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Judgment: approved by the Court for handing down | *Delivered:* **21/01/05**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CHIEF INSPECTOR SHIELDS

Complainant/ Appellant;

-and-

HAROLD DEVENNEY

Defendant/Respondent.

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a resident magistrate. On 16 January 2003 a fatal road traffic accident occurred at Ballykelly, County Londonderry. On 10 July 2003 summonses were issued under article 20 of the Magistrates Courts (Northern Ireland) Order 1981 against the respondent/defendant alleging that he had allowed a vehicle to cause an obstruction at the accident location and that no test certificate had been issued for the vehicle within the appropriate period. The respondent through his counsel applied to the resident magistrate for an order staying the proceedings on the ground that the prosecution would amount to an abuse of the process of the court. The resident magistrate acceded to that application

and stayed the proceedings. The complainant/appellant appeals against that decision.

The history of the proceedings

[2] The summonses were served on the respondent on 11 August 2003 and he was thereby required to attend Limavady Magistrates' Court to answer them on 17 September 2003. During discussions between counsel for the respondent and prosecuting counsel it emerged that the direction to prosecute was not signed until 28 July 2003. This prompted an adjournment of the summonses to enable the respondent to prepare an application to the magistrate to stay the proceedings and this was ultimately heard on 2 February 2004.

[3] In the course of the hearing of the application to stay the proceedings the following facts were established: -

1. A police officer, Sergeant Seaton, recommended prosecution of the respondent on a number of charges on 27 March 2003.
2. After consideration by an inspector of the Police Service for Northern Ireland (PSNI) the file was sent to Detective Superintendent McAllister who sent the file to the Department of the Director of Public Prosecutions on 14 May 2003, recommending prosecution on the two charges in respect of which summonses were issued.
3. Elaine Gray, a professional officer in the Director's office, was assigned the file on 9 June 2003 and she 'agreed' the charges with her supervising legal assistant, Mrs Sheena Ferguson, on 20 June 2003. On 1 July 2003, the charges were further 'agreed' with Ronald Carey, assistant director. The charges were then considered by James Scholes, senior assistant director, on 4 July 2003. He agreed that the respondent should be prosecuted on the proposed charges.
4. On 10 July Mrs Ferguson instructed Sergeant Weatherall of PSNI to issue Form 1 protective processes. She did so because Ms Gray was on leave at the time. The sergeant issued summonses on the same day. The direction to prosecute was approved by Mr Scholes on 28 July 2003 and Ms Gray signed it on that day.

[4] The resident magistrate's findings are set out in paragraph 9 of the case stated as follows: -

> "… I came to the view that until the direction was formally signed there could not be said to have been an irrevocable decision to prosecute. If, for example, the direction was never formally signed, or any one of the officers in the DPP had had a change of opinion in the light of further review,

> then the prosecution should not have gone ahead. It may appear unlikely that either of these two scenarios would have occurred but it is possible. Particularly in the circumstances of an actual summons being issued as opposed to the protective process as directed, it appeared to me that from that time the prosecution was live although I also believed the laying of the information would in itself have been objectionable. This I therefore concluded was unfair to the defendant in principle, even though in fact he was not served until August …
>
> In answer to a question from me during the *viva voce* argument Ms McKay for the prosecution conceded that Mr Scholes' decision on viewing and agreeing the recommendations could not be seen as irrevocable. The stage at which it became irrevocable was when he approved the written direction on 28 July."

The time limit for bringing proceedings

[5] Article 19 (1) of the Magistrates Courts (NI) Order 1981 provides: -

> "*Time within which complaint charging offence must be made to give jurisdiction*
>
> 19. – (1) Where no period of limitation is provided for by any other enactment-
>
> > (a) a magistrates' court shall not have jurisdiction to hear and determine a complaint charging the commission of a summary offence other than an offence which is also triable upon indictment unless the complaint was made within six months from the time when the offence was committed or ceased to continue."

The arguments

[6] For the appellant Mr Valentine submitted that the main purpose of the six-month time limit was to initiate the prosecution within a sufficiently short time to put the defendant on notice of the proceedings so as to enable him to prepare a defence to the charge. The time limit was therefore designed to

achieve fairness in the trial and it was only where it could be demonstrated that the defendant would suffer unfairness that the question of a stay of proceedings on the ground of abuse of process would arise. No unfairness to the defendant in the present case had been demonstrated.

[7] Mr Valentine pointed out that, in appropriate circumstances, it is entirely legitimate to issue a 'protective complaint' *i.e.* a complaint which is made within time but which does not prompt the issuing of a summons until some contingent event occurs. He submitted therefore that it was not necessary for the prosecuting authorities to take an irrevocable decision to prosecute within the period specified in article 19 (1). In any event, it had not been established that an irrevocable decision had not been taken before the expiry of the time limit. No fewer than four officers of the department of the Director of Public Prosecutions, (Ms Gray, Mrs Ferguson, Mr Carey and Mr Scholes) had decided that a prosecution should proceed. The approval of the written direction by Mr Scholes on 28 July should not have been treated by the magistrate as the date on which the irrevocable decision had been taken. The signing of a direction to prosecute was an action of no particular significance; it was an administrative step putting in writing a decision already taken.

[8] For the respondent Mr Larkin QC argued that the finding of fact made by the magistrate that no irrevocable decision had been taken before 28 July could not be disturbed on appeal, as suggested by the appellant. Moreover, it had been expressly conceded by the prosecution that an irrevocable decision had not been taken before that date. The conclusion reached by the magistrate involved the exercise of a discretion. This court should not interfere with the exercise of that discretion.

[9] Mr Larkin argued that the taking of a valid irrevocable decision to prosecute marks the point at which the prosecutorial discretion not to institute proceedings expires. This decision must be a reasoned decision and evidence must be available to satisfy the court as to when the decision was taken; otherwise it could not be satisfied beyond reasonable doubt that the making of a complaint was reasoned rather than arbitrary.

Must a stay be granted if an irrevocable decision to prosecute has not been made?

[10] In *R v Brentford Justices, ex parte Wong* [1981] 1 All ER 884 the applicant had been involved in a road accident. Just two days before the expiry of the six months' period permitted for the institution of proceedings, police laid an information alleging that he had been driving without due care and attention. They had not, however, finally decided by that date whether to prosecute. Another three months elapsed before they sent the applicant a letter informing him that he would be prosecuted. The applicant applied to the magistrates to stay the proceedings inter alia on the grounds that for the

police to lay an information in order to give them longer than the statutory six months to decide whether to prosecute amounted to an abuse of the process of the court. The magistrates accepted the applicant's arguments on the merits but stated that they had no power to exercise a discretion not to hear a case where all the statutory requirements had been complied with. On appeal to the Divisional Court it was held that magistrates had a discretion to refuse to hear a summons if the prosecution amounted to an abuse of the process of the court and they were entitled to conclude that there had been an abuse of the process of the court because the police had deliberately attempted to gain time by laying the information and that there was no excuse for their delay in serving the summons.

[11] For a proper understanding of the decision in the *Wong* case, it is important to note that at the date that the information was laid the prosecutor had not decided whether to prosecute. This is described variously in the judgment of Donaldson LJ as the lack of a "firm" decision or the absence of an "irrevocable" decision. What is clear, however, is that no decision had been taken. This situation provides an immediate contrast with the present case. Here the decision to prosecute had been taken. True it is that the opportunity to revise that decision remained as a theoretical possibility but that was so even after the direction to prosecute had been signed.

[12] It is also important to note that in the *Wong* case it was not suggested that in every instance where there was no irrevocable decision to prosecute, the laying of an information would inevitably amount to an abuse of process. What the court held was that such a situation *could* warrant a finding of abuse of process. At page 887 Donaldson LJ said: -

> "For my part, I think that it is open to justices to conclude that it is an abuse of the process of the court for a prosecutor to lay an information when he has not reached a decision to prosecute. The process of laying an information is, I think, assumed by Parliament to be the first stage in a continuous process of bringing a prosecution. Section 104 of the 1952 Act is designed to ensure that prosecutions shall be brought within a reasonable time. That purpose is wholly frustrated if it is possible for a prosecutor to obtain summonses and then, in his own good time and at his convenience, serve them. Of course there may be delays in service of the summonses due perhaps to the evasiveness of the defendant. There may be delays due to administrative reasons which are excusable, but that is not so in this case."

[13] It is clear from this passage that it was not contemplated that the failure to decide whether to prosecute within the stipulated period would lead ineluctably to a stay of proceedings. On the contrary, it is obvious that the court was influenced to the view that a stay could be granted because of the particular circumstances of the case, specifically the failure of the prosecuting authorities to confront the question whether to prosecute and to artificially extend the period available to them to make a decision that led the court to conclude that a stay could be appropriate.

[14] That a stay will not be inevitable where there has not been an irrevocable decision to prosecute is implicit in the argument of the respondent that the decision taken by the magistrate in the instant case was one made within discretion. If he had a discretion whether to grant a stay, he equally had a discretion to refuse it. We are of the clear view, therefore, that it is by no means inevitable that the failure to take an irrevocable decision to prosecute will lead to the staying of the proceedings as an abuse of process. The particular circumstances of each case must be examined. In this context it is pertinent to recall the words of Carswell LCJ in *Re Molloy's application* [1998] NI 78, 85: -

> "In our opinion … resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory jurisdiction may nevertheless be regarded as an abuse of the process of the court if, but only if, it operates to affect adversely the fairness of the trial. It is necessary in every case to look at the circumstances of the case, and it lies within the discretion of the court to decide whether the procedure operates against the interests of the defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in *Ex p Bennett* (at 63) that it is to be 'most sparingly exercised' and that of Viscount Dilhorne in *DPP v Humphrys* [1977] AC 1 at 26, that it should be exercised only 'in the most exceptional circumstances'."

[15] Not only, therefore, is not inevitable that a stay will be granted where there has been no irrevocable decision to prosecute, such a stay should only be granted where the absence of such a decision has operated to affect adversely the fairness of the trial.

The exercise of discretion

[16] We must turn now to consider the argument that the magistrate reached his decision within an area of discretionary judgment and that this court should not interfere with it. It is, of course, axiomatic that a decision taken within discretion is immune from challenge provided it has been made in accordance with legal principle and is not perverse.

[17] It appears to us that the magistrate concentrated exclusively on the issue whether an irrevocable decision to prosecute had been made. He did not address the question whether this would adversely affect the fairness of the trial of the defendant. It is true that he determined that the failure to reach an irrevocable decision was "unfair to the defendant in principle" but he did not elaborate on that conclusion. There was no examination of how the trial of the defendant would have been rendered unfair and one can only deduce that the magistrate concluded that the failure to reach an irrevocable decision was *ipso facto* unfair. In our judgment this was not a legally permissible approach. It was incumbent on the magistrate to address the question of how the defendant's trial might have been affected by the failure to reach an irrevocable decision. We have concluded therefore that the magistrate failed to apply the proper legal principles to the issue that he had to determine and that in consequence his decision cannot be sustained.

Was the decision to prosecute irrevocable?

[18] Although we have decided that the proper examination of the issues that arise in this case cannot be determined solely by reference to the question whether the decision to prosecute was irrevocable, we think it appropriate to deal with the subject of whether the decision can be said not to have been irrevocable.

[19] We consider that the court in *Wong* did not intend to use the expression 'irrevocable' as a term of art. It is, we believe, clear that the term was used to reflect the actual circumstances of that case. As we have already observed, it was beyond question that the prosecuting authorities in that case had not decided whether a prosecution should take place. The decision as to prosecution was not only not irrevocable; it had not been taken at all.

[20] The decision taken in the present case was, in our judgment, as irrevocable as any decision to prosecute could have been. Of course, there was always a theoretical possibility that before the direction to prosecute was signed a decision might have been reached not to proceed with the prosecution but that possibility endured after the direction had been signed. It was not magically transformed into a condition of irrevocability by the signing of the direction. In our view, the decision to prosecute was as irrevocable before the signing of the direction as it was thereafter. Even if, therefore, we had concluded that the propriety of the prosecution depended

on the question whether the decision to prosecute was irrevocable, we would have held that these proceedings should not have been stayed.

Conclusions

[21] We have concluded that the decision of the resident magistrate to stay the proceedings cannot be upheld and must be quashed. The case against the defendant ought to have proceeded. We will therefore remit the matter to the magistrates court for hearing according to law.