

Neutral Citation: [2016] NICA 26

Ref: MOR10001

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 15/6/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Between:

PPS

Complainant/Appellant;

-and-

NORMAN MILLIKEN

Defendant/Respondent

Before: Morgan LCJ and Keegan J

MORGAN LCJ (giving the judgment of the court)

[1] This is a case stated by DJ(MC) Hamill at the request of the Public Prosecution Service (PPS) in respect of a decision made by him on 18 June 2015 concerning a charge of dangerous driving contrary to Article 10 of the Road Traffic (Northern Ireland) Order 1995. Mr Coll QC and Mr Steer appeared for the PPS and Mr Ronan Lavery QC and Mr Corkey for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The respondent was charged with common assault contrary to section 42 of the Offences Against the Person Act 1861 and dangerous driving as aforesaid arising out of an incident on 21 January 2015. He entered a plea of not guilty to both charges on 22 April 2015 and the case was listed for a contested hearing on 11 June 2015. The common assault charge was dismissed and there is no issue in relation to that.

[3] The evidence adduced at the hearing was that on 21 January 2015 Warren Coates, a parking attendant at ASDA, Market Lane, Bangor issued a parking ticket to a green BMW Z3 motor vehicle which was parked across two spaces. Shortly afterwards he alleged that the respondent had approached him in an aggressive manner and an argument ensued. Mr Coates had moved away from the respondent in order to defuse the situation but the respondent had continued to shout abuse at him. A short time later the respondent drove the green BMW Z3 motor vehicle towards Mr Coates while he was talking to two members of the public causing him to jump out of the way in case he was struck by the vehicle.

[4] The matter was reported to police who interviewed the respondent. He admitted that there had been a difference of opinion between him and Mr Coates but denied acting aggressively or that he had driven his car at Mr Coates. The two members of the public gave evidence that they witnessed the respondent being verbally abusive to Mr Coates. They stated that they saw the respondent reverse out of his parking space and drive towards them. The evidence was that the respondent was driving a decent speed at Mr Coates, swerving towards him and then swerving away at the very last minute. The witness indicated by way of gesture that the car came within 20-24 inches of himself and Mr Coates. The defendant's case was that the entire incident was a fabrication and that the two witnesses had conspired with Mr Coates. That was rejected by the District Judge.

[5] There was no suggestion that the motor vehicle was being used as a weapon and the assault charge referred to the altercation which had occurred before the respondent ~~got in~~ into his car. District Judge Hamill convicted the respondent of dangerous driving and imposed a fine of £750, disqualified the respondent from driving for 18 months and imposed an offender levy.

[6] A few days later the District Judge directed that the case be listed before him again to consider whether he had power under Article 158A of the Magistrates' Court (Northern Ireland) Order 1981 (the 1981 Order) to amend the charge from dangerous to careless driving. He heard submissions from the prosecution that he no longer had jurisdiction to interfere with the conviction. He considered that he had an inherent jurisdiction to do so. He refused to exercise his powers under Article 158A (3) of the 1981 Order to require the case to be reheard before a different District Judge. He concluded on reflection that there was no great speed involved in the incident and that he should use his inherent powers to reduce the charge from dangerous driving to careless driving. He substituted for the conviction of dangerous driving a conviction for careless driving imposing a fine of £750, six penalty points and an offender levy of £15.

[7] The District Judge set out the following points of law for the opinion of the Court of Appeal:

1. Whether I, after sentencing of the defendant had taken place, had jurisdiction to and/or could lawfully, vary or rescind the conviction and sentence of the defendant for dangerous driving and replace same with a conviction and sentence for careless driving pursuant to Article 158A of the Magistrates' Courts (Northern Ireland) Order 1981.
2. Whether I had inherent jurisdiction to revisit and reopen the case after conviction and sentencing whenever it is in the interests of justice to do so.
3. Whether I had jurisdiction/could lawfully consider whether the defendant's driving was careless or dangerous after having convicted the defendant of dangerous driving and after having sentenced him accordingly.

Statutory Provisions

[8] The Magistrates' Court is a creature of statute. A District Judge has ancillary and implied powers to be derived from the statute and in a wide range of matters has an area of discretionary judgement. The Magistrates' Court, however, does not have inherent powers which in this jurisdiction are reserved to the High Court. There was no dispute between the parties on these matters and it was accepted that the District Judge was not entitled to make this decision on the basis of inherent powers.

[9] It is also not in dispute that by virtue of Article 155 of the 1981 Order a magistrates' court may during any proceedings make any amendments 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. The question in this case concerns the power of the magistrates' court to reopen cases whether to rectify mistakes or for other reasons. Specific provision for this is made in Article 158A of the 1981 Order.

"158A. - (1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.

(2) The power conferred on a magistrates' court by paragraph (1) shall not be exercisable in relation to

any sentence or order imposed or made by it when dealing with an offender if-

- (a) the county court has determined an appeal against-
 - (i) that sentence or order;
 - (ii) the conviction in respect of which that sentence or order was imposed or made; or
 - (iii) any other sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of that conviction (including a sentence or order replaced by that sentence or order); or
 - (b) the Court of Appeal has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the imposition or making of the sentence or order.
- (3) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by another resident magistrate, the court may so direct.
- (4) The power conferred on a magistrates' court by paragraph (3) shall not be exercisable in relation to a conviction if-
-
- (b) the Court of Appeal has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the conviction."

[10] Those that were drawing up the various orders in this case clearly had these provisions in mind. When the District Judge directed that the case be relisted the notice to the parties indicated that it was for:

1. An Order under Article 158A(1) to vary the sentence/Order imposed.
2. A direction under Article 158A(3) for the rehearing of a case previously dealt with.

After the hearing an Order was drawn up in relation to the original conviction directing that pursuant to Article 158A(3) of the 1981 Order the case be reheard before District Judge Hamill and that the conviction and sentence of 11 June 2015 be of no effect. The problem is that Article 158A(3) only permits the court to direct that the case should be heard again by another resident magistrate.

[11] This appeal was initially adjourned in order to give the respondent an opportunity to pursue a renewed application under Article 158A(3) of the 1981 Order but Mr Lavery indicated that he had elected not to do so. He submitted that it was clear that the District Judge on reflection realised that his assessment of the evidence was incorrect and that rather than engage in the process of further hearings and yet more delay the correct decision of the District Judge should stand. He submitted that this could be achieved by interpreting the phrase "sentence or other order" in Article 158A(1) as including conviction.

[12] On first principles we do not consider that such an interpretation is possible. The sentence or other order to which reference is made in Article 158A is referred to again in Article 158A(2). Article 158A(2)(a)(i) provides that the power in subsection (1) shall not be exercisable in relation to any sentence or order if the County Court has determined an appeal against that sentence or order. If the interpretation of Mr Lavery was correct that would include an appeal against conviction. That is impossible to reconcile, however, with Article 158A(2)(a)(ii) which provides that the power shall not be exercisable in relation to any sentence or order if the County Court has determined an appeal against the conviction in respect of which that sentence or order was imposed. Firstly, there would be no purpose served by this provision if Mr Lavery was correct. Secondly, the subsection itself plainly draws a distinction between on the one hand a conviction and on the other a sentence or order.

[13] Although we have addressed this matter from first principles the conclusion is supported by authority. In Re DPP's Application [2000] NI 49 the applicant was convicted of driving a motor vehicle without a policy of insurance. He subsequently issued a notice of application under Article 158A of the 1981 Order to have the conviction rescinded on the ground that he had lost his certificate of insurance but now found it. The magistrate purported to rescind his conviction. The DPP applied for judicial review of that decision contending that the power conferred by Article 158A(1) extended to sentences or other orders but not to convictions. Carswell LCJ cited the judgement of Woolf LJ in R v Leighton Buzzard JJ (1990) 154 JP 41 where on the equivalent English legislation he held that the reference to other order was an order such as a conditional discharge, probation order or some sort of order of that

sort which is akin to a sentence. Accordingly Article 158A(1) did not contain a power to set aside a conviction.

[14] We were referred to a number of authorities in England but in our view none of those supported any deviation from the approach set out above. We have considered the impact of our decision. In the course of argument an issue arose as to whether the respondent could once again renew his application pursuant to Article 158A(3) to have a hearing of the dangerous driving charge by another resident magistrate. That power would not be exercisable if the Court of Appeal had determined a case stated for the opinion of that court on any question arising in any proceedings leading to or resulting from the conviction. The conviction with which Article 158A(4)(b) would be concerned is the dangerous driving conviction.

[15] Plainly the Court of Appeal has not determined any case stated in relation to the proceedings leading to that conviction. Neither in our view has the Court of Appeal determined this case stated in relation to any proceedings resulting from that conviction. This case stated has been concerned with the conviction for careless driving which, although it arose subsequent to the conviction for dangerous driving, did not flow from that conviction. It follows that it is not a consequence of that earlier conviction. We consider that insofar as Article 158A(4)(b) excludes the opportunity for an accused person to avail of Article 158A(3) it should be narrowly construed. Accordingly we do not consider that it would constitute a bar to an application under Article 158A(3) in relation to the dangerous driving conviction.

[16] Finally on this issue we note that the PPS promoted the Article 158A(3) application when the matter was first raised before the District Judge and has indicated in this court that they would support such an application were it made subsequent to this decision.

Conclusion

[17] For the reasons given we answer each of the questions "No". We quash the Order of 18 June 2015 substituting a conviction for careless driving. The original Order of 11 June 2015 convicting the respondent of dangerous driving remains in place.