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Judgment: approved by the Court for handing down | *Delivered:* **07/03/2016**
(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY WAY OF CASE STATED

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Complainant/Respondent;

-v-

PATRICK STEPHEN DOUGLAS

Defendant/Appellant.

Gillen LJ, Weatherup LJ and Weir LJ

<u>WEATHERUP LJ</u> (with whom Gillen LJ agrees, Weir LJ dissenting)

[1] This is an appeal by Case Stated from District Judge Henderson dated 23 March 2015. Mr Quinn appeared for the defendant/appellant ("the defendant") and Mr Kennedy for the complainant/respondent ("the prosecution").

[2] The question of law for the opinion of the Court of Appeal was stated as follows:

> "Was I correct in law in amending a complaint of taking and driving away, contrary to Article 172 of the Road Traffic (Northern Ireland) Order 1981 to one of "vehicle interference" contrary to Article 8 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 by virtue of Article 155 of the Magistrates' Courts (Northern Ireland) Order 1981?"

[3] The following facts were stated to have been found by the Magistrates' Court -

> "[9] Between 2200 hours on 27 September 2013 and 0700 hours on 28 September 2013 a Mazda vehicle (Vehicle Registration Mark) VEZ 6615 was stolen during the course of a burglary.
>
> [10] The vehicle was subsequently located and removed to a recovery garage where it was examined by a crime scene investigator on 30 September 2013.
>
> [11] A number of fingerprints were recovered from the vehicle.
>
> [12] Fingerprints matching those of the defendant were found on the exterior and interior of the vehicle.
>
> [13] The defendant was interviewed by police on 11 December 2013.
>
> [14] The defendant denied throughout the interview that he had been involved in the taking of the vehicle.
>
> [15] The defendant admitted that he had been in the vehicle on Saturday 28 September 2013 believing it to be stolen and that he had rummaged around in it. I found that this was with the intention of stealing anything of value.
>
> [16] There was no evidence linking the defendant to the site of the theft of the vehicle, nor any evidence that he had moved the vehicle at any stage."

[4] The Case Stated recorded the charge against the defendant as follows -

> "Patrick Stephen Douglas ("the defendant") was charged that he on the 27th day of September 2013, in the County Division of Belfast, without having the consent of the owner or other lawful authority took a motor vehicle, namely a Mazda 6 registration VEZ 6615, for his own or another's use, contrary to Article 172 of the Road Traffic (Northern Ireland) Order 1981 ("taking and driving away")."

[5] The amended complaint read as follows -

> "The defendant on 27 September 2013 at 57 Marlborough Park North, Belfast, in the County Court Division of Belfast, interfered with a motor vehicle or trailer or with anything carried in or on a motor vehicle or trailer with the intention that an offence specified in Article 8(2) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 should be committed by you or some other person, contrary to Article 8 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983."

[6] The decision of the District Judge was stated as follows -

> "[30] I held that on the evidence the proper charge on the complaint should have been one of vehicle interference.
>
> [31] I held that the same facts were relied on to establish a charge of vehicle interference.
>
> [32] I held that there was no prejudice to the defendant in an amendment to the summons.
>
> [33] Consequently, I amended the summons by virtue of the statutory power conferred by Article 155 of the Magistrates' Courts (Northern Ireland) Order 1981."

[7] The question in this Case Stated arises because a summary offence cannot be tried in the Magistrates' Court unless the complaint is made within six months of the commission of the alleged offence. After six months have elapsed a defect in a summons may be remedied by amendment of the existing summons.

[8] Article 155 of the Magistrates' Courts (Northern Ireland) Order 1981 states -

> "A Magistrates' Court may during any proceeding upon such terms as it thinks fit, make any amendments to 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."

[9] Also of note is Article 154 of the 1981 Order which states –

> "(1) No objection shall be allowed in any proceedings before a Magistrates' Court to any complaint, summons, warrant, process, notice of application or appeal or other document for any alleged defect in substance or in form or for variation between any complaint, summons, warrant, process notice or other document and the evidence adduced on the part of the complainant, plaintiff, applicant or appellant at the hearing, unless the defect or variance appears to have misled the other party to the proceedings.
>
> (2) Without prejudice to the generality of Article 161 (*adjournments)* or 163 (*costs*), where a party to the proceedings has been misled by such defect or variance as is mentioned in paragraph (1) the court may, if necessary, and upon such terms as it thinks fit, adjourn the proceedings."

[10] I shall refer to Article 155 as "the amendment provision" and to Article 154 as "the defect provision".

[11] It will be noted that the defect provision addresses two matters, first of all a defect in the document, for present purposes a summons, and, secondly, a variance between the summons and the evidence adduced. The defect may be in substance as well as in form.

[12] It should also be noted that the statutory scheme in England and Wales differs from that in Northern Ireland. In England and Wales there is no direct equivalent to the amendment provision. The equivalent to the defect provision is to be found in section 123 of the Magistrates' Courts Act 1980.

[13] A literal interpretation of the defect provision would render its effect very wide ranging. No objection would be allowed for any defect in a summons or for any variation between the summons and the evidence adduced, except where the defendant had been misled, in which event the court would have power to adjourn.

[14] The courts in England and Wales have modified the potential scope of the stand- alone defect provision so as to restrict the defects and variance that would be disregarded and have provided for amendment of the summons. The scope of the English provision was considered by a Divisional Court in R v Scunthorpe Justices [1998] EWHC 228 (Admin). The applicants were jointly charged with robbery. The complainant alleged assault by the applicants who had removed her training shoes and run off with them. The prosecution and the defence agreed to pleas of guilty to charges of theft and common assault. The Justices permitted amendment of the

summons to allege theft but rejected amendment of the summons to allege common assault. At the date of the proposed amendment a period of six months had elapsed from the date of commission of the offence. Dyson J stated the following principles to be derived from the authorities –

> "(1) The purpose of the 6 month time limit imposed by Section 127 of the 1980 Act is to ensure that summary offences are charged and tried as soon as reasonably practicable after their alleged commission.
>
> (2) Where an information has been laid within the 6 month period it can be amended after the expiry of that period.
>
> (3) An information can be amended after the expiry of the 6 month period, even to allege a different offence or different offences provided that:
>
> > (i) the different offence or offences allege the "same misdoing" as the original offence; and
> >
> > (ii) the amendment can be made in the interests of justice.
>
> These two conditions require a little elucidation. The phrase "same misdoing" appears in the judgment of McCullough J in Simpson v Roberts (Times 21/12/1984). In my view it should not be construed too narrowly. I understand it to mean that the new offence should arise out of the same (or substantially the same) facts as gave rise to the original offence."

[15] Dyson J, applying the principles to the facts of the case, stated that the two offences were plainly the same misdoing or arose out of the same or substantially the same facts. The only difference was stated to be that in order to prove the offence of assault an additional element had to be established, namely that some harm had been caused to the victim.

[16] The authorities illustrate amendments being made to correct the particulars of an offence such as time or date or place or the identity of the victim. They also illustrate amendments to the description of the offence charged by changes to the section or to a re-enacted section or to the date of the relevant legislation.

[17] The authorities also illustrate amendments that concern the actual offence charged. In Scunthorpe Justices robbery was amended to theft and common assault.

In that case Dyson J referred to R v Newcastle Upon Tyne Justices, ex parte John Bryce (Contractors) Ltd [1976] 2 All ER 611 where the charge of 'permitting the use' of an overladen lorry was amended to 'use' of an overladen lorry.

[18] However, in Northern Ireland there is, in addition to the defect provision, the express power of amendment of the summons and a statutory test based on such amendment being "necessary for the purpose of raising the real questions at issue".

[19] The statutory framework providing for the defect provision and the amendment provision is longstanding in Northern Ireland and in Ireland. The immediate predecessors of the provisions were sections 155 and 156 of the Magistrates' Courts Act (Northern Ireland) 1964. Prior to 1964 the defect provision was to be found in section 39 of the Petty Sessions (Ireland) Act 1851 and the amendment provision was to be found in section 76 of the County Officers and Courts (Ireland) Act 1877.

[20] What are the real questions at issue when an amendment to the summons is proposed? The premise is that the existing summons does not raise the real questions at issue. There may be defects in the wording of the summons or the evidence adduced may be at variance with the summons. Where differences have emerged between the original summons and the evidence adduced it may be, for example, that the witnesses have not come up to proof or, as in the present case, the Court is not prepared to draw the inferences from the evidence that the prosecution contend should be drawn. The proposed amended summons will be designed to address whatever those differences might be. However, the treatment of a defect or a variance is expressly constrained in that the defendant must not be misled. This may be achieved if there is sufficient connection, not only between the facts supporting the respective charges, but also between the respective charges.

[21] O'Connor's Irish Justice of the Peace 2nd ed. (1915) asked (page 241) "Where the evidence discloses an offence different from the offence charged in the summons or information, can the justices amend and convict?" The answer in 1915 was "It is difficult to thread one's way, through the maze of contradictory dicta and decisions, to a clear conclusion". It would not be fruitful to undertake an examination of the older authorities.

[22] However, O'Connor did state that there is a great deal of force in the suggestion that Justices may amend a defective summons into a good summons provided that the summons served has given reasonable notice to the defendant of the gist of the matter of which he is ultimately convicted (page 248). This suggestion was referred to in Comerton's *Handbook on the Magistrates' Courts Act (Northern Ireland) 1964* (page 206) and *Valentine's Criminal Procedure in Northern Ireland* 2nd Edition (page 100).

[23] This approach starts with 'reasonable notice' being given to the defendant by the terms of the original summons. That reasonable notice must relate to the 'gist' of

the matter of which he is ultimately convicted under the amended summons. This approach also proceeds on the basis of there being sufficient connection between the original summons, the offending conduct and the amended summons.

[24] Comerton suggested (page 204) that an amendment cannot be made to charge a different offence. Comerton relied on two authorities, Martin v Pridgeon [1859] 23 JP 630 and R v Brickell [1864] 28 JP 359. O'Connor (page 242) comments that these authorities may represent examples where the defendant was never charged at all with the offence of which he was convicted, referring to Gibson J in R (Daly) v Cork JJ [1898] 2 IR 694. This may have arisen where a defendant had been arrested for one offence and on being brought before the Magistrate had been convicted of a different offence. The suggestion is not consistent with more modern English authorities on the defect provision such as Newcastle Justices or Scunthorpe Justices referred to above.

[25] The Court of Appeal has considered the issue of the amendment of a summons in more recent times. In DPP v Edens and others [2014] NICA 55 the defendant was charged with offences under the Protection of Badgers Act 1992 which legislation did not apply in Northern Ireland but only applied in Great Britain. Section 2 provided for an offence of cruelty by digging for a badger and section 3 provided for an offence of interfering with badger sets by causing a dog to enter a badger set. The prosecution, on discovering their mistake, sought to amend the summons to prefer charges under the Wildlife (NI) Order 1985 which provides for the offence of damaging or destroying or obstructing access to any structure or place a badger uses for shelter or protection. The District Judge refused to amend the summons. On appeal by Case Stated on a point of law as to whether the District Judge was correct to refuse the application to amend, the Court of Appeal answered that the District Judge was correct in refusing to amend the summons. The Court of Appeal was satisfied that the differences between the original charges and the proposed new charges were significant. The earlier charges alleged that the defendant had dug for a badger and/or interfered with a badger's set and caused a dog to enter and disturb the set. The new charge related to damaging or destroying or obstructing access to a shelter. The Court of Appeal refused to approve the amendment and in any event in the interests of justice considered it inappropriate to amend.

[26] The issue was previously before the Court of Appeal in Doonan v McCarney [1991] NI 213. A defendant was charged with driving, attempting to drive or being in charge of a motor vehicle on a road or public place at Drumdan, Trillick. The defendant submitted that the offence had been committed in an adjoining townland and that the summons should be dismissed. The prosecution applied to amend the summons. The Resident Magistrate refused. On appeal by the prosecution by Case Stated the question for the opinion of the Court of Appeal was whether the Resident Magistrate was correct in law to refuse the amendment. The Court of Appeal held that the Resident Magistrate was wrong to refuse the amendment. The townland was not relevant to the charge. The Resident Magistrate had jurisdiction for offences

committed within the County Court Division. Article 17 of the Magistrates' Courts (Northern Ireland) Order 1981 provides that where an offence has been committed on the boundary between two or more County Court Divisions or within 500 yards of such a boundary the offence may be treated as having been committed in either or any of such County Court Divisions.

[27] In light of the foregoing it is concluded that, in determining whether it is necessary for the purpose of raising the real questions at issue and arriving at a just decision, a summons may be amended after the expiry of the 6 month period, even to allege a different offence or different offences, provided that:

(i) the new offence arises out of the same (or substantially the same) facts as gave rise to the original offence and
(ii) there is a close connection between the new offence and the original offence
(iii) the amendment can be made in the interests of justice.

[28] In DPP v Edens none of the three elements of that test was satisfied. In Doonan v McCarney all three elements of that test were satisfied. How do the three elements apply to the present case?

The same or substantially the same facts

[29] The facts relied on by the prosecution on the original summons are the same facts relied on for the amended summons. The prosecution sought to secure a conviction for taking and driving away based on the evidence of the applicant's fingerprints in the recovered vehicle and his admitted presence in and searching of the vehicle at the place where it was recovered. The District Judge refused to reach the conclusion that the evidence was sufficient to establish the offence of taking and driving away. It could not be inferred from the facts relied on that the appellant had been party to a moving of the vehicle. Clearly there was a variance between the summons and the evidence adduced, to which the statute provides that no objection shall be allowed, subject to the defendant being misled. The identical evidence of the defendant's fingerprints in the vehicle and his admitted presence in the vehicle while searching for items that might be removed were the matters relied on to found the charge of vehicle interference.

A close connection between the offences

[30] There must be a sufficiently close relationship between the offences. The amended offence may contain ingredients that were not required in the original offence. In Scunthorpe Justices the amendment was permitted even though the added ingredient of harm to the victim had to be established for the amended

offence but not for the original offence. The original offence of taking and driving away was charged under section 172 (1) of the Road Traffic (NI) Order 1981 which provides as follows -

> "…. any person who, without having the consent of the owner or other lawful authority, takes or attempts to take, a motor vehicle, trailer or cycle for his own or another's use or, knowing that any motor vehicle, trailer or cycle has been taken without such authority, drives or attempts to drive it or allows himself to be carried in or on it shall be guilty of an offence under this Order."

[31] The close connection with vehicle interference is apparent from Article 8 of the Criminal Attempts and Conspiracy (NI) Order 1983 which provides as follows -

> "(1) A person is guilty of the offence of vehicle interference if he interferes with a motor vehicle or trailer or with anything carried in or on a motor vehicle or trailer with the intention that an offence specified in paragraph (2) shall be committed by himself or some other person.
>
> (2) The offences mentioned in paragraph (1) are-
>
> (a) theft of the motor vehicle or trailer or part of it;
> (b) theft of anything carried in or on the motor vehicle or trailer; and
> (c) an offence under Article 172 of the Road Traffic (Northern Ireland) Order 1981 (taking or driving away without consent);
>
> and, if it is shown that a person accused of an offence under this Article intended that one of those offences should be committed, it is immaterial that it cannot be shown which it was."

[32] Clearly, had the defendant's admissions to police at interview been of an ancillary matter, such as the taking of illicit drugs, the respective charges would have been unrelated and no amendment should be permitted. In the present case there is a close connection between the respective offences.

The justice of the case

[33] This is the overriding consideration. Article 154 expressly refers to a just decision. That would be the requirement in any event. The facts relied on by the prosecution were admitted by the appellant. The original summons related to the

appellant's conduct in relation to the motor vehicle on the occasion in question. From the original summons the appellant was aware that what was in question was his criminal responsibility for his conduct in relation to that vehicle on that occasion. To adopt the language of O'Connor, the gist of the complaint against the defendant concerned in reality his interference with the vehicle. The prosecution sought to make more of it than could be achieved. His admissions of vehicle interference rendered the amendment of the charge a just decision.

[34] Although not a question arising on the Case Stated, the amended summons also appears to be defective. It states the date of offence as 27 September 2013 whereas the admitted vehicle interference was the following day. Further, the place of the offence is stated to be the address from which the vehicle was taken and driven away rather than the place of the admitted vehicle interference, namely the place of recovery.

[35] In respect of the question of law stated by the District Judge, as set out at paragraph [2] above, I would answer 'Yes'.

WEIR LJ

[36] I regret that in this case I have the misfortune to differ from the majority in my answer to the question of law posed by the District Judge.

[37] The facts alleged by the prosecution were not disputed by the defence and the defendant did not call or give any evidence at the hearing. The charge was one of taking a motor vehicle on the night of 27/28 September 2013. There was no evidence adduced that the defendant was concerned in its taking or that he was present at the place from which or when it was taken or was ever in the vehicle at a time when it was being driven. There was nothing to connect the defendant with the person or persons who took the vehicle. Rather the evidence against the defendant was confined to the fact that his fingerprints were identified on both the inside and outside of the vehicle coupled with his admissions at a subsequent interview that a friend had telephoned him at home and that he had gone down to see the car. He had an idea that it had been stolen, had sat in it for about 20 minutes and had a rummage round it both inside and out. He then went back into the house. He said "I admit to being in it but not taking it".

[38] At the conclusion of the prosecution case on 5 November 2014 counsel for the defendant applied for a direction of no case to answer. In the course of that application he submitted that the ingredients of the offence charged were not made out, and that there was no evidence that the defendant had been guilty of taking the vehicle or that he had been present when the vehicle was taken or had been carried in it. It appears that during the course of his submission defence counsel mentioned by way of illustration, with hindsight perhaps unwisely, that the prosecution

evidence might have warranted a conviction for vehicle interference had the defendant been so charged. However the prosecution made no application at that stage to amend the charge, arguing rather that the presence of the defendant's fingerprint on the driving mirror, allied to his initial failure at interview to admit having been in the car, meant that the court could disbelieve his explanation to the police and convict him of taking the vehicle, or alternatively of allowing himself to be carried in it. The direction of "no case" was refused.

[39] The defendant having, as I have said, neither given nor called any evidence, the trial concluded and counsel for the defendant renewed his submission that there was nothing to connect the defendant with the taking of the vehicle or with allowing himself to be carried in it, as there was no evidence of his having been "carried", which on the authorities clearly connotes a requirement to establish some movement of the vehicle while the defendant is present in it.

[40] It was at this stage that the prosecution, no doubt by then finally awakened to the evidential lacunae, submitted in the alternative that the charge might properly be amended under Article 155 to one of vehicle interference. The District Judge invited the parties to provide written submissions, which they did, and reserved judgment. As appears from the Case Stated, in arriving at her decision the District Judge considered two authorities, namely Doonan v McCarney [1991] NI 213 and R v Newcastle-Upon-Tyne Justices ex parte Bryce [1976] 1 WLR 517. She held that on the evidence the proper charge on the complaint should have been one of vehicle interference and "held that the same facts were relied on to establish a charge of vehicle interference" and "that there was no prejudice to the defendant in an amendment to the summons". Consequently, she amended the summons, purportedly by virtue of the power conferred by Article 155 and convicted the defendant. It should be noted that more than a year had by then elapsed since the date of the alleged offence so that the six month time limit for the issue of summary proceedings had long since elapsed and, therefore, no new summons could at that stage have been issued to charge the defendant with vehicle interference.

[41] The District Judge expressly amended the complaint in purported exercise of the power given under Article 155 of the Order and not that under Article 154. Therefore, many of the English cases decided in relation to their corresponding provision to Article 154, while of interest, are not directly relevant to the question at issue here. As Weatherup LJ has noted, there is no English equivalent to Article 155 so that the applicability of any of the English authorities to the construction of that differently- worded provision must be carefully evaluated.

[42] As to the two cases considered by the District Judge, Doonan v McCarney is a Northern Ireland decision on Article 155 where the amendment sought and refused by the Resident Magistrate was merely to correct the name of a townland in which the offence had erroneously been said to have been committed to that of the adjoining townland where it had actually been committed in circumstances in which, moreover, the relevant area for jurisdictional purposes was the County Court

Division and not the townland. Not surprisingly this court held that the Resident Magistrate was wrong to acquit the defendant because of the misstated townland, which it understandably characterised as a "technicality".

[43] R v Newcastle-Upon-Tyne Justices ex parte Bryce is a decision of the English Divisional Court on the equivalent of Article 154. In that case a limited company, the owners of a motor lorry, were charged with *permitting* the driver, their employee, unlawfully to use that vehicle on a road while it was overloaded. As the evidence had developed it appeared that the charge, whilst still under the same sub-regulation of the relevant Construction and Use Regulations, ought to have been one of *using* the vehicle. That was a minor discrepancy quite different in scale and nature from that in the present case and turned upon the interpretation of the "extremely wide words" of the English equivalent to Article 154. Further, Lord Widgery CJ observed at page 614f:

> "I would not wish prosecuting authorities to think that any licence is available to them to disregard the rules and hope that their troubles may be corrected by amendment at the hearing. On the other hand, in this instance the facts of the two competing offences are really identical, and it seems to me that the justices could hardly have reasonably come to any conclusion other than that the amendment here should be permitted."

[44] In the present case the facts of the two offences are quite dissimilar. The offence alleged and charged necessarily involved being at a quite different place at a quite different time doing a quite different act, namely taking away a motor car. The facts proved against the defendant involved his sitting in the by then stationary car at a different and later time and at a different place and rummaging around in it with the intention of stealing anything within it of value. In my view these two factual situations are by no means capable of being described as "the same misdoing". The "misdoings" are entirely different. Indeed the only common denominator is that each set of actions involved the same motor car.

[45] In the present case there was no error in the summons which required amendment. The charge was clear and so was the evidence. The problem for the prosecution was simply, and as often happens, that its evidence did not prove the charge. The "misdoing" established by the evidence was, as I have illustrated, quite different from that charged as by necessary implication the District Judge must have accepted when she declined to accept the prosecution's primary submission that she should convict the defendant either of the offence charged or, as a secondary submission, of allowing himself to be carried. Instead, the District Judge in effect preferred a different charge against the defendant to match the facts by then established by the evidence she had heard and did so at a time long after the point at

which the six month time limit for bringing a fresh summary prosecution had elapsed.

[46] I consider that "the real question at issue" between the prosecution and defence in this trial was whether the facts alleged and not disputed amounted to guilt of the offence charged? No "amendment" was required for that purpose. Plainly, as the District Judge must have accepted, they did not do so and accordingly the only "just decision" would have been to acquit the defendant. The alteration for the purpose of, in effect, charging an entirely different offence to which the established facts could be fitted was inappropriate and did not result in a "just decision". The contrasting approach and decision of this court in DPP v Edens and others referred to by Weatherup LJ at paragraph [25] is instructive.

[47] I add that, as Weatherup LJ has pointed out at paragraph [34] above, when the District Judge did make her "amendment" she for some reason introduced two errors that had not been present in the original summons by inserting a date and a location for the offence of vehicle interference which were both plainly incorrect on the evidence. In my view they do, however, serve as contrasting examples of the type of errors that might properly be amended under Article 155 to accord with the established and undisputed facts as to actual date and location "for the purpose of raising the real questions at issue and arriving at a just decision".

[48] For the above reasons I would answer the submitted question in the negative.