

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

J M

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an application for leave to appeal by the prosecution against a ruling by HHJ Loughran whereby she stayed the proceedings as an abuse of process pursuant to Article 17 of the Criminal Justice (NI) Order 2004. At the end of the hearing we refused leave to appeal but reserved our reasons which are now set out in this judgment.

Background

[2] In November 2009 the defendant was interviewed by the PSNI about allegations of sexual assault upon a female child, S, alleged to have been committed in his home in October 2009. He denied those allegations. On 6 July 2010 C made an ABE video in which she outlined allegations of sexual abuse against the defendant over a 13 year period from 1997 to 2010. C and her mother accepted that they were made aware of S's allegations although there was some disagreement as to how C became aware of those allegations. It is, however, clear that she knew of the allegations before she made her own disclosure to PSNI. On 7 July 2010 N, C's younger sister, made similar allegations of a sexual nature against the defendant over a ten-year period from 2000 to 2010 in an ABE video. The defendant was interviewed about the allegations made by C and N on 16 July 2010 and denied those allegations also.

[3] In October 2010 the defendant was returned for trial in relation to S's allegations. The trial took place in May 2011 but the jury was discharged after the

prosecution's closing speech. A retrial took place in January 2012 and the defendant was unanimously acquitted on all counts.

[4] The defendant's trial in respect of the allegations by C and N followed at Belfast Crown Court in March 2012. The defendant was unanimously acquitted on three counts in respect of N. The jury was unable to reach a verdict in respect of the remaining counts involving C. The prosecution decided to pursue a retrial in respect of those counts. The defendant applied to stay the proceedings on the basis that a fair trial would not be possible. The basis for the submission was that the case made by the defendant was that C had manipulated N into telling lies about the defendant. The new jury would have to be informed of the acquittal of the defendant in respect of the complaints by N. The learned trial judge came to the view that in a retrial the jury would be drawn into speculation about issues concerning N's complaints which had been decided by the previous jury and this would give rise to unfairness which could not be cured in the trial. Accordingly she stayed the proceedings. In dealing with this application we have not found it necessary to examine the merits of the decision to stay and we say no more about it.

[5] The application was heard on 30 March 2012 at Belfast Crown Court prior to the swearing of the jury and judgment was reserved. A detailed judgment staying the proceedings was delivered on Monday, 30 April 2012, between 10:04 AM and 10:20 AM. At the end of the judgment the learned trial judge had noted some minor errors and said that if the matter was going to be taken any further she should be asked for a corrected judgment. Counsel originally instructed in the trial was not present but the PPS had instructed alternative counsel to take the judgment. Sometime after 4 PM counsel originally involved in the trial was in court in connection with another matter and mentioned that she had not yet had a chance to read the judgment staying the proceedings. The learned trial judge invited her to come into Chambers in order to provide her with a copy of the judgment. No representative of the defendant was present either in court or in Chambers on the afternoon of 30 April 2012.

[6] There is no contemporaneous record of the conversation in Chambers between the learned trial judge and counsel for the prosecution but there was an exchange of e-mails on 4 October 2012 in which the learned trial judge said that she was virtually certain that counsel for the prosecution told her, purely as a courtesy, that she was aware of the decision and wanted an opportunity to consider it. The learned trial judge indicated that the question of an adjournment did not arise.

[7] Prosecution counsel mentioned this case again at approximately 1:30 PM on Friday 4 May 2012. She indicated that she advised senior counsel for the defendant that she was going to do so. She stated that the prosecution intended to appeal the ruling and she gave the required acquittal agreement under Article 17(8) of the Criminal Justice (Northern Ireland) Order 2004 (the "2004 Order").

Statutory Background

[8] A prosecution right of appeal was established by Part IV of the 2004 Order. The general procedure for the exercise of the right is set out in Article 17.

“(1) This Article applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.

(2) The prosecution may appeal in respect of the ruling in accordance with this Article.

(3) The ruling is to have no effect whilst the prosecution is able to take any steps under paragraph (4).

(4) The prosecution may not appeal in respect of the ruling unless, following the making of the ruling—

- (a) it informs the court that it intends to appeal; or
- (b) it requests an adjournment to consider whether to appeal and if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal....

(8) The prosecution may not inform the court in accordance with paragraph (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in paragraph (9) is fulfilled.

(9) Those conditions are—

- (a) that leave to appeal to the Court of Appeal is not obtained; and
- (b) that the appeal is abandoned before it is determined by the Court of Appeal.”

[9] Article 18 provides that where the prosecution informs the court in accordance with Article 17 (4) that it intends to appeal the judge must decide whether or not the appeal should be expedited. If he so decides he may order an adjournment of the trial with a view to continuing it after any appeal if necessary. If he decides not to expedite the appeal he may discharge the jury. On an appeal under Article 17 the Court of Appeal may confirm, reverse or vary the ruling to which the appeal relates and, where it reverses or varies the ruling, it must order that proceedings for the offence be resumed, that a fresh trial take place or that the defendant be acquitted in respect of the offence. Where the Court of Appeal confirms the ruling it must order that the defendant be acquitted of the offence.

[10] Article 32 of the 2004 Order provides for such rules of court as are necessary and expedient, including the provision of time limits which are to apply in connection with the provisions of Part IV. That power has been exercised by the making of the Crown Court (Prosecution Appeals) Rules (Northern Ireland) 2005 (the "2005 Rules"). Rule 2 deals with requests for an adjournment and Rule 3 with applications for leave to appeal.

"2.—(1) Subject to paragraph (2), a request by the prosecution for an adjournment under Article 17(4)(b) of the 2004 Order shall be made to the judge immediately following the making of a ruling to which Article 17 of the 2004 Order applies...

(3) The judge shall grant the request for an adjournment under Article 17(4)(b) of the 2004 Order unless there are exceptional circumstances which make it necessary for the prosecution to indicate immediately whether or not it intends to appeal.

(4) Where the judge grants an adjournment under Article 17(4)(b) of the 2004 Order, the trial shall be adjourned -

- (a) until the next business day; or
- (b) where there are exceptional circumstances, for such longer period as the judge considers necessary.

3.—(1) Where the prosecution intends to appeal against a ruling under Article 17 of the 2004 Order, it shall inform the judge of its intention -

- (a) immediately following the making of that ruling; or
- (b) where proceedings have been adjourned pursuant to Article 17(4)(b) of the 2004 Order, immediately upon the resumption of the said proceedings.”

[11] These provisions were considered in this jurisdiction in R v Grindy [2006] NICA 10. That was a case in which the defendant was charged with the theft of computer equipment while delivering consignments. It was contended at trial that the police had failed to properly investigate and report on CCTV coverage at specified premises as a result of which the learned trial judge ordered the proceedings to be stayed as an abuse of process. After he delivered his ruling the defendant, with the agreement of prosecution counsel, was permitted to leave the dock and the jury was discharged. Twenty to thirty minutes after discharge the prosecution informed the clerk of the court that it wished to seek an adjournment under Article 17 (4) (b) of the 2004 Order in order to consider appealing against the judge's ruling. The application was pursued before the trial judge the following morning and he concluded that he was no longer competent to entertain any application for an adjournment.

[12] The court in Grindy noted that the scheme of the legislation was designed to allow for the possibility that an expedited hearing in the Court of Appeal could take place which would allow for the resumption of the trial if the ruling were reversed. The requirement of "immediacy", however, was contained within the Rules rather than the substantive legislation. It concluded that the application for adjournment had not been made immediately because of the intervening discharge of the jury thereby preventing an expedited hearing. That did not preclude the prosecution from applying for leave to appeal solely because it failed to comply with the requirement to either apply immediately for an adjournment or inform the judge immediately of its intention to appeal. Each case had to be judged on its facts and in this case the court found that it would have been unfair to allow the appeal to proceed because the defendant had been deprived of an expedited appeal and an opportunity to make an application for a direction of no case to answer.

[13] Identical legislative provisions were considered by a five judge Court of Appeal in England and Wales in R v NT [2010] EWCA Crim 711. The background to the case was that the prosecution had indicated its intention to appeal following a ruling staying the case but it was not until the next day that the prosecution gave the acquittal agreement required by Article 17 (8). The court noted that there was no inherent power to entertain a prosecution appeal and that jurisdiction came only from the legislation. Article 17 (2) required the prosecution to act in accordance with the provisions of Article 17. Article 17 (4) required the prosecution either to inform the court that it intended to appeal or to request an adjournment to consider whether to appeal. Postponement of both of those alternatives was not permitted. In

particular, if the prosecution wished to reflect on whether to appeal, it could only do so where it had sought an adjournment following the ruling for that purpose. The court concluded, therefore, that the statute required the prosecution to avail of one of the Article 17 (4) options immediately in order to give jurisdiction. The prosecution had not done so in that case because in the absence of the acquittal agreement it could not avail of Article 17(4) of the 2004 Order. The requirement of immediacy in Rule 2(1) of the 2005 Rules was merely a reflection of the statutory position.

Consideration

[14] There are some modest differences between the approaches taken in Grindy and NT. The court in Grindy focused on the immediacy requirement contained within Rule 2 (1) of the 2005 Rules. In NT the court looked at the legislative structure contained in Article 17 of the 2004 Order and deduced the same immediacy requirement from that Article. In that sense, therefore, there is no direct conflict between the decisions because they were looking at different aspects of the legislation. The court in Grindy examined the elasticity of the concept of immediacy and concluded that the requirement would not be satisfied where some intervening event in connection with the case had taken place. In NT the court did not examine the concept in the same way but concluded that a 24-hour delay in giving the acquittal agreement could not be cured.

[15] The most important distinction, however, between the judgments concerns the consequences of failure to comply with the immediacy requirement. Because the court in Grindy focused its decision on the Rules it concluded that it did not necessarily follow that a breach of the Rule necessarily prevented the prosecution from proceeding with the appeal. Where, however, the immediacy requirement comes from Article 17 itself, the requirement in Article 17 (2) that the prosecution must act in accordance with the Article means that a failure to do so necessarily deprives the court of jurisdiction.

[16] This aspect of the interpretation of Article 17 was not the subject of consideration by the court in Grindy and we are consequently free to review it. We accept that the interpretation of the legislative provisions in NT is correct. It follows, therefore, that where there has been a failure to comply with the immediacy requirement the court has no jurisdiction to entertain the appeal or an application for leave to appeal.

Conclusion

[17] In this case the prosecution did not indicate its intention to appeal nor did it apply for an adjournment to consider whether to appeal at the time of the hearing. It first indicated an intention to appeal on Friday 4 May 2012. For the reasons given we consider that Article 17 (4) of the 2004 Order does not provide the prosecution with

an option to spend four days considering its position before deciding to inform the court how it wishes to proceed. If it wishes to consider its position the prosecution must apply for an adjournment immediately following the ruling.

[18] Because we considered that we had no jurisdiction under the statute to entertain this appeal we refused the leave application.