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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
ROSALEEN ANGELA McDONAGH FOR JUDICIAL REVIEW OF A DECISION
BY THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

DIVISIONAL COURT

Before: Deeny LJ and Colton J

DEENY LJ

[1] This judgment addresses an issue that has been raised in the Magistrates' Court in this case and in other Magistrates' Courts relating to the power of a Public Prosecutor to issue a summons following a complaint to the Magistrates' Court pursuant to Section 93 of the Justice Act (Northern Ireland) 2015.

[2] The matter was heard by this court on 11 December 2018. Mr Martin McCann appeared for the applicant instructed by Mr Oliver Roche, solicitor, who had taken the point at the lower court. Dr Tony McGleenan led Mr Philip McAteer for the Public Prosecution Service. There had been a direction by agreement at a previous review hearing that the application would be dealt with as a rolled up hearing addressing both leave and the substantive application. At the hearing before us the proceedings were amended to allow discontinuance against the Department of Justice.

The Facts

[3] On 29 June 2017 the Public Prosecution Service ("the PPS") sent to the Northern Ireland Courts and Tribunal Service ("NICTS") three complaints relating to driving offences allegedly committed by the applicant. These were sent electronically by the Causeway system which links several bodies in Northern Ireland involved in the administration of justice.

[4] A document furnished by the PPS in hard copy form recorded that the complaints had been sent on 29 June at "10:47:44.783". The same document recorded that the NICTS acknowledged the message for complaint with its unique ten digit number on the same day at "10:48:25.564". It was not in dispute that this was an electronic acknowledgement of receipt and that the complaints had not been considered by either Resident Magistrate, Lay Magistrate, Clerk of Petty Sessions or any other person employed by the Court Service. A summons to the defendant (now applicant) to answer this complaint was sent out the same day. It was signed above the printed words on successive lines: "Public Prosecutor, Lay Magistrate, District Judge, [Clerk of Petty Sessions]." It is common case that it was in fact issued by a Public Prosecutor, an office to which we will return in a moment.

[5] Ms McDonagh's solicitor Mr Roche noted that the summons began as follows: "Whereas complaints are made before me that you ..." then setting out four breaches of the Road Traffic Order. The summons had not been signed by a Lay Magistrate, District Judge or Clerk of Petty Sessions but by a Public Prosecutor. Therefore the complaint was made by him rather than before him. Mr Roche raised the issue of the legality of the PPS issuing a summons without judicial consideration in correspondence with the Public Prosecution Service and took the point himself when he appeared on behalf of Ms McDonagh before District Judge McElholm at Londonderry Magistrates' Court. Counsel attended to represent the Director of Public Prosecutions. We have been furnished with an undated written judgment of the District Judge (MC) carefully considering the submissions made on behalf of this applicant and rejecting them. Ms McDonagh was then convicted on the matters, the subject of the complaints, her only defence being this technical point about the summons.

[6] A pre-action protocol letter then followed with the Order 53 statement, subsequently, dated 1 June 2018, with a skeleton argument appended thereto.

Statutory Background

[7] Section 93 of the Justice Act (Northern Ireland) 2015 altered the previous procedure with regard to the issuance of summonses in the Magistrates' Courts in this jurisdiction in an important way. It allowed a Public Prosecutor to issue such a summons rather than that being done by a Lay Magistrate or Clerk of Petty Sessions on the application of a prosecutor. The relevant section reads as follows:-

"93 – (1) Where a complaint has been made by a Public Prosecutor to a lay magistrate that a person has, or is suspected of having, committed a summary offence, the Public Prosecutor may issue a summons directed to that person requiring that person to appear before [a magistrates' court] to answer to the complaint.

(2)

(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.

(4) Where a Public Prosecutor is satisfied that a summons issued under subsection (1) has not been served, the Public Prosecutor may, without a complaint being made to a lay magistrate, re-issue the summons extending the time for the appearance of the person summoned.

(5) Any existing statutory provision which applies to a complaint made or summons issued under paragraph (1), (2), (3) or (4A) of Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981 shall apply (with appropriate modifications) to a complaint made or summons issued by a Public Prosecutor under the corresponding subsection of this section.

(6) In this section "Public Prosecutor" has the meaning given in section 29(5) of the Justice (Northern Ireland) Act 2002."

[8] The explanatory note to the Act makes clear the intention of Parliament, if not already apparent.

"This section enables a prosecutor from the Public Prosecution Service to issue a summons to an accused person without first having to get a Lay Magistrate to sign the summons, provided that a complaint has been made to a Lay Magistrate."

Submissions of Appellant

[9] Mr McCann for the appellant submits that the problem, if there is one, as he put it, is that the Magistrates' Courts (Northern Ireland) Order 1981 was not expressly amended by Section 93.

[10] The relevant parts of the 1981 Order read as follows.

**"Summary trial
Issue of summons to accused or warrant for his arrest**

20. – (1) On a complaint being made to a lay magistrate that a person has, or is suspected of having, committed a summary offence, the lay magistrate may issue a summons directed to that person requiring him to appear before a magistrates' court to answer to the complaint.

(2) On a complaint being made to a lay magistrate that a person has, or is suspected of having, committed an indictable offence, the lay magistrate may either –

(a) issue a summons requiring him to appear before a magistrates' court; or

(b) issue a warrant to arrest that person and bring him before a magistrates' court

(3) Where the offence charged in the complaint is an indictable offence, a warrant under this Article may be issued by a lay magistrate at any time notwithstanding that a summons has previously been issued and whether before or after the time mentioned in such summons for the appearance of the person summoned.

(4) Where a lay magistrate is satisfied that a summons issued under paragraph (1) has not been served, the lay magistrate may, without a complaint being made to him, re-issue the summons extending the time for the appearance of the person summoned.

(5) Where a district judge (magistrates' courts) is satisfied that a person suspected of having committed a summary offence cannot for any reason be served with a summons, the district judge (magistrates' courts) may issue a warrant for the arrest of that person notwithstanding that a summons has not been first issued.

(6) A warrant may be issued in respect of any offence notwithstanding that the offence was committed outside Northern Ireland if an indictment for the offence may legally be preferred in Northern Ireland.

(7) A warrant shall not be issued under this Article unless the complaint is in writing and substantiated on oath."

[11] The original legislation referred to Resident Magistrates and Justices of the Peace.

[12] Article 21 of the same Order introduced a practical reform. Article 21 reads as follows:

“Signing of summons by clerks of petty sessions

21.—(1) Notwithstanding anything in section 6(1) of the Magistrates' Courts Act (Northern Ireland) 1964 or any other statutory provision, a clerk of petty sessions may exercise the functions of a justice of the peace relating to the making of complaints, other than complaints on oath, under Article 20 or any other statutory provision providing for complaints to be made to a justice of the peace or authorising a justice of the peace to issue summonses; and Article 20 or by any other statutory provision or rule of law regulating, or relating to, the making of complaints, other than complaints on oath, to, or the issuing of summonses by, a justice of the peace shall apply by virtue of this paragraph in relation to the making of such complaints to, or the issuing of summonses by, a clerk of petty sessions as if he were a justice of the peace.

(2) Notwithstanding anything in Article 2 (4) or any other statutory provision, nothing in this Article shall enable an assistant or deputy clerk of petty sessions to exercise the functions of a justice of the peace under any statutory provision providing for complaints to be made to a justice of the peace or authorising a justice of the peace to issue summonses.

Counsel in the papers before me seems to have quoted from an earlier version of 21. The effect of that reform at the time was to allow the Clerks of Petty Sessions to sign the summonses rather than getting in a Justice of the Peace, now Lay Magistrate to do so.

[13] Mr McCann’s contention is that there should have been an express amendment of the Magistrates’ Court Order to address the role of the Public Prosecutor.

[14] He further argues that this is not a mere matter of form but the need for a Justice of the Peace, as it formerly was, to look at a complaint before a summons was issued introduced a measure of judicial independent purview which was of importance.

[15] In support of his submissions he cited Fordham, Judicial Review Handbook, 6th Edition, page 518, paragraph 50.2, to this effect.

“A public body must not surrender its independent judgment to a third party nor must one public body bring about the surrender of another public body’s independent judgment.”

[16] He pointed out that the current edition of the Lay Magistrates’ Handbook, published by the Department of Justice and updated as recently as November 2017 stated at paragraph 6.1 that:

“The functions of Lay Magistrates include hearing complaints with a view to issuing summonses and warrants, for example from the Police Service of Northern Ireland, Police Prosecution Service, HM Revenue and Customs and others.”

[17] He drew attention to Article 4(2) (v) of the Justice Act (Northern Ireland) 2015 which provides that:

“A Lay Magistrate shall –

(b) Have as regards to the whole of Northern Ireland the jurisdiction and duties which immediately before commencement were vested in or imposed on a Lay Magistrate as regards a County Court Division.”

He submitted that the absence of any provision limiting the Lay Magistrate’s power cut across the power relied on by the PPS for Public Prosecutors to issue summonses.

[18] He acknowledged that the inappropriate wording on the summons to which I have referred at [5] above, as noted by his solicitor, had now been changed so that summonses refer to the complaints being made “before a Lay Magistrate or District Judge”. He set out various other matters relating to the passage of this legislation through the Northern Ireland Assembly.

[19] The court had the benefit of helpful written and oral argument on behalf of the PPS but it is convenient to incorporate those into the consideration of the matter by this court.

Consideration

[20] If one looks at Section 93(5) of the 2015 Act one sees that:

“Any existing statutory provision which applies to a complaint made or summons issued under Article 20 of the Magistrates’ Courts (NI) Order 1981 shall apply (with appropriate modifications) to a complaint made or summons issued by a Public Prosecutor under the corresponding sub-section of this section.”

It is not right to say therefore that the legislature overlooked the earlier provision, Article 20 of the 1981 Order when enacting this provision. It was not necessary, in our view, for the legislature to go further by abolishing or amending the reference to a Lay Magistrate in Article 20 of the 1981 Order. The reason for that is that a role still exists for a Lay Magistrate. The power to issue the summons is given to a Public Prosecutor. That office was created by Section 25 of the Justice (NI) Act 2002. Section 29 deals with the Public Prosecution Service and paragraph (5) reads as follows.

“The Director may designate any member of staff of the Service who is -

- (a) a member of the Bar of Northern Ireland, or
- (b) a solicitor of the Supreme Court;

and any person designated under this sub-section is to be known as a Public Prosecutor.”

[21] One pauses to consider that. The Public Prosecution Service is an independent body established by an Act of Parliament to be responsible for the conduct of all criminal proceedings “which are instituted in Northern Ireland on behalf of any police force (whether by a member of that force or any other person)”: s. 31(1) of the 2002 Act. There are two aspects of this. The Public Prosecutor is a member of the staff of this independent statutory body but is also a qualified barrister or solicitor. Not every member of the staff of the PPS will be a Public Prosecutor. They must be designated as such by the Director. What the legislature was doing was entrusting to such an office holder the right to issue a summons, provided they had laid a complaint before the Magistrates’ Court. It is not in dispute that they are entitled to lay the complaint electronically.

[22] It is important to remember, as can be seen from Section 31(3) of the 2002 Act, that the PPS does not have a monopoly of prosecutions in Northern Ireland. If complaints are laid by other ‘persons’, for example Her Majesty’s Revenue and Customs, they are not entitled to issue the summons of their own motion. In such cases a Magistrate or a Clerk of Petty Sessions on his behalf must still agree to and sign the summons. Therefore it is perfectly proper for Article 20 of the 1981 Order to continue in force and provide for those circumstances.

[22] Mr McCann's broader argument that a judicial element in the issuing of summonses existed and has been wrongly removed seems misplaced. Firstly, as Dr McGleenan pointed out this is primary legislation and the legislature is perfectly entitled to take this step.

[23] Secondly, although Mr McCann adverted to DPP v Long [2008] NICA 15, the effect of that decision, following the decision of the House of Lords in R v Manchester Stipendiary Magistrate (ex parte Hill) [1983] AC 328 and the decision of this Court in Re McFarland [1987] NI 246 is that the receipt of the complaint is a ministerial matter which can be delegated to a member of staff, and now received electronically as is not in dispute. Furthermore it is the complaint itself which requires the defendant to come before the court. As Girvan LJ said the court's jurisdiction does not depend upon a summons or warrant being issued. We see no wider principle of law that is infringed by empowering a Public Prosecutor to issue a summons.

[24] It may well be right to say that a public body should not surrender its independent judgment to a third party, as the editor of Fordham Judicial Review Handbook stated and as relied on by Mr McCann. But that is not in this situation. The legislature has empowered a Public Prosecutor to exercise a role previously exercised by the Clerk of Petty Sessions on behalf of Magistrates.

[25] Nor is the quote from the Lay Magistrates' Handbook of assistance to the appellant. It would be of slight weight in any event but in fact it is correct in saying that the Lay Magistrates continue to have a function with regard to issuing summonses and warrants for HM Revenue and Customs and others but it is incorrect in saying they now have that role for the Public Prosecution Service and the Police. Nothing turns on this.

[26] Section 4 of the Justice Act 2015 is really addressing the issue of the wider jurisdiction in the administration of the courts in Northern Ireland but it is not inconsistent with Section 93 of the same Act. If one looks at Section 93 it says that "the Public Prosecutor may issue a summons" to the person named in the complaint. That leaves open the possibility that he may choose to ask the court to issue the summons. That may not happen in practice but it does seem that the Lay Magistrate could still perform that role personally or by delegation to the Clerk of Petty Sessions.

Conclusion

[27] We conclude that we can see no good reason in law to criticise the decision of the learned District Judge. The effect of Section 93 of the Justice Act (Northern Ireland) 2015 is to empower a Public Prosecutor i.e. a barrister or solicitor in the service of the Public Prosecution Service and so designated by its Director, to issue a summons to a defendant, provided a complaint has been laid before the Magistrates' Court according to law. This is what happened here and the complaint and

summons are both valid. We therefore find that the applicant's application for judicial review of the District Judge fails, although we do grant leave. We find for the Public Prosecution Service.