

NCN: [2019] EWHC 825 (Admin)



CO/3757/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Thursday, 14 March 2019

Before:

LORD JUSTICE SIMON
MR JUSTICE GOSS

B E T W E E N :

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

LUKE BERRY

Respondent

ANONYMISATION APPLIES

MR J BOYD (instructed by Crown Prosecution Service) appeared on behalf of the Appellant.

MR R HOLLAND (instructed by Cousins Tyrer) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE SIMON:

- 1 This is a prosecution appeal by way of case stated from the decision of District Judge (Magistrates' Court) Lower sitting at the Leeds Youth Court. The decision was made on 20 March 2018 when the Judge found that there was no case for the defendant to answer on the charge of criminal damage contrary to section 1(1) and section 1(4) of the Criminal Damage Act 1971. The defendant, who was then a youth, is now 18.
- 2 Since the appeal raises both factual and procedural issues, it is convenient to start with the prosecution facts as set out in the case stated. The facts were in the form of written statements which were treated as agreed. The witness EB was a young woman of 17 years who had been in a relationship with the defendant. By 18 February 2018 the relationship has ended and she was living in protected accommodation at an address in Huddersfield.
- 3 Kevin Wyers was a carer living at the address. His evidence was that at about 1.30 in the morning of 8 February he had heard that the defendant was on his way to see EB. Mr Wyers told EB and they were both worried about what he would do. Mr Wyers moved her to a different part of the building to keep her safe and then phoned the police.
- 4 He said that at about 1.50 he went down to the front door and opened it to see if he could see the defendant trying to get into the back of the house. He saw what he assumed was his shadow by the lower ground floor window and shouted out, "I've called the police." He then shut the door, and as he went to the carer's flat he heard a smash "and could only imagine that the defendant had broken the window to get in". The defendant then ran in and barged past him to get into the carer's flat looking for EB. When he realised she was not there he shouted out, asking where she was. There was then a scuffle as Mr Wyers tried to steer the defendant out of the house. He then phoned the police to say that the defendant had managed to get into the house, and whilst he was still on the phone he followed the

defendant downstairs as he continued to look for EB. The defendant then went back upstairs to look for EB whilst Mr Wyers remained on the phone. Finally, the defendant ran downstairs and out of the house through the door on the bottom floor.

5 When the police arrived Mr Wyers went downstairs with the police officer to check that the defendant had gone and, in doing so, went to the "bottom stairs flat" where he had seen a broken window.

6 There were two police statements from Police Constable Earles. He said that when he arrived at the premises he had taken statements from EB and Mr Wyers and had taken a photograph of a broken window. At about 6 am he had returned and - looking through a window - he found the defendant asleep on a bed. He arrested and cautioned him at 6.05. The room in which he was found had a smashed window. The defendant had a cut on his hand which he said had been caused when he entered through the broken window.

7 In interview, the defendant had given "no comment" answers to questions he was asked. He appeared in the Youth Court on 20 March 2018. The court was sitting as a "Not Guilty Anticipated Plea" (or NGAP) court; in other words, a court in which pleas would be taken and directions given for trial. This is what both the District Judge and the prosecutor had expected. In the event, it proved to be a mixed list where only four out of the 13 defendants were expected to plead not guilty. The charge was put to the defendant who pleaded not guilty. The defence submitted that they were content for the trial to go ahead "on the papers". The defence advocate told the Judge that his client would not dispute entering the property or being found in the bed by the broken window; he simply denied responsibility for breaking it.

8 The Judge had already read the prosecution case in advance of the opening. He decided to proceed with the trial in furtherance of the overriding objective and in accordance with the court's obligations actively to case-manage proceedings, and on the basis that the defence

was prepared to agree the prosecution's statement as read (see, CPR Part 1.1(2)(b), (e), (g)(i) and (ii) and Part 3.2(2)(e) and (f)). CPR Part 3.2(2) provides:

(2) Active case management provides:

...

(e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;

(f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings.

9 The defence indicated that the defendant would not be giving evidence. At this point the prosecutor informed the Judge that she was not able to prosecute a trial as she was an associate prosecutor employed by the Crown Prosecution Service (CPS). The Judge expressed surprise at this since characteristic 6 of "Transforming Summary Justice" made clear that the first hearing should be prosecuted by someone who is knowledgeable and proficient and with sufficient experience, skill and authority to allow cases to be dealt with effectively. However, the Judge explained that the prosecutor would not need to open the case as he had read it. She would not need to examine the prosecution witnesses as their statements would be read and she would not need to cross-examine the defendant as he was not going to be called to give evidence in his own defence.

10 In the case stated the Judge has fairly acknowledged that he was not aware of the terms of section 7A(2)(a)(ii) of the Prosecution of Offenders Act 1985 which, effectively, limits the rights of audience of an associate prosecutor to non-trial matters. He wrongly assumed that this was a matter of the demarcation of functions within the CPS. The Judge proceeded to conduct the trial by re-reading the prosecution statements and the note of the defendant's police interview, as well as looking at the photograph of the broken window.

11 At the conclusion of the prosecution case the defence submitted that there was no case to answer, relying on the second limb of *R v Galbraith* [1981] 1 WLR 1039. The Judge accepted that submission. He directed himself that he was not concerned with the defendant's conduct generally, only whether he had broken the window. Neither EB nor Mr Wyers saw him break the window. There was neither eye-witness evidence nor CCTV-recorded evidence of him doing so. Furthermore, there was no evidence as to whether the broken window was the defendant's point of entry or whether he had come through either the front door or the door on the bottom floor. It was suspicious that the window being broken coincided with the defendant being at the property, but there was no reliable evidence that he was at the property until after the window had been broken. The only evidence that he had been there prior to the window being broken was Mr Wyers's evidence that he had seen what he thought was the defendant's shadow. On this basis the Judge accepted that there was some evidence to support the prosecution case but found that it was so inherently weak that the prosecution case taken at its highest was such that no properly directed tribunal could properly convict upon it.

12 In the light of these facts, two questions are raised by the Judge in the case stated. (1) Was it open to me to have moved to an immediate trial on the day of the defendant's first appearance? (2) On the basis of the evidence I considered, am I entitled as a matter of law to accede to the defence submission of no case to answer?

13 I deal first with question (1). It is convenient to start with the terms of section 7A of the Prosecution of Offenders Act 1985:

(1) The Director [of Public Prosecutions] may designate [under this subsection] members of the staff of the Crown Prosecution Service who are not Crown Prosecutors.

(2) Subject to such exceptions (if any) as may be specified in the designation [under subsection (1)], a person so designated shall have such of the following as may be so specified, namely -

(a) the powers and rights of audience of a Crown Prosecutor in relation to -

...

(ii) the conduct of criminal proceedings in magistrates' courts other than trials [of offences triable either way or offences which are punishable with imprisonment in the case of persons aged 21 or over];

...

(3) A person [designated under subsection (1) ...] shall exercise [any powers so conferred] subject to instructions given to him by the Director.

14 It is clear from the terms of section 7A, of the 1985 Act, that the associate prosecutor did not have rights of audience to conduct the trial since an offence under section 1(1) of the Criminal Damage Act 1971 is punishable by a term of imprisonment in the case of an offender over the age of 21.

15 Mr James Boyd, who appears for the Director of Public Prosecutions, submitted that a wrong course was taken right from the start. His argument was that the first appearance should have been confined to the taking of a plea and that if an accused pleads not guilty the proper course is for the magistrates' court to exercise its power to adjourn the case for trial (see section 9(1) and (3) and section 10(1) of the Magistrates' Court Act 1980). He submitted that what emerged in the first hearing was an issue as to who smashed the window. That was an issue in relation to which there should have been a trial, with the prosecution in a position to respond to the defence that it was not the defendant.

16 Mr Boyd acknowledged that there will be cases where it may be appropriate to conduct an unscheduled trial, and this was explicitly recognised by the judicially led Stop Delaying Justice Initiative and endorsed in the judgment of Sir Brian Leveson PQBD in the Divisional Court decision, *Director of Public Prosecutions v Radziwilowicz and Wanas* [2014] EWHC 2283 (Admin). In that case the Divisional Court set out the broad aim that all contested cases in the Magistrates' Court will be fully case managed at the first hearing when the plea is taken, and will be disposed of by way of a trial or otherwise at the second hearing, see [8]. In the same paragraph the court set out what it accepted may be exceptions to that course, for example, where a defendant admits to being in possession of stolen property in the circumstances described in the prosecution witness statement but denies that he knew or suspected that the property had been stolen. Another example might be where a defendant was admitting to being in possession of a knife in the circumstances deposed by the prosecution witnesses, but asserts that he had good reason or lawful authority for carrying it. Such cases involve questions in relation to the defendant's state of mind rather than the determination of factual matters. Mr Boyd submitted that this was not such a case.

17 [9] of *Radziwilowicz and Wanas*, the court referred to a principle that underlies the Stop Delaying Justice Initiative:

The real issue is fairness of the proceedings to all parties.

18 The question in *Radziwilowicz and Wanas* was the legitimacy of a District Judge's decision to refuse an adjournment in circumstances where the defence wished to have a trial and the prosecution objected on the basis that it did not have the evidence to proceed, and, in any event, the prosecutor was an associate prosecutor and did not have the authority to conduct the trial.

19 The refusal of the adjournment in those circumstances was avowedly in the nature of a disciplinary sanction. The facts were different from the present circumstances but it is to be noted that the President said [11]:

... the fact that, as the District Judge well knew, the prosecutor was not authorised to conduct trials only makes it more obvious that it was clear that the trial could never proceed ...

20 The present case did not involve an inquiry into the defendant's state of mind. The issue was the identity of the person who Mr Wyers had heard break the window. In addition, fact that the prosecutor was not authorised to conduct the trial should also have made it clear to the Judge that there might be problems in proceeding with an unscheduled; and at least for the prosecution and unexpected trial.

21 It is apparent that the Judge was aware of the potential problems of requiring the prosecutor to conduct the trial although he thought that her status as an associate prosecutor was simply a matter of her terms of employment rather than confined by statutory enactment. However, the decision to proceed with a trial was not only to override the statutory provision but was made based on a mistaken view as to the limited nature of the prosecutor's function at trial. Once the defence submitted that there was no case to answer, the prosecutor necessarily became directly engaged in the conduct of the trial.

22 Criminal Procedure Rules Part 24 provides for rules in relation to trial and sentence in the Magistrates' Court. Part 24.3(3)(d) provides:

at the conclusion of the prosecution case, on the defendant's application or on its own initiative, the court -

(i) may acquit on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict, but

(ii) must not do so unless the prosecutor has had an opportunity to make representations

- 23 The rule is clear in its terms and reflects legal authority, see, for example, *R v Barking and Dagenham Magistrates Justices ex p Director of Public Prosecutions* [1995] Crim LR 953. Here, the prosecutor did not have an opportunity to make representations and could not do so. As Mr Boyd submitted, the prosecutor could not contribute to the trial process.
- 24 Mr Richard Holland, who appears for the defendant and who made focussed and realistic submissions, argued that there was no suggestion of any challenge to the prosecution case. He further submitted that even if the prosecutor had been able to make submissions at the close of the prosecution case, "it would be overstating the effect of advocacy to conclude that the ultimate result should have been different". This leads, albeit obliquely, to the second question raised in the case stated: whether the court was right to accede to the submission of no case to answer.
- 25 Mr Holland submitted that whatever the procedural deficiencies, including the failure to comply with CPR 24.3(3)(d)(ii), the Judge was right to conclude that there was, in fact, no case to answer. He had weighed the prosecution evidence and accepted that some of it supported the prosecution case, but was entitled to conclude that it was insufficient. In any event, he submitted that if the judge had found there was a case to answer the defendant could still not have given evidence and the prosecution would have faced the stricter test: whether it had proved the case to the criminal standard so that the Judge could be sure of the defendant's guilt. He plainly could not be.
- 26 In my view the latter point is far from self-evident but in any case the argument fails at the prior stage. In resisting the submission of no case, a properly qualified prosecutor could at least have argued that there was a circumstantial case to answer. The circumstances were the close association in terms of time and place of the defendant's presence in the early

hours of the morning at a place he should not have been, the sound of breaking glass within seconds of Mr Wyers shouting out that he would call the police, the presence of the defendant within the house shortly afterwards barging past Mr Wyers, the discovery of the broken window shortly afterwards when the police arrived and the defendant lying on a bed in the bedroom with the broken window in the morning. In my view such an argument would have satisfied the second limb in *Galbraith* or at the very least might have done so.

27 Drawing these threads together, I would answer the first question, no. Although the Judge was right to have in mind the need for dealing with cases expeditiously, and actively managing cases, (and nothing in this judgment should discourage judges or magistrates from proper and effective case-management), it was not open to him to move to an immediate trial on the date of the first court appearance in the circumstances of this case. It follows that the answer to the second question is also, no, not least because he acceded to the submission of no case without the prosecution being able to make representations, and for the reasons I have given it is no answer to say that the submission would have succeeded whatever the prosecution might have said, even if it were a question that arose for decision on the case stated.

28 I would, accordingly, allow the appeal and remit the case to be heard before a differently constituted Magistrates' Court so that proceedings can be conducted in accordance with the law. No doubt, on remission those responsible for the prosecution will have particular regard to the public interest and the Code for Crown Prosecutors in the circumstances and given the lapse of time.

MR JUSTICE GOSS:

29 I agree.

MR BOYD: My Lords, I appear on the basis of a legal aid representation order. Could that be taxed in the normal way?

LORD JUSTICE SIMON: Yes. Thank you both for your submissions.

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