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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **30/04/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARIA FIONDA (A MINOR) BY HER MOTHER AND NEXT FRIEND RONA McDAID FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF A DISTRICT JUDGE (MAGISTRATES' COURT) MADE ON 30 JUNE 2016

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SIR ANTHONY HART

[1] This is an application brought by Rona McDaid on behalf of her 14 year old daughter Maria Fionda to quash the decision of District Judge (Magistrates Court) McCourt on 30 June 2016 to dismiss a summons in respect of which they were the main prosecution witnesses following his refusal of an application by the prosecution to adjourn the summons. In view of the unusual history of this case it is necessary to set out the chronology of events in some detail.

[2] Their witness statements allege that on Wednesday 3 September 2014 Rona McDaid and her 11 year old daughter were walking along the pavement in Mary Street, Crossgar. They allege that a jeep type vehicle driven by Paul Bell drove towards them, crossed the road, drove along the pavement on their side and stopped. It appears that the pavement is sufficiently wide at this point to allow a vehicle to park completely on the pavement but still allow pedestrians to pass, perhaps with difficulty.

[3] Maria alleged that the front corner of the jeep brushed against her skirt and then hit her left arm knocking her arm backwards. She did not have a bruise but her arm was sore for a short time afterwards. She told her mother who said that the car had also hit her handbag.

[4] Her mother confirmed this version of events, identifying the driver of the vehicle because she had worked for him for seven years or so. She confirmed that her daughter had no injuries and was not hurt but was "slightly annoyed about this

happening". Her mother also said "there is a history between myself and Paul Bell's family which is being dealt with by solicitors", although she did not explain what this "history" involved.

[5] The matter was reported to the police and statements taken by the PSNI from the applicant and her daughter who is now aged 14. Mr Bell said he would make himself available for interview, but did not do so. The PSNI file was sent to the PPS which directed that Paul Bell be proceeded against on summons on a single charge that he drove a vehicle without reasonable consideration for other persons using the said road, contrary to Article 12 of the Road Traffic (Northern Ireland) Order 1995. A complaint in those terms was made on 2 March 2015.

[6] For some reason that has not been explained it was not until 18 February 2016, 13½ months after the summons was issued and 18½ months after the alleged incident, that the defendant made his first appearance before the Magistrates' Court and indicated that he would plead not guilty.

[7] The next court hearing was on 3 March 2016. It seems that the defence did not appear. The case was reviewed and fixed for trial on 5 April.

[8] On 10 March the case was reviewed and because the defence had a difficulty with the trial date of 5 April that date was vacated with a new trial date being fixed on the defendant's application for 5 May 2016.

[9] The matter was listed again on 24 March 2016 for review when the defendant said that 5 May did not suit as he was on holiday at the time. The trial date of 5 May was therefore vacated and the District Judge brought the case forward as a contest to 26 April 2016. The applicant and her daughter were notified of the new trial date of 26 April.

[10] The case was listed again for review on 7 April 2016 when the court was told that there were issues regarding disclosure and that the defendant wished to raise issues in relation to bad character of the applicant and her daughter. The case was reviewed again on 21 April, by which time bad character applications had been lodged by the defence in relation to both the applicant and her mother. It appears that part at least of the bad character application related to some form of squabble between the defendant's child and the applicant's daughter in the school playground. I find it hard to understand how such matters could conceivably be regarded as relevant to a charge of this nature.

[11] The case was reviewed again on 25 April 2016, and because there were outstanding disclosure issues the trial date of 26 April was vacated and the case relisted on 12 May 2016 for mention and to fix a new date for the trial. Inexcusably the applicant and her daughter were not informed that the trial had been adjourned.

They attended at the court on 26 April and waited all day until someone approached them and they discovered that the case had already been adjourned.

[12] The case was listed on 12 May before a Deputy District Judge in order for issues in relation to disclosure to be considered.

[13] It was again reviewed on 19 May 2016 and on this occasion it was fixed for contest on 7 July 2016. This was now the fourth contest date that had been allocated to this case.

[14] The PPS Victims Witness and Care Unit (VWCU) is responsible for ascertaining whether witnesses are available for intended court dates. Joanne Hunter, an administrative officer attached to the VWCU, has deposed that she spoke to the applicant on two occasions, one of which was 6 May 2016, in relation to her availability for later court dates. As it is PPS practice that availability is sought for four months from the date of listing she has deposed that in May the availability sought would have included July 2016.

[15] It appears that the applicant first learnt of the new contest date of 7 July 2016 towards the end of May from the NSPCC, and on 31 May 2016 the VWCU were aware of this. However, it appears that it was not until 22 June that the VWCU managed to establish contact with the applicant and Stephen Lavery's e-mail of that date is in the following terms:

> "I have got speaking (sic) to Rona this afternoon. She has advised that the original availability (sought back in February) did not cover the date of her holiday. Any further contact made with her for availability was on the back of a cancellation due to issues within the court and unfortunately the holiday simply slipped her mind during these conversations as it had been booked almost 7-9 months previously."

The year before the applicant had booked a holiday in Italy between 5 and 12 July 2016.

[16] The applicant disputes that she said to Stephen Lavery that the holiday had "slipped her mind". However, his contemporary email supports his account, as does the note on the court record of 30 June that there was a "slip of mind". I consider that this court should proceed on the basis that the applicant did say that the holiday dates had slipped her mind.

[17] The case next came before the District Judge on 23 June when the PPS applied to adjourn the contest fixed for 7 July 2016 because the applicant and her daughter would be unavailable on that date. The District Judge adjourned the matter to 30

June to find out why the applicant and her daughter were unavailable and asked for documentary proof of the booking of the holiday.

[18] It appears that the applicant was not approached for this documentary evidence of the holiday as the District Justice had directed, and the matter came back before him on 30 June 2016.

[19] The application of 30 June to adjourn the case was moved by Conor Gannon of the PPS. At paragraph 9 of his affidavit of 18 September 2017 he made the following points:

- He confirmed that no documentary proofs had been provided for the court.

- The witness had said that her availability had been sought in February which did not cover the date of her holiday.

- The District Judge was told that any further contact in relation to obtaining further availability would have been in the context of a cancellation of a court hearing due to issues within the court, and that unfortunately the holiday date "just slipped her mind" as it had been booked 7/9 months previously.

- Mr Gannon said that he would also have told the court that there would be no reason to disbelieve the witness as to when she said she booked the holiday.

- Mr Gannon deposed that the District Judge was not satisfied with the explanation given and was not prepared to delay the case any further, stating that ultimately this was a civil case and dismissed the summons.

[20] Inexcusably the applicant was not told that the case had been dismissed. She telephoned the police on a number of occasions to ascertain what had happened, but it was not until 29 September 2016 that her efforts to find out what had happened were successful. On that day she rang the PPS and was told that the case had been dismissed on 30 June, and that someone would call her with more information but this did not happen.

[21] On 29 September she contacted her solicitor and was advised to make contact with him again when she had obtained more information from the PPS and the police. She therefore contacted her solicitors on 14 October 2016 and told them that the prosecution had been dismissed.

[22] Her solicitor sought counsel's advice, and on 5 December 2016 the applicant's solicitors wrote a lengthy pre-action protocol letter to the PPS setting out a very detailed chronology of events as known to the applicant and her advisers at that stage. The letter asked what the court was told on 30 June and what reasons it gave for refusing the adjournment application and dismissing the summons. Order 53 proceedings were threatened if a reply was not received within 14 days. The PPS did not respond to this letter, and Mr Kennedy on behalf of the PPS said that although the letter was received by the PPS it was not forwarded to the appropriate department within the PPS.

[23] The applicant's solicitors did not issue proceedings after the expiry of the 14 days, but submitted an emergency legal aid application on 13 January 2017. This was more than three and a half months after the applicant had learnt that the adjournment had been refused on 30 June and the case dismissed, and more than five weeks after the pre-action protocol letter had been sent.

[24] On 15 March 2017 legal aid was granted after an initial refusal. On 29 March 2017 the proceedings were issued. This was three and a half months after the expiry of the 14 notice period contained in the letter of 5 December, six months after the applicant had learnt of the dismissal of the case, and more than nine months after the decision which she now seeks to impugn.

Extension of time

[25] This court has to decide whether to extend the three month period required by Order 53 for the applicant to bring this application. In *Laverty's Application* [2015] NICA 75 at [21] this court stated that:

> "The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantive hardship to, or substantial prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding."

[26] It was clear from the submissions of Mr Ronan Lavery QC on behalf of the applicant that the reason why the matter did not proceed after 5 December 2016 was that the applicant was pursuing legal aid. However, I do not consider that this is something which can excuse the failure of the applicant to bring this application promptly. Because of the failure of the PPS to explain to the applicant why the summons had been dismissed, and the failure of the PPS to respond to the pre-action protocol letter, I am satisfied that the court should extend the time to bring these

proceedings until the expiry of the 14 days after the pre-action protocol letter of 5 December 2016.

[27] However, I do not consider that the time should be extended beyond that date. Given the time that had already elapsed since the applicant learnt of the dismissal of the summons on 29 September, I consider the applicant's advisers were obliged to pursue the matter with the utmost expedition given the passage of time to that date. As this court pointed out at [26] in *Laverty's application*:

> "There is no good reason for extending time based on the outstanding application for legal aid. Although an application for legal aid may be a factor contributing to good reason to extend time an applicant must make and pursue the legal aid application in a timely fashion."

[28] When a prospective applicant for judicial review is already well outside the three month period within which Order 53 proceedings are to be brought there is a heavy burden on the applicant's advisers to move as rapidly as possible to institute proceedings. As the Court of Appeal pointed out in *Davis v Northern Ireland Carriers* [1979] NIJB No. 3, and as has been repeatedly emphasised over the years, the rules of court are there to be observed. If legal aid is being sought in my opinion an applicant should issue the Order 53 summons and then ask the court not to proceed until the legal aid position is resolved.

[29] Mr Lavery QC argued that that the applicant was justified in waiting for the information sought from the PPS was made available, but he accepted that the information was still not available when the proceedings were issued. I am satisfied that the reason for the delay in issuing the proceedings was solely because the applicant wished to have the benefit of legal aid granted to her as her daughter's next friend to enable the application to be brought.

[30] I do not consider that the legal aid application was pursued in a timely fashion. It should have been lodged immediately upon the expiry of the 14 days from the pre-action protocol letter of 5 December, and not left until 13 January 2017. The applicant should therefore have lodged the Order 53 proceedings on or about 20 December 2016, and asked the court not to list the matter or deal with it any further until the legal aid application had been resolved. The applicant did not do that in this case and I consider that there was no reasonable excuse for delaying until legal aid was granted on 15 March. Even when legal aid was granted another two weeks elapsed before the Order 53 summons was issued.

The merits

[31] An additional factor in deciding whether time should be extended is whether or not there is a public interest in this matter proceeding. As Lord Steyn pointed out in *Attorney General's Reference (No. 3 of 1999*) [2001] 2 AC 91:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear or harm to person or property. And it is in the interests of everyone that *serious crime* should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public." (Emphasis added)

[32] It is important to bear in mind that Lord Steyn's principle in relation to a consideration of a triangulation of interests was predicated on the need to investigate and prosecute "serious crime". The allegations in this case relate to a minor incident which did not involve any significant physical injury to the applicant and her daughter, although it was no doubt an unpleasant episode. The charge brought in this instance against Mr Bell was of driving without reasonable consideration for others.

[33] When considering the triangulation of interests, as the Divisional Court pointed out in *Morrison* [2013] NIQB 67 at [14]:

> "It is undoubtedly right that the history of the progress of the case including any adjournment history is relevant in exercising the discretion but a case listed on the first occasion should proceed unless the court is persuaded by other relevant factors that it should be adjourned."

[34] During the application attention was directed at the failure of the prosecution to obtain documentary proof of the applicant's holiday as directed by the District Judge. Mr Lavery sought to argue from this that this meant that the District Judge's decision was vitiated by an erroneous view of the facts. I do not consider that the failure of the police to obtain a copy of the applicant's holiday booking documents as directed by the District Judge on 23 June is relevant. The evidence before the court is that Mr Gannon on behalf of the PPS made it clear to the District Judge on 30 June that there was no reason to disbelieve the applicant's account that she had purchased this holiday the previous year, and there is no reason for this court to

infer that the absence of the documents was considered relevant by the District Judge when he made his decision.

[35] There were undoubtedly a number of failings by the prosecution in relation to the way in which this matter was dealt with throughout its history. First of all, the investigation of this case and the decision to issue proceedings appears to have taken an extraordinarily long time, particularly given the very minor nature of these events and that there were only two prosecution witnesses. The failure of the PPS and/or the police to notify the applicant that she and her daughter were no longer required to attend on the hearing which had been vacated on 26 April and which resulted in their spending all day at court to no purpose was inexcusable. Equally inexcusable was the failure to notify the applicant that the case had been dismissed on 30 June, and subsequently to provide full information as to why this had happened, despite numerous requests by the applicant herself and requests from her solicitors to the PPS.

[36] However, the applicant herself is not free from criticism in relation to the events leading up to 30 June decision because she failed to tell the PPS that she would not be available in early July because she had booked her holiday and that, as was recorded at the time, the matter slipped her mind.

[37] In this instance the District Judge was faced with an application to vacate the fourth contest date fixed in this case. That date was already long past the target date for disposal of matters of this sort of 12 May 2016. The case had already been adjourned on a number of occasions when dates fixed for contest had to be vacated, on one occasion because the trial date was not suitable for the defendant who was out of the jurisdiction.

[38] In these circumstances some judges might have agreed to vacate the trial date yet again and fix a new trial date, but others could properly have taken the view that the case had been adjourned so many times that a further adjournment was not justified. In making his decision the District Judge was entitled to give proper weight to what this Court described in *Morrison* at [40] as "…the public interest in the timely conclusion of summary proceedings", and by saying that he was not prepared to delay this case any further he clearly had this principle in mind. It was suggested the District Judge could have left the case in the list for 7 July but as he knew the main prosecution witnesses would not be available on that date there would be no useful purpose in doing so, merely a waste of precious court time and avoidable inconvenience and expense to the parties.

[39] It appears from Mr Gannon's affidavit that on 30 June the District Judge also expressed the view that this was a civil matter. We do not have the benefit of an affidavit from the District Judge as to what he meant by that, but if he meant that the applicant and her daughter could pursue the matter by issuing civil proceedings against Mr Bell, as the allegation against Mr Bell cannot be regarded as an allegation

of a serious crime in my view that was a proper consideration for him to take into account when deciding whether or not to grant another adjournment.

[40] As Mr Kennedy for the PPS reminded the court, the issue in this case is whether the District Judge was justified in refusing the prosecution application to further adjourn the case, and then dismissing the summons, not whether there were failures in communication at various stages by the PPS and/or the PSNI. Whilst those matters can be taken into account, I consider these are of limited significance when deciding whether the decisions by the District Judge on 30 June were a reasonable exercise of his discretion.

[41] This was a minor case which had already taken far longer than it should have done to get to court, and despite the commendable efforts of the District Judge to bring this case to trial it had still not been heard. This was the fourth contest date that the court was being asked to vacate. I am satisfied that the District Judge had all the relevant information before him when he exercised his discretion, and his decision to refuse the application and to dismiss the summons was within the proper range of decisions open to him.

[42] Given the minor nature of the alleged circumstances giving rise to the charge; the history of the case in the Magistrates Court, and the considerable delay by the applicant in issuing these proceedings, I do not consider that the public interest requires the resurrection of the charge by extending time and granting the relief sought, and I consider the application should be dismissed.