

IN THE CROWN COURT OF NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

v

WILLIAM RONALD MARKS, JAMES DANIEL McGEOWN,
JOHN SIMINGTON and CAROL KEALEY

Defendants

HART J

[1] The defendants are charged with offences of corruption and money laundering and have been sent for trial by the Serious Fraud Office (the SFO) by means of the “direct transfer” procedure provided for by art. 3 of the Criminal Justice (Serious Fraud) (NI) Order 1988 (“the 1988 Order”). The defendants take issue with the adoption of the direct transfer procedure in this case, and contend that as a result (a) the defendants are not properly before the Crown Court; or (b) that the actions of the SFO leading up to the transfer were so irregular that they either invalidated the transfer notice or represented an abuse of process. The defendants therefore argue that the court should rule that the transfer was a nullity, or that a stay should be granted on the grounds of an abuse of process. The defence submissions were advanced on behalf of the defendant Marks by Mr Barry McDonald QC (who appears for the defendant with Mr Dessie Hutton), and counsel for each of the other defendants adopted his submissions.

[2] These submissions require the court to consider the procedure under the 1988 Order, as well as the actual course of events in the present case, and it is convenient to describe the events leading up to and constituting the direct transfer first.

(i) Each defendant appeared before the Magistrates’ Court on summons, and in the case of Marks the summons was issued on 13 January 2010 and it required him to appear at Belfast Magistrates’ Court on 12 February 2010. The defendants’ solicitors asserted in correspondence that the summons was actually served on 25 January

2010, this has not been contradicted and I proceed on the basis that that was the date of service.

(ii) The summons contained four charges against the defendant Marks, and was endorsed with the following legend at the foot of the summons:

“This summons is issued for the purposes of a transfer to the Crown Court under article 3 of the Criminal Justice (Serious Fraud) (NI) Order 1988”.

(iii) On 28 January 2010 Marks’ solicitors faxed a letter to the officer dealing with the case on behalf of the SFO. In the letter requests were made for information about various matters, but in particular a request was made for an adjournment of the hearing due on 12 February 2010 in order that the defendant’s solicitors might consider matters relating to undertakings sought by the SFO. These have not been placed before the court and presumably there was previous correspondence in relation to these matters. However, the defendant’s solicitor said that Marks reserved the right to challenge “the proposed procedure for direct transfer to the Crown Court”.

(iv) By a reply faxed the same day the SFO said that the transfer bundle would comprise about 55 lever arch files, and no material would be served before the hearing on 12 February 2010;

(v) By a letter of 5 February 2010 Marks’ solicitors posed the following questions.

- “1. Can you please provide us with full written reasons why transfer is being effected in this case?
2. Can you please provide us with full written reasons why the case is considered sufficiently complex to justify transfer?
3. Can you please provide us with full written reasons why the case is considered sufficiently serious to justify transfer?
4. Can you please provide us full written details of when and by whom the decision was taken to transfer the case?
5. Can you please confirm whether the evidence was complete and the charges settled by the time this decision was taken?
6. Can you please advise whether the decision maker considered all charges individually as against the statutory condition for transfer?
7. Can you please provide us with details and a chronology indicating what has been done in this case since the date of the initial search and seizure of property from our client and his arrest and questioning in June 2006.

Please note we require your response as a matter of urgency in order that we may consider the matters before the Court on 12 February 2010."

(vi) In its reply of 5 February 2010 the SFO, inter alia, said that in relation to the queries "in respect of the Crown's intention to transfer this case, this is not a matter we propose to comment on prior to the hearing on 12 February 2010".

(vii) By letter dated 9 February 2010 the defendant's solicitors criticised the refusal of the SFO to provide answers to the questions set out above and sought replies before the first hearing on 12 February 2010.

(viii) The hearing of 12 February 2010 appears to have been confined to an application by the defendant's solicitors for the grant of legal aid, although that matter was not determined by the district judge in view of issues about the extent of the defendant's property. The matter was then adjourned to 5 March. In the defendant's skeleton argument at paragraphs 16 and 17 it is stated that Ms Coyle on behalf of the defendant "raised the issue of the satisfaction of statutory conditions and the failure of the SFO to give an adequate response. She advised that she was flagging this up as it may have become an issue". At paragraph 17 it is stated that:

"Counsel for the SFO indicated that they intended to pursue the transfer procedure. He stated that the intention was to serve transfer bundles on 5 March 2010 and to transfer the case on that date". ... "The case adjourned until 5th March 2010 at the SFO's request".

None of these assertions were challenged and I proceed on the basis that they are correct.

(ix) On 3 March 2010 the SFO issued a notice of transfer addressed to the clerk of petty sessions. The material parts of the notice of transfer are as follows.

"5. Accordingly, the functions of the Magistrates' Court cease in relation to the case, except as provided by Article 4(3) and (6) of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 and by Article 29(2)(c) of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981.

6. The proposed place of trial is the Crown Court sitting at Belfast.

7. William Ronald Marks, James McGeown, John Symington and Carol Kealey were on 12th February 2010, required to appear at Belfast Magistrates' Court on 5th March 2010.

Notice has been given to them that this requirement has now ceased but that it is their duty to appear before the Crown Court sitting at Belfast or at such other place as shall be notified to them, on a date to be notified to them.”

[3] The essence of Mr McDonald’s first submission is that because the defendant was before the Magistrates’ Court by way of summons, it was not open to the SFO to utilise the transfer procedure and therefore the purported transfer was a nullity. This submission is based upon the argument that art. 4(3) and 4(6) of the 1988 Order only apply where a defendant has been remanded on bail (or in custody) and does not apply where the defendant is before the court on summons.

[4] Mr Fowler QC (who appeared with Mr Sefton for the SFO) argued that the notice served by the SFO complied with the scheme of the 1988 Order in all respects because it is possible to have a direct transfer when a defendant is charged by way of summons, and he pointed to the provisions of s. 51(4)(4a) of the Judicature (NI) Act 1978 as empowering the Crown Court to admit a defendant to bail who has been committed for trial under 1988 Order.

[5] The 1988 Order is the Northern Ireland equivalent of the Criminal Justice Act 1987 which was enacted following the *Report of the Fraud Trials Committee* chaired by Lord Roskill, and its broad purpose is described in *Arlidge and Parry on Fraud*, 3rd Ed. at 24-002 and 24-003.

“The transfer procedure was intended to reduce the scope for the abuse of committal proceedings in cases of complex fraud. The Roskill committee recognised that the committal procedure had serious drawbacks which were often exploited by defendants. Before 1988, committal proceedings were often prolonged and expensive. The complexity of the evidence and the legal issues was not suited to determination by lay magistrates. Few magistrates’ courts, in London at least, had the time or the space to accommodate a big committal hearing.

The overall scheme of CJA 1987 is that certain prosecuting authorities are authorised to transfer a case to the Crown Court without the need for committal proceedings, subject to the defendant’s right to apply to have the charges dismissed on the ground that there is insufficient evidence against him. Upon service of the notice of transfer, the magistrates’ court ceases to have jurisdiction (except for certain ancillary matters such as bail, legal aid and witness order), the case is removed to the jurisdiction of the Crown Court, and the prosecution can prefer a bill of indictment.”

[6] Although it is unusual to have a procedure that expressly permits a defendant to be sent for trial without having had his or her case considered by the Magistrates' Court, such procedures are not unknown, as where a voluntary bill is approved by a Crown Court judge or a bill is preferred by the Attorney General under s. 2(2) of the Grand Jury (Abolition) Act (NI) 1969, or where a direct transfer takes place in certain cases involving children. For example, where there is a voluntary bill, unless the court is asked to issue a summons against the accused requiring his attendance he will not be on bail or in custody until the indictment has been presented to the Crown Court and he has been arraigned upon it.

[7] However, whether the 1988 Order can only be invoked if a defendant is on bail or in custody depends upon the provisions of the statute itself. The relevant provisions of the 1988 Order are to be found in arts. 3 and 4.

“3.-(1) If -

(a) a person has been charged with an indictable offence; and

(b) in the opinion of an authority designated by paragraph (2) or of one of such an authority's officers acting on the authority's behalf the evidence of the offence charged -

(i) would be sufficient for the person charged to be committed for trial; and

(ii) reveals a case of fraud of such seriousness and complexity that it is appropriate that the management of the case should without delay be taken over by the Crown Court; and

(c) before the magistrates' court in whose jurisdiction the offence has been committed -

(i) has commenced hearing the evidence for the prosecution (other than a deposition relating to the arrest or to the remand of the accused), where the court is conducting a preliminary investigation, or

(ii) has begun to conduct a preliminary inquiry, the authority or one of the authority's officers acting on the authority's behalf gives the court a notice (in this Order referred to as a “notice of transfer”) certifying that opinion, the functions of the magistrates' court shall cease in relation to the case, except as provided by Article 4(3) and (6) of this Order and by Article

29(2)(c) of the Legal Aid, Advice and Assistance
(Northern Ireland) Order 1981.

(3) A designated authority's decision to give notice of transfer shall not be subject to appeal or liable to be questioned in any court.

Notices of transfer – procedure

4.-(1) A notice of transfer shall specify the proposed place of trial and in selecting that place the designated authority shall have regard to the considerations to which section 48(1) of the Judicature (Northern Ireland) Act 1978 requires a magistrates' court committing a person for trial to have regard when selecting the place at which he is to be tried.

(2) A notice of transfer shall specify the charge or charges to which it relates and include or be accompanied by such additional matter as regulations under paragraph (7) may require.

(3) If a magistrates' court has remanded a person to whom a notice of transfer relates in custody, it shall have power -

(a) to order that he shall be safely kept in custody until delivered in due course of law; or

(b) to release him on bail that is to say, by directing him to appear before the Crown Court for trial;

and where his release on bail is conditional on his providing one or more surety or sureties and the court fixes the amount in which the surety is to be bound with a view to his entering into his recognizance subsequently, the court shall in the meantime make an order such as is mentioned in sub-paragraph (a).

(4) Where notice of transfer is given after a person to whom it relates has been remanded on bail to appear before a magistrates' court on an appointed day, the requirement that he shall so appear shall cease on the giving of the notice, unless the notice states that it is to continue.

(5) Where the requirement that a person, to whom the notice of transfer relates, shall appear before a magistrates' court ceases by virtue of paragraph (4), it shall be his duty to appear before the Crown Court at the place specified by the notice of transfer

as the proposed place of trial or at any place substituted for it by a direction under section 48(2) or (3) of the Judicature (Northern Ireland) Act 1978.”

[8] Articles 3(1)(a), (b) and (c) prescribe certain conditions which, if satisfied, have the effect that “the functions of the Magistrates’ Court shall cease in relation to the case”, except in relation to bail and legal aid. The clear effect of the words “shall cease” is to deprive the Magistrates’ Court of any function in relation to the case once the notice of transfer has been served, except for such functions as are preserved in relation to bail and legal aid. Article 4(3) provides that the Magistrates’ Court can order the defendant to be remanded in custody, or released on bail, to appear at the Crown Court. Were it not for those powers a defendant who was already in custody would be deprived of the right to seek a judicial determination from the Magistrates’ Court as to his remand status following his transfer to the Crown Court. Articles 4(4) and 4(5) provide that where a defendant is on bail, then his bail obligation is altered so as to require him to appear before the Crown Court.

[9] It would seem strange that because the defendant is not on bail nor in custody because he is only before the Magistrates’ Court on summons the direct transfer procedure could not be adopted. I can see no logical reason for such a situation, as it is in ease of a defendant that he has not been arrested, and so not been placed in peril of losing his liberty, but if there is a lacuna in the statutory framework then it is for the legislature to correct any defect that there may be.

[10] However, I am satisfied that there is not a lacuna in the scheme for the following reasons. First of all, whilst the provisions of arts. 4(3) and (4) apply where the defendant is in custody or on bail, art. 4(1) requires the proposed place of trial to be identified in the notice of transfer, and therefore by necessary inference the notice of transfer alters the obligation of a defendant who is on summons, but not in custody or on bail, to appear before the Magistrates’ Court by substituting an obligation to attend at the Crown Court to which the case is being transferred instead of attending at the Magistrates’ Court.

[11] Secondly, s. 51(2) of the Judicature (Northern Ireland) Act 1978 expressly provides a means whereby a defendant who has not been returned for trial on bail or in custody can be compelled to appear before the Crown Court.

“(2) Where an indictment has been presented although the person charged has not been committed for trial, the Crown Court may issue a summons requiring that person to appear before the Crown Court or a warrant for his arrest.”

[12] Finally, whilst the power contained in s. 51(2) is a general power, s. 51(4) expressly deals with the situation where a defendant who was in custody before being sent to the Crown Court by way of the direct transfer procedure.

“(4) The Crown Court may admit to bail, or direct the admission to bail of any person –

(a) who has been committed in custody for appearance before the Crown Court or in relation to whose case a notice of transfer has been given under Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (serious and complex fraud) or under Article 4 of the Children’s Evidence (Northern Ireland) Order 1995 (certain cases involving children).”

I am therefore satisfied that, contrary to Mr McDonald’s submissions, there are procedures whereby a defendant who is brought before the Magistrates’ Court on summons can be brought before the Crown Court by way of the direct transfer procedure, and the procedure is not confined to situations when a defendant is on bail or in custody. I am therefore satisfied that the notice of transfer in the present case was valid, the defendants are lawfully before the court, and I reject the first submission on behalf of the defendants.

[13] The second submission advanced by Mr McDonald is that by acting in the fashion it did the SFO was guilty of an abuse of process, because it adopted the process for an improper motive and engaged in an improper manipulation of the court’s processes because (1) it thereby prevented the defendant from arguing that the summons was void for duplicity; and (2) from applying for legal aid. In considering the application for a stay on the grounds of an abuse of process I apply the principles described in R v William James Fulton [2009] NICA 39 at [48]-[58].

[14] Mr Fowler stated that the SFO adopted this procedure (a) in ease of the defendants because it was less intrusive as it did not require the defendants’ arrest, and (b) it meant that the matter could be more speedily brought within the Crown Court’s case management processes.

[15] The first explanation is self-evidently credible and reasonable, and I consider that where the prosecution adopts a procedure which is most favourable to the accused, which in the present case spared him from arrest because he was on summons, it cannot be argued to amount to an abuse of process unless it was adopted for some oblique motive. I find it difficult to see how that could be the case and none has been suggested.

[16] The explanation that the SFO wished to bring the matter within the Crown Court case management process at the earliest opportunity is one that is expressly stipulated as a relevant consideration under art. 3(1)(b)(ii) of the 1988 Order which requires the designated authority to be of the opinion “that it is appropriate that the management of the case should without delay be taken over by the Crown Court”. To invoke the direct transfer procedure for a reason expressly permitted by statute is perfectly proper and cannot amount to an abuse of process unless one of the conditions required to justify doing so is not satisfied. I am satisfied that this case is

both serious and complex, and I therefore conclude that neither of the grounds so far advanced in support of the application for a stay have been made out.

[17] What of the procedure adopted having the effect of depriving the defendant of the opportunity to apply for legal aid at the Magistrates' Court? I consider that it was open to the defendants' solicitors to apply to the Magistrates' Court for legal aid, notwithstanding the service of the notice of transfer, by virtue of the provisions of art. 3(1) of the 1988 Order. It appears that no application was made to the Magistrates' Court after 3 March to deal with this aspect of the case, but in any event the defendant was able to make an application on his first appearance before the Crown Court when he was granted legal aid.

[18] Can it be said to be an abuse of process to deprive the defendant of the opportunity to argue before the Magistrates' Court that the charges against him were void for duplicity? Given that the purpose of the direct transfer procedure is to remove proceedings from the Magistrates' Court, at the latest prior to the commencement of conventional committal proceedings, it is inevitable that, depending upon the stage the proceedings have reached, the defendant may be deprived of such an opportunity. That is inherent in the procedure created by the 1988 Order, and I do not consider that the invocation of the direct transfer procedure can be held to be an abuse of process in the circumstances of the present case. The defendant has the opportunity to make any point that is lawfully open to him before the Crown Court, whether in relation to the sufficiency of evidence under the provisions of article 5, or in relation to the form and content of the charges.

[19] It was also argued that the SFO has been guilty of an abuse of process by refusing to state its reasons for adopting the direct transfer procedure, Mr McDonald submitting that the defendant ought to have had the opportunity to make representations to the SFO. It is established that the SFO as a designated authority is amenable to judicial review notwithstanding the terms of art. 3(3) of the 1988 Order, see R v Salford Magistrates' Court Ex parte Gallagher [1994] Crim. L.R. 374, and in R v Magill [2006] NICC 13 Deeny J accepted that where the direct transfer procedure had been adopted it was open to the Crown Court to stay the proceedings on the grounds of abuse of process. However, I am not persuaded that a designated authority is obliged to permit a defendant to make representations as to the mode of transfer, and I agree with the learned authors of *Arlidge and Parry on Fraud* at 24-011 where it is stated that

'Had it been intended that a person charged should have a right to make representations to the designated authority as to whether the case ought to be transferred or sent, express provision would have been made.'

The purpose of the direct transfer procedure is to ensure that cases are brought speedily to the Crown Court which has the power to decide whether there is sufficient evidence to justify the defendant being placed on trial, in addition to the

other powers at its disposal to ensure that the defendant receives a fair trial. To require the SFO to respond to enquires of the sort made on behalf of Marks in the present case would be to encourage unnecessary satellite litigation at the pre-Crown Court stage. The SFO could give its reasons if it wishes, but I consider that it is not bound to do. However, if I am wrong in this it has now given its reason for adopting the direct transfer procedure.

[20] The final ground upon which a stay was sought was that the SFO improperly manipulated the procedures of the court by serving the notice of transfer on 3 March, two days before the hearing of 5 March which it had itself suggested as the adjourned date for the hearing which it had sought earlier, and that it did so without any warning to either the defendants or the Magistrates' Court of its intention to move sooner. At best this was discourteous to the Magistrates' Court. No explanation has been given by the SFO for not waiting until 5 March, and in the absence of any explanation I infer that the most likely explanation for forestalling the hearing of 5 March in this fashion is that the SFO wished to prevent any argument about the validity of this procedure in view of the correspondence from Marks' solicitors set out above.

[21] Nevertheless I do not consider that this is a sufficient reason to stay the proceedings as an abuse of process because I do not consider that the defendants have suffered any real prejudice as a result. The SFO had made it abundantly clear in the summons, in correspondence and in what was said at court on 12 February, that it would proceed by way of direct transfer, and had it done so on 5 March and not on 3 March the district judge would have been bound to accept that the matter had thereby been taken out of the hands of the Magistrates' Court, and, subject to the question of the granting of legal aid, that the Magistrates' Court no longer had any part to play in the proceedings. As the defendants were neither on bail nor in custody their liberty was not at stake. To grant a stay on this ground alone would be to administer a disciplinary sanction, but as Lord Lowry pointed out in R v Horseferry Road Court, ex p Bennett [1994] 1 AC at 74 "the discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct", an observation reinforced by Carswell LCJ in Re DPP [1999] NI 106 at 117. To stay the proceedings would be out of proportion to the mischief which occurred, and as I consider that this falls well short of what is required to establish that a stay on the grounds of abuse of process should be granted I refuse the application for a stay for that reason also.

[22] It therefore follows that the present applications by Marks and the other defendants fail.