a trial before a District Judge and if the District Judge himself/herself agreed that such a course was appropriate.

Remedying the mistake

[17] This court's attention has been drawn to the decision of the House of Lords in *Inco Europe v First Choice* [2000] 2 All ER 109. In that case the issue was whether words could, and should, be read into a statute where there was an error in an amending statutory provision. The judgment of the House of Lords was that in certain limited circumstances such an approach is appropriate.

[18] In his speech, with which the other Law Lords concurred, Lord Nicholls said the following at page 115:

> "I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words, or substitute words.
> …
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So, the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters:
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> (1) the intended purpose of the statute or provision in question;
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> (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and
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> (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise, any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: …"

[19] Applying that three part test to the present circumstances, it is the judgment of this court that all three elements are satisfied:

(i) The intended purpose of the 2008 Order was to update the law in relation to sexual offences, not to remove the jurisdiction of District Judges to hear certain cases on a summary basis in the interests of justice and where the prosecution and defence consent.

(ii) The intended purpose was not given effect in this limited instance because the option of summary trial was removed without intention, reasoning or explanation.

(iii) If the error in Schedule 1 to the 2008 Order had been noticed, the inclusion of section 52 of the 1861 Act in that Schedule would most definitely have been corrected and the reference removed.

[20] That finding is sufficient to dispose of this application, in the applicant's favour. On his behalf an argument was also advanced about the scope of Article 158A of the 1981 Order, which was the provision relied on by the PPS in its application to the District Judge to rescind the convictions. We do not find it necessary to reach a conclusion on that issue, which revolved around whether Article 158A allows only a sentence to be rescinded or whether it extends also to convictions.

[21] In conclusion, therefore, having considered submissions and authorities which might have been, but which were not, put before the District Judge, this courts concludes and declares that the following provisions of the Sexual Offences (NI) Order 2008 disclose a clear and obvious error in removing provision for summary prosecution of historical offences which was contrary to the intended purpose of the statute and are of no force and effect:

(a) The following provisions of para 15 of Schedule 1 to the 2008 Order which deals with "Minor and Consequential Amendments":

> Magistrates' Courts (Northern Ireland) Order 1981 (NI 26)
>
> 15. In Schedule 2 to the Magistrates' Courts (Northern Ireland) Order 1981 (indictable offences which may be dealt with summarily upon consent of the accused)—
>
> (a) omit paragraph 5(a)(vii) (offence under section 52 of the Offences Against the Person Act 1861);
>
> (b) omit paragraph 10 (offences under the Criminal Law Amendment Act 1885);
>
> (c) omit paragraph 23 (offence under Article 21 of the Criminal Justice (Northern Ireland) Order 2003).

(b) The following provisions of Schedule 3 of the 2008 Order which deals with "Repeals":

Short Title	Extent of Repeal
The Magistrates' Courts (NI) Order 1981 (NI 26)	In schedule 2, paragraphs 5(a)(vii), 10 and 23

[22] In light of that declaration, the decision of the District Judge dated 27 October 2020 whereby he rescinded the conviction of (and the sentence imposed on) the applicant for an offence of indecent assault, contrary to section 52 of the 1861 Act, is removed into this court and having been so removed is quashed accordingly.

[23] It therefore follows that the decision of the Public Prosecution Service dated 3 December 2020 whereby the respondent decided to re-prosecute the applicant for the offence of indecent assault is declared unlawful.

[24] The effect of this decision and these orders is that the applicant is restored to the position which he was in before the matter was brought back before the District Judge in 2020.

[25] We shall hear the parties as to costs.

[26] The parties are to have liberty to apply in respect of this order.