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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **7/3/16**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEAL BY WAY OF CASE STATED FROM A DECISION OF THE PRESIDING DISTRICT JUDGE (MAGISTRATES' COURT)

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Between:

PPS

Complainant/Respondent;

And

JAMIE BRYSON

Defendant/Appellant

_____

Before: Morgan LCJ, Gillen LJ and Keegan J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application by way of case stated from a decision of the Presiding District Judge (Magistrates' Courts). The background was that the appellant had been charged with 4 offences of taking part in an unnotified procession, on 5 and 19 January 2013 and 9 and 16 February 2013, contrary to section 6(7) of the Public Processions (Northern Ireland) Act 1998 ("the 1998 Act") and an issue arose about the nature of the burden upon the appellant in respect of the statutory defence in section 6(8) of the 1998 Act. Mr McConkey appeared for the appellant and Mr Russell for the respondent. We are grateful to both counsel for their helpful oral and written submissions.

Introduction

[2] The judge found that the parades which took place on the relevant dates were processions for the purposes of the 1998 Act. On each date the processions had not

been notified in advance to the PSNI in accordance with section 6 of the 1998 Act. The four processions were unnotified processions within the meaning of the 1998 Act and the appellant had participated in each. He had been advised by police at a meeting on 29 January 2013 that the processions were unnotified and unlawful. The Presiding District Judge was not satisfied on the balance of probabilities that he did not know and neither suspected nor had reason to suspect that there had been a failure to satisfy the notification requirements under section 6 of the 1998 Act. She found the appellant guilty of participating in unnotified processions on the dates in question contrary to section 6(7) of the 1998 Act.

[3] The relevant provisions of the 1998 Act are as follows:

> "6 Advance notice of public processions.
>
> (1) A person proposing to organise a public procession shall give notice of that proposal in accordance with subsections (2) to (4) to a member of the PSNI not below the rank of sergeant by leaving the notice with him at the police station nearest to the proposed starting place of that procession."

The requirements in relation to the notice are not material but by virtue of section 6(6) the Chief Constable must ensure that a copy of the notice is sent immediately to the Parades Commission. The two subsections relevant to this appeal then follow:

> "(7) A person who organises or takes part in a public procession—
>
> (a) in respect of which the requirements of this section as to notice have not been satisfied; or
>
> (b) which is held on a date, at a time or along a route which differs from the date, time or route specified in relation to it in the notice given under this section,
>
> shall be guilty of an offence.
>
> (8) In proceedings for an offence under subsection (7) it is a defence for the accused to prove that he did not know of, and neither suspected nor had reason to suspect, the failure to satisfy the requirements of this section or (as the case may be) the difference of date, time or route."

[4] The Presiding District Judge noted that the mischief at which the offence in section 6(7) was aimed was the minimisation of the opportunity for public tension and disorder as well as securing effective policing. She considered that the provisions were of great importance to the wider public interest and the peaceful regulation of society as a result of which the legislature provided for a prison sentence of up to 6 months on conviction.

[5] It was submitted by the appellant that section 6(8) of the 1998 Act raised an evidential rather than a legal burden upon him. In determining that issue the Presiding District Judge considered whether a legal burden was reasonable and proportionate or arbitrary. She noted that the matters which the court must consider for the purposes of the defence were matters that were within the knowledge of the appellant and could be readily proved by him. He had the opportunity to give evidence, call witnesses and cross-examine witnesses. She was satisfied that the imposition of a legal burden was proportionate, within reasonable limits and not arbitrary. The two questions raised in the case stated were:

> "Was I correct to hold that the legal burden imposed upon the accused by section 6(8) of the Public Processions (NI) Act 1998 does not unjustifiably infringe the presumption of innocence?
>
> Was I correct in applying a legal burden to section 6(8) of the Public Processions (NI) Act 1998?"

Preliminary matters

[6] The appellant was convicted on 18 March 2015. The application to state a case was received by the clerk of petty sessions on 30 March 2015 within the 14 day time limit set by Article 146 (2) of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") and copied to the respondent. Subsequent to some further representations the case was stated, stamped and dispatched on 5 June 2015 within the three-month time-limit prescribed by Article 146 (6) of the 1981 Order. Article 146 (9) of the 1981 Order provides as follows:

> "(9) Within fourteen days from the date on which the clerk of petty sessions dispatches the case stated to the applicant (such date to be stamped by the clerk of petty sessions on the front of the case stated), the applicant shall transmit the case stated to the Court of Appeal and serve on the other party a copy of the case stated with the date of transmission endorsed on it."

[7] It is agreed that the case was not transmitted to the Court of Appeal until 2 October 2015 which is approximately 15 weeks outside the statutory time-limit and

that a copy of the case stated was not served on the PPS until 19 October 2015. The appellant's solicitor accepts that it was entirely the responsibility of his office that the case was not transmitted and served as required by the legislation. Although the PPS accepted that it could not complain of specific prejudice, it was contended that the delay in this case was such that the court no longer had jurisdiction to deal with the case stated.

[8] Article 146(9) of the 1981 Order received extensive consideration by this court in Foyle, Carlingford and Irish Lights Commission v McGillion [2002] NI 86. There the case had been transmitted to the Court of Appeal but a copy had not been served on the other party for a further period of three months. The court considered previous decisions in Dolan v O'Hara [1975] NI 125 and Pigs Marketing Board (Northern Ireland) v Redmond [1978] NI 73 which indicated that the provisions of the corresponding section were mandatory and deprived the court of jurisdiction if they were not complied with. Relying on Article 6 ECHR the court did not accept that there was a reasonable relationship of proportionality when the applicant was altogether barred from presenting his appeal because he failed for a period to serve a copy of the case on the other party even though no prejudice had accrued to that party. It concluded, therefore, that the court was obliged by section 3 of the Human Rights Act 1998 to read the statute as directory rather than mandatory.

[9] The issue was refined further by this court in Wallace v Quinn [2003] NICA 48. In that case a requisition for a case stated was served on the clerk of petty sessions in Newry in accordance with Article 146(2) of the 1981 Order but no copy of the requisition was served on the respondent. The respondent accordingly had no opportunity to make representations about the content of the case stated. The case stated having been received was then duly dispatched to the Court of Appeal but again there was no service of the stated case upon the respondent.

[10] The court noted that in London and Clydeside Estates Ltd v Aberdeen District Council [1979] 3 All ER 876 and R v Immigration Appeal Tribunal, ex parte Jeyeanthan [1999] 3 All ER 231 the focus was on attempting to determine the intention of Parliament in respect of the consequences of a failure to observe the statutory requirements. The court concluded that the approach to the construction of the requirements of Article 146 of the 1981 Order should be that set out by Lord Woolf MR in the latter case:

> "I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.

> 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question).
>
> 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question). I treat the grant of an extension of time for compliance as a waiver.
>
> 3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question).
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

[11] In this case the requirements of Article 146 (2) have been complied with. The respondent has been given an opportunity to have an input to the draft case stated. The provisions of Article 146 (9) are directed towards the issue of delay. The procedure in the Magistrates' Courts is summary. The case stated procedure may require the court to resume the hearing in order to determine the case according to law. The time limits are designed to ensure that there is reasonable expedition in the determination of the charge and that the uncertainty for those involved in the case is not prolonged. The failure to transmit the case to the Court of Appeal introduced delay in the listing of the case stated and has consequently impacted upon the achievement of those objectives.

[12] We are satisfied that in the circumstances the failure to transmit the case as required meant that there was no substantial compliance with the statutory requirements. We consider that in order to look at whether we should proceed despite the delay it is necessary to consider the extent of the failure, the reasons for it, any specific prejudice caused by the delay, the nature and importance of the issue to be determined in the proceedings and the general prejudice arising from any delay. The delay in this case is substantial having regard to the statutory scheme. In

considering whether or not to proceed despite the delay it is appropriate to take into account the absence of specific prejudice but also to recognise the general prejudice associated with considerable delay in summary proceedings. We accept that the delay was not the fault of the appellant personally. The issue in this case is one that may be helpful in removing any doubt about the law. We consider that this case is very close to the borderline. If we conclude that the delay is irremediable we would be deprived of jurisdiction. On balance we have decided that we can address the questions despite the delay.

Consideration

[13] The leading case on the issue of whether a burden placed upon a defendant in a criminal statute is a legal or evidential burden is Sheldrake v DPP [2004] UKHL 43. Although there was some disagreement about the application of the relevant legal principles, all members of the court agreed with the legal principles set out in Lord Bingham's judgment. He reviewed the law prior to the passing of the Human Rights Act 1998 and noted a number of instances where the courts had applied a legal burden in respect of a statutory defence. He noted in particular R v Hunt [1987] AC 352 where Lord Griffiths said that in such a case the court should take account of practical considerations affecting the burden of proof and in particular the ease or difficulty that the respective parties would encounter in discharging that burden. Lord Bingham noted that the presumption of innocence was recognised in domestic law prior to the passing of the Human Rights Act.

[14] He then turned to the leading Strasbourg authority, Salabiaku v France (1998) EHRR 379, in which the court accepted in principle that contracting states may under certain conditions penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. In respect of presumptions of fact or law the court accepted that such presumptions operated in every legal system but that the Convention required states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

[15] Lord Bingham summarised the principles at paragraph [21] of Sheldrake:

> "The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on

> reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

[16] Their Lordships had two cases to which they applied those principles. The first concerned Mr Sheldrake who had been convicted of being in charge of a motor vehicle in a public place after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit. The relevant legislation provided that it was a defence for the person charged with the offence to prove that at the time he was alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit. The provision was directed to the legitimate object of preventing the death, injury or damage caused by unfit drivers. The burden placed on the defendant was not beyond reasonable limits or in any way arbitrary. The defendant had a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive. By contrast the second case involved a potential penalty of 10 years and in the view of the majority placed a burden upon the defendant which might well have been all but impossible for him to satisfy. That did not satisfy the presumption of innocence.

[17] Mr McConkey accepted that whether the appellant knew that there had been a failure to satisfy the notification requirements was within his own knowledge but submitted that the police could have gathered evidence in aid of the conviction by erecting signs and advising those in the procession by loudspeakers or otherwise of the lack of notification. We recognise, of course, that such evidence would have been admissible but in the absence of extensive signage and broadcasting equipment the implication is that the police would have been powerless to achieve the evidence upon which a conviction would have to be based. On the other hand the issue of whether the appellant knew that the parade was unnotified or had a suspicion to that effect was a matter plainly within his own knowledge. He had every opportunity to bring forward such evidence as he wished to deal with that matter.

[18] We are satisfied that the legislative purpose of these provisions is to provide for the regulation of parades and processions, to control public disorder and damage, to minimise disruption to the life of the community and to enhance community relations. Those are clearly legitimate aims. If the legal burden were to rest on the prosecution in respect of the knowledge and suspicion of the appellant we agree that steps of the kind set out by Mr McConkey above would be required in order to secure a conviction. In some cases it would be possible to take such steps but that would clearly require considerable pre-planning and allocation of resources. In the absence of such steps the legislation would be almost impossible to apply. Where the information was within the appellant's knowledge it was clearly more appropriate to place the legal burden on him. That burden was not arbitrary or beyond reasonable limits.

Conclusion

[19] For the reasons given we answer each of the questions in the affirmative.