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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY WILLIAM McFARLAND FOR JUDICIAL REVIEW

CARSWELL LCJ

This is an application for judicial review of a conviction and sentence by Omagh Magistrates' Court on 5 May 1999 and of a decision by His Honour Judge Foote QC sitting in the County Court for the Division of Fermanagh and Tyrone on 11 November 1999, whereby the conviction and order of the magistrates' court were affirmed. The charge against the applicant was one of indecent assault, to which he originally pleaded not guilty. Part way through the trial he changed his plea to guilty and was sentenced to eight months' imprisonment by the resident magistrate. The applicant claims that he pleaded guilty because he was misled concerning the sentence which he might receive, and that the conviction and sentence should be set aside. He appealed to the county court, but the judge raised the question of his jurisdiction to entertain an appeal against conviction when the applicant had entered a plea of guilty. Neither party was able to suggest grounds upon which the court could deal with the matter,

although Mr Valentine produced authority in this court which established that the judge may have had jurisdiction in the circumstances of the case. The judge suggested that the applicant might bring an application for judicial review of the resident magistrate's decision. The appeal was withdrawn on behalf of the applicant and the judge ordered that the conviction and order of the magistrates' court be affirmed.

The charge arose out of an incident which took place on 21 June 1998 in the nurses' home of Tyrone County Hospital, Omagh. The complainant J O'D alleged that the applicant had come into her room while she was asleep and touched her in the vaginal region. The applicant admitted in police interview that he had been in her room and may have touched her on the foot, but denied touching her in the vaginal region.

A plea of guilty to the offence of indecent assault was entered on the applicant's behalf in December 1998 by the solicitors then acting for him, Messrs Patrick Fahy & Co. On 24 January 1999 an application was made to the resident magistrate Mr CP McRandal to change the applicant's plea to not guilty. The magistrate indicated that he needed some medical evidence to provide a foundation for the application. The application was subsequently renewed before another resident magistrate, who allowed a change of plea.

The case accordingly came back for hearing on 5 May 1999 as a contest before Mr McRandal in Omagh Magistrates' Court. The magistrate was asked to disqualify himself, but did not accede to the application. His refusal to disqualify himself was originally relied upon by the applicant as one of the grounds for judicial review, but at the hearing before us his counsel did not pursue this point, we think correctly.

The applicant stated in his affidavit sworn on 7 March 2000 that counsel acting for him at the trial, Mr Mark Mulholland, paid two visits to the magistrate

in chambers before the commencement of the hearing. The first was in relation to his disqualifying himself, and the second after consultation with the applicant, which on the applicant's account appears to have been a discussion about the strength of the case. Mr Mulholland in his affidavit refers to one discussion at this stage in chambers but not to a second.

The hearing commenced and the complainant gave evidence about the incident. According to Mr Mulholland's affidavit her evidence was convincing and was not significantly shaken in cross-examination. At that stage the magistrate called counsel into his chambers to discuss the case. In paragraph 3 of his affidavit the magistrate sets out his account of what took place:

> "... The injured party's evidence in my opinion was of impressive quality and following the conclusion of the injured party's evidence I invited Counsel, both for the defence and the prosecution, into chambers. I did this for a number of reasons:
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> (i) I wanted Counsel to clarify whether the Defendant's case was that he had not touched the injured party at all or that he had not touched her in the manner alleged by her.
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> (ii) I wanted to know whether there was more to the defence than just a challenge to the injured party's credibility.
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> (iii) I wanted to know how long the case was likely to take as there were other cases in the list for hearing.
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> In the course of the discussion in Chambers I indicated that if the case was being run on an issue of credibility that the injured party was a powerful witness for the prosecution. I also did indicate that the offence of indecent assault in the circumstances of entry late at night to a nurses home was a serious one which might require me to refer the matter to the Crown Court in the event of a finding of guilt for sentence. I indicated that a sentence in the region of 18 months might well be imposed in my experience. I did not suggest to Counsel that his client should

> change his plea. I asked Counsel to obtain more specific instructions as to the nature of his client's defence in view of Counsel's comment to me that the Defendant's case was that he `may' have touched the injured party. I did not mention to him any alternative length of sentence in the event of a guilty plea. In the course of my discussions in Chambers with Counsel I did not say that I did not believe the Applicant's account. At this stage the Applicant had not given evidence."

The applicant's affidavit of 7 March 2000 contains his account of what took place when Counsel returned from his conference with the Resident Magistrate:

> "... again he asked me if I wished to proceed with the contest. I told him in no uncertain terms that I did. Mr Mulholland then advised that I would receive only six months imprisonment if I pleaded guilty there and then but that if I continued with the contest that Mr McRandal would refer the matter to the High Court where I might be sentenced to eighteen months or more imprisonment. I still refused to plead guilty. We returned to the Courtroom and Julie Boyd, the next witness for the Prosecution, was called to the stand. When she had finished giving her evidence Mr Mulholland asked her a few questions and then Mr McRandal stopped the case again and he asked Mr Mulholland as to where his line of questioning was leading. Again, Mr Mulholland asked for an adjournment for a few minutes so that he could speak to me and again I accompanied him to a consultation room. He advised me to wait there for him until he had gone to see Mr McRandal. He went away for a few minutes and then returned and he advised me very strongly to plead guilty. He lead me to understand that the Magistrate had taken a very strong and favourable view of the evidence of the two witnesses that he had heard. He advised me that if I continued to contest the matter his understanding was that the Magistrate would most certainly refer the matter to the High Court for sentencing where I would receive a sentence of 18 months or more as referred to earlier in my Affidavit."

Mr Mulholland's account of what took place in chambers is contained in

paragraph 4(b) of his affidavit:

> "At the close of the cross-examination of the complainant the Resident Magistrate rose and asked to see Counsel in Chambers. Two matters are noteworthy.
>
> (i) The Magistrate did express a view that he was impressed with the evidence of the complainant.
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> (ii) If the case were to continue and should the accused be convicted then due to the seriousness of the matter, referral to the Crown Court for sentencing was open to him. Reference to tariff in the region of 18 months was mentioned in this context."

Mr Mulholland goes on to say that it was suggested that he take further instructions from the applicant and then went to speak to him. He adamantly denies that he put pressure on the applicant or advised him to plead guilty and avers that he made him aware of the implications of pleading guilty but emphasised that for him to enter a plea of guilty he would have to accept that he was guilty as charged. The case did in fact continue for a further short time, another Crown witness being called, before the applicant changed his plea, which tends to confirm Mr Mulholland's account.

Mr Mulholland did say, however, at paragraph 4(c)(ii) of his affidavit:

> "I did make reference to a discussion in chambers however, I did not give a verbatim account of what had been said. I did convey the views that were to be relayed."

When the applicant had pleaded guilty Mr Mulholland applied to have the sentencing adjourned so that a pre-sentence report could be obtained. The Magistrate felt that this was unnecessary, then Mr Mulholland addressed the court in mitigation and the Magistrate imposed a sentence of eight months' imprisonment. This tends to negate the suggestion made by the applicant that

there was a plea bargain in which he was given to understand that the sentence would be six months if he pleaded guilty. Apart from the fact that the sentence was eight months rather than six months, if there had been such a bargain counsel would not have found it necessary to ask for a pre-sentence report.

We are quite satisfied that the case made by the applicant in his grounding affidavit of pressure by which his will was overborne is unfounded. We are, however, concerned by the alternative point which was adumbrated in paragraph 3(d)(ii) of the applicant's amended statement and more fully developed by Mr Valentine in argument before us. The thrust of this submission was that the applicant had been misled by the magistrate's remark about sending the case to the Crown Court for sentence and his reference to a tariff figure of eighteen months, both of which appear to have been relayed by Mr Mulholland to the applicant, and that he was materially influenced by this when deciding to change his plea to guilty. Unfortunately in so saying the magistrate misapprehended the extent of his powers. Under Article 46(2) of the Magistrates' Courts (Northern Ireland) Order 1981 he could have decided to commit the applicant for trial at any time *before* his determination to convict and sentence him (this being one of the offences specified in Schedule 2 to the Order). He could not, however, have continued to hear the evidence and convicted the applicant, then referred the case to the Crown Court for sentence. Once he had decided the issue of guilt he would have had to proceed to impose sentence himself, being then limited to the statutory maximum of twelve months. The applicant was therefore faced with a difficult situation, on the information relayed to him by counsel from the magistrate: if he continued to contest the charge and was convicted, as seemed likely from what he was told, he faced the possibility of a sentence of eighteen months, as against a substantially lesser sentence if he pleaded guilty. He says that he was advised that it would be six

months on a plea of guilty. Neither the magistrate nor Mr Mulholland refers to any projected sentence on such a plea, but counsel must have given the applicant some estimate of the probable term. If he had known that the maximum which could be imposed was twelve months, he might have regarded it as justifiable to proceed and risk conviction, while regarding it as too large a gamble to risk a sentence of eighteen months.

These factors in our opinion bring the case within the class of those described by Lord Parker CJ in *R v Turner* [1970] 2 QB 321 at 325, in which –

> "the advice is conveyed as the advice of someone who has seen the judge, and has given the impression that he is repeating the judge's views in the matter."

In those circumstances, to quote Lord Parker again, "it is really idle to think … that he really had a free choice in the matter."

It is clear from cases such as *R v Turner* and *R v McNeill* [1993] NI 46 that in such a situation the Court of Appeal will allow an appeal from the conviction on the ground that the plea was a nullity. The question then arises whether this court is empowered to quash the conviction of a lower court when the same situation arises. It was always well established that a conviction obtained by perjury or other fraud could be set aside on certiorari: see, eg, *R (Burns) v County Court Judge of Tyrone* [1961] NI 167 and the authorities there cited. It is unnecessary for present purposes to enter into the issue whether the conviction in such cases was properly regarded as void or voidable (as to which see the decision in *Sweeney v District Judge Brophy* [1993] 2 IR 202), for if it was so flawed it could be set aside, and under the modern law it can equally be the subject of judicial review. The modern authorities were reviewed by Watkins LJ in *R v Bolton JJ ex parte Scally* [1991] 1 QB 537, in which the Divisional Court reached the conclusion that procedural unfairness may be a ground for setting aside a

conviction. In the cases there under review the applicants had pleaded guilty to driving motor vehicles with excess alcohol in their blood, on the basis of blood tests later shown to have been defective. The court held that the pleas were vitiated by the error on the part of the prosecution, which was sufficiently analogous to the established categories of fraud, collusion and perjury to give it jurisdiction to set aside the convictions on judicial review.

This decision provides a clear analogy with the present case. The conviction in the present case is flawed, because it rests on a plea of guilty which was vitiated by the lack of true consent on the part of the applicant brought about by misapprehension stemming from the magistrate's discussion with counsel. We therefore consider that we have jurisdiction to grant judicial review of the applicant's conviction in Omagh Magistrates' Court, and we shall make an order of certiorari quashing it. For the avoidance of doubt, we consider that the effect of our order is that the applicant could not be tried again, were such a course to be contemplated.

We do not wish to leave the case without saying a word about discussions in chambers between judges or magistrates and counsel (in which term we include solicitors acting as advocates) representing accused persons. It is a well established practice that counsel should have ready access to the trial judge when there are matters to be communicated or discussed of such a nature that counsel cannot in the interests of his client mention them in open court: *R v McNeill* [1993] NI 46 at 48, per Hutton LCJ. This power should be sparingly exercised, in view of the importance of the principle that everything should where possible should be dealt with in open court in the presence of the defendant. We would discourage judges and magistrates from discussing with counsel in chambers matters relating to issues in the case at hearing. We would also urge restraint in discussions on sentence, notwithstanding the observations of Hutton LCJ in *R v*

McNeill at page 49. It is our impression that counsel are a great deal too ready to ask to see a judge to inquire about his views on possible sentence, and we take the view that judges should exercise a considerable degree of reticence about giving an indication of the penalties which they have in mind. We certainly consider that they should be careful to avoid entering into discussions such as those in the present case which could be interpreted in such a way by the defendant as to affect his free will in deciding on his course of action.

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JUDGMENT

OF

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