Neutral Citation No. [2014] NICA 55 | *Ref:* **OHA9266**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **25/07/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Complainant/Appellant

and

EDWARD EDENS, GRAHAM OFFICER, DARREN MILLAR, RYAN KIRKWOOD AND CHRISTOPHER KIRKWOOD

Defendants/Respondents

Before: MORGAN LCJ, HIGGINS LJ and O'HARA J

O'HARA J (**Delivering the judgment of the Court)**

Introduction

[1] In April 2012 each of the respondents was charged with having committed offences in February 2012 contrary to the Protection of Badgers Act 1992 ("the 1992 Act"). The 1992 Act does not in fact extend to Northern Ireland – it applies only in England, Wales and Scotland. In February 2013 the appellant applied to the District Judge to amend the charges by replacing them with charges under the nearest equivalent Northern Ireland legislation, the Wildlife (NI) Order 1985 ("the 1985 Order"). That application was dismissed in July 2013. In this appeal the appellant challenges the decision of the District Judge not to allow the charges to be amended.

[2] In this Court the appellant was represented by Mr P Coll. Mr D Scoffield QC led Mr W Atchison for the respondents Mr Officer, Mr R Kirkwood and Mr C Kirkwood. Mr I Turkington represented the respondent Mr Miller and Mr C Rea represented the respondent Mr Edens. We are grateful to all counsel for their helpful written and oral submissions.

Background

[3] The complaints made against the different respondents are not identical but the gist of the allegations is that they interfered with a badger sett, that they dug into the sett and that they caused unnecessary suffering to a badger. It is also alleged against some of the respondents that they caused a dog to enter the sett and disturb it. The respondents deny the charges.

[4] In November 2012, some seven months after the charges were brought, it came to the attention of the appellant that the 1992 Act does not extend to Northern Ireland. Accordingly, an application to amend the charges which were presented under that Act was made in February 2013. The intention was to replace them with charges under the 1985 Order. The application was refused by the District Judge in a written decision delivered on 9 July 2013. In that decision the District Judge recognised that he had a wide power under Article 155 of the Magistrates' Courts (NI) Order 1981 to amend summonses so long as no prejudice is caused to the respondents. He referred to a number of authorities which had been cited to him, including R v Pain et al [1986] 82 Crim App R 141 and concluded:

> "I therefore exercise my discretion not to allow the amendment, not on the ground that it imposes some prejudice on the defendants, but more significantly it seems to me that the original case was never capable of prosecution within this jurisdiction and cannot be allowed to be amended, but only withdrawn. One cannot amend that which effectively never existed as a charge."

[5] The effect of this decision was that the prosecution could proceed with other charges against each respondent but not with any charges under either the 1992 Act or the 1985 Order. At the request of the appellant the District Judge has stated a case for this Court on the following point of law:

> "Whether I was correct in law to refuse the appellants' application to amend charges under the Protection of Badgers Act 1992, which Act does not apply to Northern Ireland, to a single charge of intentionally damaging or destroying or obstructing access to a structure or place which a badger (Meles Meles) used for shelter contrary to Article 10(4)(a) of the Wildlife (Northern Ireland) Order 1985, which offence is subject to a statutory time limit of 6 months for a complaint, and the amendment being sought outside the said limit."

Statutory Provisions

[6] Article 19 of the Magistrates' Courts (NI) Order 1981 provides that where no period of limitation is provided for by any other enactment 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 6 months from the time when the offence is alleged to have been committed. Article 155 of the same statute then provides:

> "A Magistrates' Court may during any proceedings 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."

[7] As its title suggests the 1992 Act is a statute which provides specifically for the protection of badgers as opposed to the protection of wildlife generally. The provisions which are relevant to this appeal are:

> **"Section 2**
> **Cruelty**
>
> (1) A person is guilty of an offence if –
>
> (c) except as permitted by or under this Act, he digs for a badger; …
>
> **Section 3**
> **Interfering with badger setts**
>
> A person is guilty of an offence if, except as permitted by or under this Act, he interferes with a badger sett by doing any of the following things –
>
> (d) causing a dog to enter a badger sett …
>
> intending to do any of those things or being reckless as to whether his actions would have any of those consequences.

Section 12
Penalties and forfeiture

(1) A person guilty of an offence under Section 1(1) or (3), 2 or 3 above is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both. …"

[8] There is no direct Northern Ireland equivalent of the 1992 Act. Accordingly, the appellant had to apply to amend the charges by replacing them with the following charge under Article 10(4)(a) of the 1985 Order:

"**Protection of certain wild animals**

10-(4) Subject to the provisions of this Part if any person intentionally or recklessly –

(a) Damages or destroys, or obstructs access to, any structure or place which any wild animal included in Schedule 5 uses for shelter or protection;

he shall be guilty of an offence."

Article 26(2) of the 1985 Order provides that proceedings for a summary offence under the Order may be brought within a period of 6 months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his knowledge. Article 27 provides that a person who is guilty of an offence under Article 10 shall be liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale or to both.

Authorities

[9] The parties referred us to an extensive range of authorities, many of which we found to be fact specific and therefore of limited relevance. In the present cases not only are the charges defective because they refer to non-applicable legislation for which there is no direct equivalent in this jurisdiction but there is an additional issue arising from the fact that the application to amend was made after the expiry of the 6 month time limit provided for in Article 19 of the Magistrates' Courts Order and Article 26 of the 1985 Order.

[10] In his judgment the District Judge relied to some degree on the decision of the Court of Appeal in England and Wales in R v Pain et al. That case involved a

prosecution for making and selling fake perfumes. The original charges could have been, but were not, brought under the Trade Descriptions Act 1968. Instead they were brought as conspiracies to defraud and conspiracies to obtain property by deception. At the trial in the Crown Court the prosecution was allowed to amend the indictment to charge statutory conspiracies under the Trade Descriptions Act notwithstanding the fact that the time limit for bringing charges under that Act had expired. On appeals against conviction the Court of Appeal allowed the appeals and quashed the convictions on the ground that the trial judge had no jurisdiction to allow the amendments out of time.

[11] We have been unable to discern any principle in Pain's case which is of general application. Not only is it of limited relevance to the circumstances of this appeal but, in light of two other decisions to which we have been referred, we do not believe that it can still be considered good law.

[12] The first of those decisions is that of the House of Lords in R v Ayres [1984] 78 Cr App R 232. Mr Ayres was charged on indictment with conspiracy to defraud at common law. The substantive fraud alleged was an intention to obtain money from an insurance company by deception contrary to section 15 of the Theft Act 1968 by a false representation that a load of scallops had been stolen while in transit. He appealed against his conviction on the ground that the indictment should have been laid as a conspiracy to obtain property by deception contrary to section 1(1) of the Criminal Law Act 1977 and not as a conspiracy to defraud at common law. The House of Lords held that on the true construction of the Criminal Law Act 1977 an offencewhich amounted to a common law conspiracy must be charged as such and not as a statutory conspiracy under section 1; conversely a section 1 conspiracy could not be charged as a common law conspiracy. Accordingly, a conspiracy to defraud at common law could only be charged when the evidence did not support any statutory substantive conspiracy. The evidence in the instant case supported an attempt to obtain property by deception if the conspiracy had been carried out, the appellant had been convicted upon an indictment which did not charge him accurately with the only offence for which he could properly be convicted, and there had thus been a material irregularity in the trial. It was, however, further held that no miscarriage of justice had actually occurred because the particulars of the offence in the indictment left no one in doubt that the crime alleged was a conspiracy to obtain money by deception and the trial judge made it plain in his direction to the jury that that was the case. Accordingly, the Court would apply the proviso to section 2(1) of the Criminal Appeal Act 1968 and dismiss the appeal.

[13] In the course of his speech Lord Bridge stated:

> "In a number of cases where an irregularity in the form of the indictment has been discussed in relation to the application of the proviso a distinction, treated as of crucial importance, has been drawn between an

> indictment which is `a nullity' and one which is merely `defective'. For my part, I doubt if this classification provides much assistance in answering the question which the proviso poses. If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but pleaded in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."

[14] If one disregards for present purposes the references to the proviso, the essential point is clear – the question in any case concerns the degree to which the charge is inaccurate, incomplete or otherwise imperfect and whether the particular error has prejudiced or embarrassed the defendant. The second case of some importance to which we have been referred is The Queen v Scunthorpe Magistrates ex parte M and G [1998] EWHC 228 (Admin). This is a decision of a Divisional Court comprised of Lord Bingham, Lord Chief Justice and Mr Justice Dyson. M who was 14 and G who was 16 were jointly charged with robbery in that they assaulted a 15 year old girl, removed her shoes and ran off with them. Following discussions it was agreed between the prosecution and defence that M and G would plead guilty to alternative charges of theft and common assault. The Crown Prosecution Service agreed that the public interest was adequately met by this course of action. When the case came before the Youth Court the justices allowed an application to amend the information to allege theft whereupon M and G pleaded guilty to that charge. However, when the prosecutor asked for the charge of common assault to be put, the clerk to the justices raised an objection as a result of which the justices refused to allow the new charge to be put.

[15] The objection raised by the clerk and accepted by the justices was that, common assault being a summary offence which cannot be tried by a Magistrates' Court unless the information is laid within 6 months of the offence being committed, there was no power to amend the information to allege common assault against M and G because by the time the application was made 6 months and 3 days had passed since the commission of the offence.

[16] The Divisional Court quashed the refusal by the justices to allow the application to amend the information by adding the charge of common assault. In the course of his judgment Dyson J stated:

> "In my judgment the following principles can be derived from the authorities:
>
> (1) The purpose of the 6 month time limit --- is to ensure that summary offences are charged and tried as soon as reasonably practicable after their alleged commission.
>
> (2) Where an information has been laid within the 6 month period it can be amended after the expiry of that period.
>
> (3) An information can be amended after the expiry of the 6 month period, even to allege a different offence or different offences provided that:
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> (i) the different offence or offences allege the `same misdoing' as the original offence; and
>
> (ii) the amendment can be made in the interest of justice.
>
> These two conditions require a little elucidation. The phrase `same misdoing' appears in the judgment of McCullough J in Simpson v Roberts. In my view it should not be construed too narrowly. I understand it to mean that the new offence should arise out of the same (or substantially the same) facts as give rise to the original offence."

[17] Applying those principles to the facts of the case before them, the Divisional Court then reached the following conclusion:

> "With those principles in mind, I turn to the present case. In my view the justices applied the wrong test. They expressly declined to consider whether the common assault and theft were based on the same facts, or substantially the same facts, as the robbery. Instead they asked themselves whether the offences

> were different offences. They decided that they were completely different offences, simply because robbery is a far graver crime than common assault, the maximum penalty for the former being life imprisonment. In my judgment it is clear beyond argument that the new offences of theft and common assault arose out of the same, or substantially the same, facts as the original offence of robbery. Moreover, since the prosecution was prepared to accept pleas to the lesser offences and the applicants were willing to offer those pleas, the interest of justice plainly required the amendments to be made."

Submissions

[18] For the appellant Mr Coll submitted that the similarities are such between the offences alleged contrary to the 1992 Act and the single offence alleged contrary to the 1985 Order that there could be no reasonable perception of injustice or prejudice to the respondents. He emphasised that the focus should not be on the fact that there is no direct equivalent of the 1992 Act in Northern Ireland but on the fact that the pre-existing 1985 Order was cast in comparable terms. In essence, he submitted, the application to amend was akin to amending the section 3 charge with the section 2 charge largely falling away. He also highlighted the close similarities between the penalties for offences under the two statutes.

[19] In his submission for the respondents whom he represented, which submission was adopted by counsel for the other respondents, Mr Scoffield QC took issue with the suggestion that there was a substantial degree of similarity between offences under the 1992 Act and the 1985 Order. He further argued that even if the historic distinction between complaints which are a nullity and those which are defective is no longer valid, the charges in the present cases are much further towards what might be called the nullity end of the spectrum. He highlighted that in various authorities reference was made to the Statement of Complaint and the Particulars of Complaint with the courts showing a greater willingness to allow amendments if at least one of those two elements is correct in its form. In his contention neither element is correct in this appeal. The reference to the 1992 Act means in effect that the Statement of Complaint is wrong and the different format of the statutes means that the particulars are also necessarily defective.

Conclusion

[20] We have had the benefit of more extensive submissions than the District Judge enjoyed. In light of those submissions and in particular the two decisions which we have highlighted we have reached the same conclusion as he did but for different reasons. The District Judge based his decision upon R v Pain. For the

reasons given above we do not consider that this decision should now be followed. Accordingly, we must re-examine the issue afresh in order to answer the question posed. That requires us first to consider the particulars of the complaint to determine whether the complaint can fairly be related to the charge in respect of which the amendment is made. That decision should be based on a consideration of whether the charge broadly relates to the same wrongdoing. Secondly, if satisfied that it does so relate, we must then consider whether it is in the interests of justice to amend having regard in particular to any prejudice to the respondents.

[21] The differences between the original charges and the proposed new charges are significant. They include the following:

(a) The earlier charges alleged that the respondents had "dug" for a badger and/or "interfered with a badger's sett by damaging the sett causing a dog to enter and disturbing the sett". It is to these allegations that the respondents had addressed their case.

(b) The new charge widens considerably what is alleged against the respondents. There is no mention of digging nor of the use of a dog. These are no longer necessary ingredients of the prosecution case.

(c) The new charge is much more general in nature. It relates to damaging or destroying or obstructing access. A conviction could be obtained on this charge, unlike the earlier charges, if there was no digging and no damage but a badger sett had simply been obstructed.

(d) Moreover, the old charges refer to a badger sett. Proving the existence of a "badger sett" was therefore also a necessary ingredient of the offence which (under section 14 of the 1992 Act) requires "signs indicating current use by a badger". The new charges refer simply to a structure or place which a badger "used for shelter".

[22] We have concluded, therefore, that even if we were to allow an amendment sought outside the statutory time limit, the matters set out in paragraph [21] are such as to make it inappropriate to amend in the interests of justice. Accordingly, we answer the question posed in the affirmative.