Neutral Citation No. [2015] NIMag 2 | *Ref:* **14/106836**

Judgment: approved by the Court for handing down | *Delivered:* **15/09/2015**

*(subject to editorial corrections)**

PETTY SESSIONS DISTRICT OF EAST TYRONE

COUNTY COURT DIVISION OF FERMANAGH AND TYRONE

THE DIRECTOR OF PUBLIC PROSECUTIONS

Complainant

AND

JOHN FERGUSON

Defendant

DISTRICT JUDGE (MC) JOHN I MEEHAN

Preliminaries

1. This defendant was summonsed to answer two complaints, namely

That you

1. on the 16th day of August 2013 …. passed as genuine a certain thing namely a Bank of England £20 note which was and which you knew or believed to be a counterfeit of a currency note contrary to section 15(1)(a) of the Forgery and Counterfeiting Act 1981.
2. on the 18th day of August 2013 …. passed as genuine a certain thing namely a Bank of England £20 note which was and which you knew or believed to be a counterfeit of a currency note contrary to section 15(1)(a) of the Forgery and Counterfeiting Act 1981

2. At a case review on 25th March 2015, Mr. Forde, BL moved an application for certification for counsel, that being himself, under the defendant's current criminal aid certificate. He handed up written submissions. These had not been directed, nor would they have been. In those circumstances, I said that I would read both those submissions and the evidence tendered with the summons during the luncheon recess.

3. I repeat here the relevant parts of The Legal Aid, Advice and Assistance (Northern Ireland) Order 1981;

> *Free legal aid in the magistrates' court*
> 28. - (1) If it appears to a magistrates' court that the means of any person charged before it with any offence, or who appears or is brought before it to be dealt with, are insufficient to enable him to obtain legal aid and that it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence before it, the court may grant in respect of him a criminal aid certificate, and thereupon he shall be entitled to such aid and to have-
> (a) a solicitor; and
> (b) subject to paragraph (2), counsel,
> assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36.
> (2) Free legal aid given for the purposes of any defence before a magistrates' court shall not include representation by counsel except in the case of an indictable offence where the court is of opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable.
> (2A) The power conferred by paragraph (1) to grant a criminal aid certificate includes power to grant a certificate for a limited period, for the purposes of specified proceedings only or for the purposes of limited aspects of proceedings, and to vary or remove any limitation imposed by a criminal aid certificate.
>
> 31 - If, on a question of granting a person free legal aid under Article 28, 28A, 29 or 30, there is a doubt whether his means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt shall be resolved in favour of granting him free legal aid".

4. Counsel cannot be certified under a criminal legal aid certificate where the offence is summary only. Thus, charges such as common assault contrary to s.42 of the 1861 Act (whether or not an assault upon a female), breach of a Non-Molestation order, riotous behaviour, wrongful entry on premises, drink driving, driving without insurance, or carrying an imitation firearm cannot be the subject of certification. This is

despite the fact that most if not all of these carry a possible prison sentence of up to 6 months.

The Prosecution evidence

5. The tendered evidence was to the effect that on 18th August 2013, the defendant purchased goods in a store and tendered a £20 note. The shop assistant declined to accept it because "it didn't feel right". Encouraged by the defendant, who guided her on where to look for a glow from the note when under the security scanner, she got another note from the till, one she believed genuine, and found that it likewise glowed in the same places. That persuaded her to accept the proffered note as genuine.

6. The evidence from the manager of the same store was to the effect that the £20 note which the shop assistant used for the comparison and which she had found in the till had in fact been passed by the defendant the previous day during another purchase. In this regard, there was also CCTV footage.

7. Another incident was also alleged to have taken place at a restaurant on 16th August and likewise involved the same defendant attempting to pass a counterfeit £20 note. I deal with this in more detail later in regard to the evidence of Constable Summers.

8. A witness from the Bank of England has provided an expert report, confirming that the two notes seized by police from the store were counterfeit.

9. In a formal police interview on 20th August 2013, the defendant had no comment to give in respect of this matter. He did however answer questions when interviewed again on 24th January 2014. He gave an account of having received the notes as payments from a man for doing some odd jobs. That man later gave a Statement to the police and, on the detail, it was apparent that credibility issues were raised. It was also highlighted by the police in interview that the serial numbers for the three notes concerned were in sequence. The defendant made the case that he had acted in good faith at all times. He accepted that the first note, at the restaurant on 16th August, was counterfeit, but did not accept this in respect of the other two notes, since one was neither checked nor accepted, while he asserted that the other one had passed a proper security check.

10. The foregoing allegations were appraised at the time merely for the purposes of testing counsel's assertions as to the nature of the prosecution case. They were to be regarded only as the untested allegations at that stage.

Counsel's case for unusual difficulty

11. Mr. Forde wished - warned - that his written submissions should be treated as confidential, save to the extent that he repeated them in court, so that the defendant's right to silence, in effect, could be protected in respect of the upcoming trial.

12. In his written submissions, Mr. Forde asserted that the prosecution statements included hearsay and that no application had been lodged in this respect. He did not identify the alleged hearsay. He further hypothesised that an application *may* be made (his emphasis) during trial for waiver of the notice requirements and leave to adduce such hearsay, leading to "unusual difficulties".

13. I could identify potential hearsay evidence in just one statement, but it was with regard to a fact which the defendant witnessed and which he accepted in interview to be true. Mr. Forde did not elaborate during the subsequent oral submissions and I could not accept his bare assertion without more.

14. The next point made by Mr. Forde in his written submissions was with reference to bad character evidence. He asserted;

One prosecution statement is made up entirely of bad character evidence. No application has been lodged. The defence have (sic) specifically raised this in open court on the basis that the contest has been listed weeks past the target date in order to accommodate the police officer whose statement is grounded completely on bad character evidence, yet no application has been lodged.

15. This reference could only be to the evidence of Constable Summers. The events to which he was to attest were the subject of the second complaint, so I could not see how it could be described as bad character evidence. The Statement recounted that when the police attended what was to turn out to be the second incident on 18th August 2013 they were content to accept at that time the defendant's representation that he had been as much the victim as anyone else; someone must have off-loaded the counterfeit note upon him without him spotting the deception. The police let the matter go at the time, telling the defendant that no further action would be taken unless more evidence came to light. The prosecution case, of course, is that more evidence did indeed come to light about events 2 days previously and now forming the basis of the first complaint.

16. Mr. Forde's remaining ground for asserting unusual difficulty in the written submission was with reference to the admissibility of the interview transcript.

Upwards of 60% of one of the PACE interviews and substantive parts of another PACE interview contains (sic) inadmissible evidence. If the prosecution do not agree to redact those portions then it will be necessary to have a hearing on the admissibility of the evidence. This could possibly be an unusually difficult application which is not normally present in criminal cases before the court.

17. In my experience, the prosecution would never refuse to edit a transcript so as to expunge irrelevant or prejudicial material. (Sometimes the issue can be simply

overlooked, the material is handed up and the consequential prejudice to the defendant causes a mistrial.) I did not believe there was any real prospect of this issue becoming contentious at trial.

18. On the other hand, it is correct that the PACE interview, as revealed in the transcript, combined questioning on two quite distinct investigations. The first concerned possession of drugs. That arose from what was found when the defendant's house was searched. In the second interview, the defendant made admissions in respect of that matter.

19. It is therefore most unfortunate that the papers here were put together to include matters which were irrelevant to the case in hand and, if seen by a judge for case management purposes, could force a recusal.

Counsel's case for unusual gravity

20. This aspect of the application was dealt with more fully by Mr. Forde when he came to make his further submissions in open court. At that stage it became apparent that he had taken exception to the fact that I had resorted to the tendered evidence for the purpose of testing his written submissions, including points which he wished to be kept from the prosecution. In his paper, he had pointed out that these charges could warrant up to 6 months imprisonment as a maximum and the starting point under sentencing guidelines would be 3 months. On a full contest and "on account of other known matters" he suggested that the sentence in this case might be closer to the maximum. There was, then, already a discrete revelation by Mr. Forde that his client had a criminal record.

21. In court, however, Mr. Forde handed up the printout of the defendant's full and prolific record. Asked immediately why he had done that, Mr. Forde said that he had wished to object to me looking at the tendered evidence and alleged that I did not let him (I had no idea what he meant). Consequently, he felt it appropriate that I should also have the defendant's previous record, in full. Mr. Forde added that, while he had been thinking of inviting me to recuse myself because I had seen the tendered evidence, he was certainly now going to ask that I do so because he had felt obliged (as he put it) to reveal the existence of an active suspended sentence.

22. Mr. Forde evidently took the view that he could force a judge to recuse himself by revealing his client's previous record and thus engineering bias, or at least the appearance of bias. The defendant's right to silence and his right to a trial conducted without reference to his antecedents (save where leave to adduce bad character evidence has previously been granted) is by way of a shield, not a sword. No defendant is entitled to secure a change of trial judge by voluntarily making prejudicial disclosures about himself. Of course, this defendant was not involved in the transaction; it was his

barrister who chose to act as he did. Whilst Mr. Forde's behaviour is to be strongly deprecated, the defendant cannot be blamed for that.

23. Mr. Forde had a perfectly good point to make about the situation where I had seen an interview transcript which needlessly included information on other prejudicial matters. It is regrettable that he did not make his application on that basis – if he should have found it necessary. It was in fact quite clear to me that the prejudicial material contained in the prosecution papers, now that I had been required to consult them, meant that I had to recuse myself as regards the actual hearing.

Decision

24. Apart from unusual difficulty, the other ground upon which Mr Forde sought to rely was that of unusual gravity. I agree that immediate custody was a real possibility in the event of a conviction, especially after a contest. Should a custodial sentence be imposed, then it would follow that the suspended prison sentence would most likely be imposed consecutively. Therefore, the situation in which the defendant found himself could properly be described as grave.

25. On the other hand, it is not unusual in petty sessions for defendants to face the possibility of up to 6 months imprisonment in the event of conviction. I have already noted (at paragraph 4, above) several types of case where certification is simply not available.

26. A relevant suspended sentence is a matter of history and cannot be changed through the trial process. The existence of a suspended sentence, while undoubtedly significant when considering gravity for the purposes of "standard" criminal aid, is less relevant whether to afford an enhanced level of representation. A barrister, with respect, is not going to make the activation of a suspended sentence less likely than would a solicitor, in the event of a conviction.

27. Unusual gravity, in any event, is far from determinative with respect to certification for counsel. The defendant had already been vouchsafed the aid of a solicitor in the preparation and conduct of his defence. That was secured, I expect, without needing to mention a previous record, let alone a suspended sentence. The issue now was whether the standard certificate was sufficient for the purposes of vindicating the defendant's right to an appropriate level of legal representation.

28. Aside from the particular and unexpected irregularity in these papers, I do not accept that counsel who volunteers his detailed analysis of the prosecution papers in furtherance of his own cause can legitimately object to the certifying authority looking at those same papers, especially when counsel also maintains that his analysis should not be shared with the prosecution. Under the present legislation I have to somehow act as a certifying authority while also avoiding any compromise to the defendant's

right to a fair trial. This conflict would not arise if, for example, certification for counsel were dealt by the Legal Services Commission.

29. Just as the risk of imprisonment will tend to be the dominant element when deciding whether free criminal aid should be granted to an indigent accused, so it is that complexity, or difficulty, will tend to be the dominant consideration when one comes to the question of certifying for counsel. In assessing the reasons for authorising counsel, it is implicit that this would be in order to afford the defendant the particular skills in which that branch of the profession distinguishes itself.

30. Those skills include a deeper understanding of the law and an acquired expertise, assisted by the instructing solicitor, in setting up a case for trial and in courtroom advocacy, especially in cross-examination techniques. All of the special skills of that branch, in fact, are material to considerations of unusual difficulty. Mr. Forde was not attended by his instructing solicitor. There was no sign that any aspect of the defence required detailed investigation or enquiries. There was no sign that any research had been undertaken in preparation for argument on legal points (outside of the legal aid issue). There was no sign of statements of evidence having to be taken from any potential defence witnesses at counsel's direction; indeed, there was no sign of any need for counsel's directions at all. No independent expert evidence appeared to be in contemplation. Mr. Forde's arguments for certification appeared to be grounded upon his reading of the prosecution papers alone and I had found that this did not take any significant amount of time. I was not made aware that counsel had even consulted with the defendant as yet.

31. The prosecution case was straightforward and I had been given no reason to doubt that a case to answer would be made out. It then becomes one in which the defendant is called upon to give his explanation as to his behaviour. I took it that the defendant would then seek to rebut the evidence that he was acting dishonestly, much along the lines of what he said in interview. The outcome would turn upon what the trial judge made of the defendant and of his explanations. I did not consider this so difficult a case to prepare and present on the defendant's part that the services of a reasonably competent solicitor would be insufficient. If anything, it would be for the prosecutor to deploy enhanced cross-examination skill in such a case as this. The prosecutor in the Magistrates' Courts is as likely to be a solicitor as a barrister.

32. In all, I did not consider that the real risk of a comparatively lengthy prison sentence (taking account of the suspended sentence) was sufficient to warrant certification for counsel.

Should such an application be made by counsel in advance of trial?

33. The lead case on the issue as to the timing of an application for criminal legal aid remains that of Re Havern [2006] NIQB 66. There, the solicitor had entered pleas of not

guilty on behalf of his client and applied for criminal aid. The resident magistrate declined to consider the application before hearing the contest in due course. Girvan, J, as he then was, identified the decisive considerations in the following passage;

> [8] … The purpose of granting legal aid is to enable the defendant to prepare and conduct his defence and thus to ensure a fair trial. This would not be achieved by leaving it to the court to decide after the event whether legal aid should have been available to cover the work done in preparing and conducting the defence. There would in any event be grave danger in such a course since the court's view of the merits of the defendant's defence case would colour the court's approach and could easily lead the court to visit on the defendant and his solicitor a financial penalty by refusing legal aid. The term "the merits test" is a misleading one. This should really be a reference to "an interests of justice test". The focus must be on the question whether legal aid is necessary to ensure a fair trial against the background of an established lack of means. A matter of great importance in considering the interests of justice is whether the deprivation of liberty is at stake. If there is the real possibility of imprisonment then in the interests of justice legal representation should be available (see Benham v UK (1996) 22 EHRR 293). In order to carry out the function properly the court must be acquainted with the degree of risk the defendant faces of a deprivation of liberty. To be so acquainted the court has to probe the Crown case to a certain extent to understand the gravamen of the Crown case…. In Re McKinney Carswell J pointed out that it was to the Crown that the magistrate should normally look to ascertain the height of the case being made against the accused person.

34. By the same token, Havern reaffirmed that the resident magistrate (now district judge (Magistrates' Courts)), should normally look to the prosecution alone to provide any information necessary to inform the decision. Where defence counsel, in pursuit of certification, volunteers the nature of the case, highlights problems in mounting a defence, or emphasises that the defendant might expect an immediate custodial sentence upon conviction, this does raise an issue as to whether the same district judge who rules on the application should also be trying the case. This is the fundamental problem about having the same person act as both certifying authority and trial judge. It is simply not practicable, though, for district judges to hear this kind of application and then routinely arrange for another judge to hear the contest.

35. Modern practice is for counsel to move the application for certification, notwithstanding the professional position whereby counsel has no interest in whether a solicitor secures legal aid; counsel is entitled to a reasonable fee and this is payable by the instructing solicitor, whether or not the solicitor has been put in funds.

36. Conversely, it is now rare to have an application to certify moved by the solicitor. One significant consequence is that one hears no case made first-hand as to why the solicitor does not feel able to conduct the case alone. Instead, counsel is left to plead in his or her own cause.

37. In the instant case, it has been disclosed to me for the first time that the Law Society and the Bar Council have in fact agreed an "uncertified contest fee rate". Mr. Forde asserts that the amount involved does not represent reasonable remuneration. I do not doubt his sincerity in that regard, but it would be *Wednesbury* unreasonable for me to take that assertion into account. I do not wish to appear in any way unsympathetic to the proposition that lawyers, like labourers, are worthy of their hire (See, *The Hourly Rate: A Position Paper* (1995) LSNI, by this same author). However, in my present position, I have no role in determining counsel's proper fee level. If counsel's fee is to be met from public funds, the amount is a matter for regulations. In other circumstances, it is a matter for counsel.

38. The existence of this agreed fee rate does mean, though, that the defendant has no interest in the outcome of an application to certify for counsel out of public funds. The defendant is going to have the benefit of representation by counsel in any event and counsel will be paid. What matters more, then, is the defendant's right to a fair trial, which includes a right to be judged on the basis that he presents as someone of previous good character, confident of vindication.

39. Whereas, strictly speaking, the judge is being asked to rule upon whether it is sufficient that the defendant be represented by a solicitor alone, the modern legal services market has taken that decision out of the court's hands. The only real issues left are whether the solicitor is to be spared the personal liability for counsel's fees and whether counsel is to be afforded a higher fee out of public funds.

40. Once one takes account of this market arrangement there are also implications for timing. The Havern case, which deprecated any deferral of an application until determination of the case itself is to be distinguished. That case concerned the different and more fundamental issue as to whether the defendant was to be afforded legal representation on public funds at all. The learned judge was pointing out that the statutory test must be applied when the application is moved. The instant case concerns the distinct issue as to whether an application for certification must be determined in advance of trial and with counsel already engaged on terms agreed. As always, the underlying question is whether that is in the interests of justice.

41. Such applications are advanced on the basis that counsel's services are necessary for the purposes of a contested hearing. It would be unusual that counsel's services should be afforded to the defendant where the charges are admitted. Applications made in advance of the actual trial are made in circumstances where the court – and often

defence counsel- does not really knows whether the case will be contested at all. On the other hand, the fact that a case does end up as a plea is not to say that authoritative and informed advices from counsel, mayhap following detailed investigation and research, were not required before the matter could be resolved without such a trial. Should the application be made at the conclusion of the case, though, that much can be put before the court without inhibition.

42. Now that defendants on "standard" legal aid are routinely receiving the services of counsel anyway, it is merely consistent with the obligation to protect public funds that more care is taken to avoid certifications which result from a lack of frankness or because of irresponsibility on the defendant's part. Consider these commonplace situations in petty sessions;

- The defendant fails to attend court and is convicted in his or her absence.
- Counsel announces on the day that the defendant will now plead guilty. Upon enquiry, counsel explains brightly that the defendant accepted advices. Counsel had not met the defendant before the contest day. It is not apparent that the same advices could not or should not have been given by the solicitor.
- The defendant abandons the contest on the day because the only tactic was to wait and see whether the prosecution witnesses actually turned up. This is most common in domestic violence cases.
- The prosecution announces that it is prepared to withdraw the case on the basis that the defendant has, in turn, agreed to accept a caution. This involves the defendant accepting his guilt. By the same token, this resolution involves the prosecution, for its part, recognising that the case is not really that grave.

43. In most, though not necessarily all, of those scenarios, public funding for the services of a solicitor alone would have provided the defendant with the appropriate level of legal representation. The decision on certification for counsel will thus be so much better informed – and the public interest thereby better protected - if left to the contest day.

44. For these reasons I am now of the view that applications for certification ought normally to be deferred until the determination of the case. That will be a better way to protect the defendant's rights. There will always be exceptions. For example, should the court find it necessary to direct skeleton arguments on some point of law in advance that would be a clear case of unusual difficulty. By the same token, it remains important to keep in mind Girvan, LJ's warning of the danger of visiting a financial penalty based upon the court's view of the merits of the defence case

45. Nothing in the foregoing is intended to suggest that an application for certification which is moved directly by the defendant's solicitor ought to be deferred. There will still be solicitors who want to know whether they will be indemnified from public funds, should they instruct counsel.

46. Finally, it is not appropriate for counsel to apply for certification on a confidential basis. These are matters concerning the allocation of public funds. For so long as it is a decision to be made by a judge in a public court it is right that the public should know the basis for the decision.

Postscript

47. This case was ultimately listed for contest before another district judge (MC) at Omagh Magistrates' Court on 11th June 2015. On that day all charges against the defendant were withdrawn by the prosecution on the basis that he accepted a caution. The court record shows that defence counsel once again made application for certification and that it was granted.

Dated this 15th day of September, 2015

Judge John I Meehan
District Judge (Magistrates' Court)
Dungannon