Criminal legal aid – Magistrates' Court – whether in interests of justice to award legal aid – risk of imprisonment – whether appropriate to defer issue to end of trial – whether correct test applied.

Neutral Citation No. [2006] NIQB 66 | *Ref:* **GIRC5651**

Judgment: approved by the Court for handing down | *Delivered:* **29/09/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARTIN HAVERN FOR JUDICIAL REVIEW

GIRVAN J

[1] The application Martin Havern is charged with a number of offences including dangerous driving on 20 May 2005, failing to stop when required to do so by a constable, excessive speed, drunken driving, failing to provide a sample and dangerous driving on 6 May 2005. The prosecution case alleges that on 20 May 2005 the defendant was the driver of a black Lexus car which was driven at speed in Newry in the early hours of the morning. When the police signalled to the driver to stop the car was seen to swerve and the driver began to drive towards the constable forcing him to jump out of the way. The constable estimates that his speed was in the region of 55 to 60 miles an hour in a 30 mile per hour speed limit area. The car continued towards an another reserve constable who also signalled the car to stop. Again the vehicle swerved towards him and was seen to be driven at him. After that the car did stop and the driver shouted at the police in a slurred voice and drove off at speed. The police witnesses allege that they saw the car they had observed speeding parked outside the defendant's house in Newry. The defendant was arrested and identified by the police witnesses as the relevant driver. The defendant has a record of some length including 23 road traffic offences.

[2] The defendant appeared at Newry Magistrates' Court on 10 November 2005. His solicitor, Mr Fitzsimons, indicated to the court that the applicant was pleading not guilty to the charges and applied for legal aid. It appears that the case was one of a number of cases listed for contest in a special court before Mrs Watters, Resident Magistrate. Previously his case had come before

Mr Copeland, Resident Magistrate. He concluded that the financial test for legal aid was satisfied, the defendant being in receipt of benefits. He reserved the issue whether it was appropriate in the interests of justice to grant legal aid (the so called "merits issue").

[3] According to the affidavit of the Resident Magistrate, she said it would not be normal practice to grant legal aid in relation to purely motoring matters. In paragraphs 4 and 5 of her affidavit the Magistrate set out the position as follows:

> "4. Mr Fitzsimons told me that his client might be facing a custodial sentence and invited me to hear the facts of the Crown. I had read the charge sheet but I do not remember the witness statements were still attached. It would not be my practice to read the witness statements before the hearing of a contest. I did not think it was appropriate to hear from the Crown on the issue of legal aid but I told Mr Fitzsimons I would reserve the decision until I had heard the case because he claimed that his client's liberty may be in jeopardy. It would in my experience be very rare for a defendant to be sentenced to a custodial term for any of the offences that the applicant faced before me.
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> 5. Mr Fitzsimons would not accept my decision to reserve and continued to argue with me. At that stage I told him that I had other cases to hear and asked him to go and consult with his client. He did so and came back into court later to ask for an adjournment because he was considering judicially reviewing my decision. The order book sheet states that I refused legal aid. That was my original intention but I said I would reserve my decision until I had heard the case before Mr Fitzsimons argued that his client would be facing a custodial sentence. At the end of the evidence I would have been able to review and assess the issue of legal aid depending on the view I took of the evidence and the defendant's record if he had one."

In paragraph 5 of his affidavit Mr Fitzsimons sets out his version of events thus:

> "I also referred the Resident Magistrate to the Widgery Guidelines and again submitted that legal aid should be granted. The Magistrate stated that

> there's no risk of loss to his lively hood as he was in receipt of a Job Seekers Allowance. I asked her to consider the risk and conviction of a sentence being imposed which would deprive the applicant of his liberty. The Resident Magistrate replied 'these are only motoring offences. I have six other cases to deal with here and haven't time to listen to this. There are senior practitioners in Belfast who do these cases all the time and do not apply for legal aid.' She indicated that she would reserve in the matter until she had heard the case. I stated this was not an acceptable position as I could not proceed without knowing whether or not my applicant would be granted legal aid. The Resident Magistrate replied 'I don't care if that is not acceptable. This man is driving a Lexus car. He is paying insurance and tax and driving an expensive car on the road and I don't think that the charges before me merit legal aid but I will reserve on that until the outcome of the case having heard the merits of the case.' I explained that the car did not belong to the defendant and he was not insuring or taxing it and invited the Resident Magistrate to seek from the prosecution an outline the facts which would be presented to the court. The Resident Magistrate declined to do so. I sought to refer her to the case of Re McAuley's Application. However she declined to be addressed on the law and stated that she was passing the matter to enable me to take my client's instructions on what he wanted to do. …"

[4] Article 28 of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 makes provision in certain circumstances for the granting of free legal aid in the Magistrates' Court:

> "(1) If it appears to a magistrates' court that the means of any person charged before it with any offence or who appears or is brought before it to be dealt with are insufficient to enable him to obtain legal aid and that it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence before it, the court may grant in respect of him a criminal aid certificate, and thereupon he shall be entitled to such aid and to have:

(a) a solicitor;
(b) subject to para. (2), counsel, assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36."

Article 31 is also relevant. It provides:

> "If, on a question of granting a person free legal aid under Article 38, 29 or 30, there is a doubt whether his means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt shall be resolved in favour of granting him free legal aid."

[5] Mr Larkin QC on behalf of the applicant argued that on any rational view of the facts on which the prosecution propose to rely the applicant's liberty was in peril. He contended that the magistrate herself made clear that she did not seek an overview of the facts from the prosecution. Had she done so she would have been in a position to form a proper view about the gravity of the alleged offences with which the applicant was charged. A central aspect of the application had gone unexplored and unquestioned. The magistrate had failed to follow the guidance to be found in the judgment of Carswell J (as he then was) in Re McKinney's Application [1992] NI 63. Criminal legal aid is not retrospective (see Rodgers [1979] 1 All ER 693 and Welsby (1998) 1 CAR 197 at 206. The wording of Article 28(1) "the court may grant in respect of him a Criminal Aid Certificate and *thereupon* she shall be entitled to legal aid" makes this clear. The magistrate failed to appreciate that legal aid could not be granted retrospectively and proceeded on the incorrect assumption that she could at the end of the case have retrospectively authorised legal aid for the work done that day in court.

[6] Ms McAllister one behalf of the respondent contended that to be granted legal aid the defendant must satisfy two broad tests, a financial test (which was satisfied in the present instance) and a "merits test". This latter term relates to the question whether it is desirable in the interests of justice the defendant receive legal aid. The courts in this jurisdiction apply the Widgery criteria (see Re McAuley's Application [1992] 4 NIJB 2 and Re McKinney's Application [1992] NI 63). Counsel argued that a decision to defer a decision on the granting of legal aid did not amount to a refusal. The decision to defer the decision till after hearing evidence was not Wednesbury unreasonable. Neither the decision not to seek information about the case on the prosecution render it unreasonable. Had the magistrate decided to grant legal aid after hearing the evidence the grant would have covered that day's proceedings. While McKinney's Application may be authoritative of the

proposition that the grant of legal aid is not retrospective this clearly referred to it not being able to be backdated to cover earlier appearances.

[7] The recommendations to be found in the Widgery Committee's report at paragraph 169 form the criteria applied by the courts in this jurisdiction. It states:

> "We stress the necessity for a practical and commonsense approach when applying this test, for the offences in which a sentence of imprisonment is authorised and in which imprisonment is a theoretical consequence of conviction are legion. It is only in those cases where imprisonment must be seriously regarded as a possibility – a small proportion of the whole – that we see a prima facie need for legal aid. Sometimes the risk of imprisonment will be apparent. Sometimes it will depend in the event on the accused's record. If the court dealing with the application knows the accused's record – the accused himself may put it forward – it will naturally take it into account even if it means the case having to be tried by a differently constituted bench. Ordinarily the court will not know the accused's record and we simply have it in mind that the court should then try to distinguish the cases in which its own experience and the general practice in Magistrates' Courts suggest that imprisonment or some other form of custodial sentence will have to be seriously considered in the event of conviction on the particular facts disclosed in the information. We do not think that experienced magistrates have any difficulty in identifying such cases from the terms of the information before them supplemented by one or two brief questions as to the nature of the case for the prosecution. If legal aid is refused, but the case when open proves to be more grave than had originally appeared, the court can review its decision and if necessary adjourn the matter for a fresh start with legal aid on a subsequent occasion. Occasional inconvenience like this must be accepted as an alternative to the wholesale granting of legal aid in undeserving cases."

In Re McKinney Carswell J stated:

> "It appears to us that there is force in the contention advanced by counsel for the applicant before us that a magistrate should not put the defendant's solicitor in the position of having to make a case contrary to his clients' interests in order to secure the grant of legal aid, in which the solicitor has himself a real interest. We do not propose to lay down any hard and fast procedure for the magistrates to follow in obtaining the information necessary for them to determine legal aid applications before them, for we are confident that their own good sense will enable them to do so effectively, if they bear in mind the importance of the applicant's point which we have accepted. In the ordinary way the prosecutors should be able to furnish the court with the information which it needs. We have no doubt that magistrates will receive any further details which defence solicitors wish to put before them, and this may be of particular value if the information which the prosecutor can provide is not adequate. It seems to us that the important factor is that magistrates should not compel or expect the defence solicitor to provide information as a matter of course and that they should ordinarily expect to receive it from the prosecution."

[8] Faced with an application for legal aid in the Magistrates' Court the Resident Magistrate must address two questions firstly, whether the applicant has sufficient means to enable him to obtain legal aid and secondly whether it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence. A party granted legal aid becomes a legally aid party on the issue of a Criminal Aid Certificate and not before. Until the certificate is granted the party has no right to legal aid. The wording of Article 28 makes this clear and the authorities now establish beyond doubt that legal aid cannot be retrospective to cover work done before the grant of the certificate. The magistrate was incorrect in her understanding that she could at the end of the case review the matter and could decide to grant legal aid if she considered it appropriate at that stage. The question whether it was in the interests of justice that the defendant should receive free legal aid for the preparation and conduct of the defence had to be addressed at the time the application was made. The purpose of granting legal aid is to enable the defendant to prepare and conduct his defence and thus to ensure a fair trial. This would not be achieved by leaving it to the court to decide after the event whether legal aid should have been available to cover the work done in preparing and conducting the defence. There would in any event be grave danger in such a course since the court's view of the merits of the defendant's defence case would colour the court's

approach and could easily lead the court to visit on the defendant and his solicitor a financial penalty by refusing legal aid. The term "the merits test" is a misleading one. This should really be a reference to "an interests of justice test". The focus must be on the question whether legal aid is necessary to ensure a fair trial against the background of an established lack of means. A matter of great importance in considering the interests of justice is whether the deprivation of liberty is at stake. If there is the real possibility of imprisonment then in the interests of justice legal representation should be available (see Benham v UK (1996) 22 EHRR 293). In order to carry out the function properly the court must be acquainted with the degree of risk the defendant faces of a deprivation of liberty. To be so acquainted the court has to probe the Crown case to a certain extent to understand the gravamen of the Crown case. In the present case the magistrate proceeded on the basis that she was dealing with motoring cases and that in her experience it was very rare that a defendant would be sentenced to a custodial term for any of the offences facing the applicant. She did not however explore the nature of the case or the gravity of the evidence that the prosecution were going to rely on. Had she done so it would have been clear that if the prosecution made good the allegations a custodial sentence was not merely possible but likely. In Re McKinney Carswell J pointed out that it was to the Crown that the magistrate should normally look to ascertain the height of the case being made against the accused person.

[9] In the circumstances the decision to defer the granting of legal aid until the completion of the case cannot stand. The decision accordingly must be quashed and the matter will be remitted to the Magistrates' Court for reconsideration. In the circumstances this matter should go before another Resident Magistrate who can determine the application for legal aid in the light of this judgment.