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CO/222/2014
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 31 January 2014

B e f o r e:

LADY JUSTICE RAFFERTY DBE

MR JUSTICE JAY

Between:
THE QUEEN ON THE APPLICATION OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Claimant

v

SUNDERLAND MAGISTRATES' COURT

Defendant

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(Official Shorthand Writers to the Court)

Mr T Little (instructed by the Crown Prosecution Service) appeared on behalf of the **Claimant**
Mr R Smith QC (instructed by the Crown Prosecution Service) appeared on behalf of the **Interested Parties**
The **Defendant** did not attend and was not represented

J U D G M E N T
(As approved)

1. LADY JUSTICE RAFFERTY: Mr Beardmore, a member of the public, on 19 August 2013 laid an information before Gateshead Magistrates in support of an application for a summons requiring Miss Webster, an employee of the Independent Police Complaints Commission, to answer a charge of misconduct in public office.

2. That summons was issued on 1 October 2013. On 6 November 2013 Mr Enzor, Deputy Chief Crown Prosecutor for the NE of England by letter put Mr Beardmore on notice that in reliance upon section 6(2) of the Prosecution of Offences Act 1985 he intended to take over the conduct of the prosecution. As a consequence proceedings were discontinued, the ground being insufficient evidence for a realistic prospect of conviction. Mr Enzor attached to his letter a detailed note alerting Mr Beardmore to his entitlement to a review of the decision. Mr Beardmore sought one.

3. On 13 December 2013 a specialist prosecutor provided detailed reasons. She had identified no evidence that Miss Webster had been wilfully negligent in the exercise of her duty or that in exercising her duty she had misconducted herself.

4. On 29 November 2013 Mr Beardmore made two separate applications by way of information on oath supporting his application for summonses requiring Miss Williams and Mr Enzor to answer allegations of misconduct in public office. That laid against Miss Williams related to her refusal as Chief Crown Prosecutor to take action Mr Beardmore had requested. The precise details need not trouble us.

5. That laid against Mr Enzor related to a letter from him to Mr Beardmore, dated 6 August 2012. It confirmed that it was not within the power or remit of the Crown Prosecution Service to take action in response to Mr Beardmore's earlier letter of 25 June 2012 which recited allegations of criminal misconduct against the following: officers of Northumbria Police including the Chief Constable, officers of Durham Constabulary, Her Majesty's Attorney General, the Chief Executive of the Serious Fraud Officer, a Member of Parliament, eight staff employed by the Independent Police Complaints Commission, a former legal officer, "many more persons" and a named Detective Chief Inspector.

6. The summonses at the heart of this claim, those in respect of Miss Williams and Mr Enzor, were issued by a lay magistrate sitting at Sunderland Magistrates' Court on Christmas Eve 2013. They were re-issued on 7 January 2014. No point is taken as to the re-issue. Each, supported on oath by Mr Beardmore, was without further inquiry issued.

7. The claimant's submission is that no magistrate, properly advised and correctly applying his mind to the elements of the offence of misconduct in public office, could reasonably have issued a summons based on Mr Beardmore's informations. Consequently, the only reasonable conclusion, so the argument goes, is that the elements of the offence were not established and/or that the informations were vexatious. Further information so as to consider both those points should have been sought before issue, the failure to seek it Wednesbury unreasonable. The Respondent

relies in particular on documents: a 20-page letter from Mr Beardmore to Miss Williams, the late July response to it, and Mr Enzor's 6 August letter.

8. Those working in Sunderland Magistrates' Court knew as early as November 2013 of what the Claimant calls the collateral and vexatious nature of these private prosecutions, and yet, he argues, allowed the informations on Christmas Eve to go before a lay magistrate who should have been offered assistance as to the legal framework and at the very least put on notice as to concerns about the motives for those private prosecutions. The Claimant submits that a 20 December 2013 decision (to which we shall shortly turn) to put the informations before the Justice of the Peace was designed to avoid a potential public law claim, a consideration without relevance to the requirements of section 1(1)(a) of the Magistrates' Court Act 1980. It reads:

> "On an information being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue-
>
> (a) a summons directed to that person requiring him to appear before the magistrates' court to answer the information..."

9. A letter from the Clerk to the Justices to Mr Beardmore dated 13 November 2013 reads:

> While the informations relate to an offence known to the law and the elements of the offence may be prime facie present (ie the allegation that the defendant abused his/her power as a public official) the reality is that this is a collateral attack on the decision of the CPS not to prosecute. That is a matter which ought properly to be considered by the Administrative Court and, in my opinion, therefore, this is an appropriate case for which we should decline jurisdiction by refusing to issue a summons."

10. On 20 December 2013, a note included in the chronology prepared by the Magstrates' Court reads:

> "DJ Roger Elsey considers the informations dated 29 November 2013 and informs the legal adviser [named] that the summonses could now be issued and the informations should be laid before a lay magistrate for consideration. The reason to issue the summons was the view that Mr Andrew Beardmore was likely to judicially review HMCTS."

To this puzzling comment we shall return.

11. When considering whether to issue a summons, the magistrate should at the very least ascertain (a) whether the allegation is of an offence known to law and if so whether the essential ingredients of the offence are prima facie present, (b) if the offence alleged is not out of time (c) that the court has jurisdiction (d) whether the informant has the necessary authority to prosecute: R v West London Metropolitan Stipendiary Magistrate ex parte Klahn [1979] 1 WLR 933.

12. In addition, the magistrate is adjured to consider whether the allegation is vexatious. He enjoys a residual discretion to hear from proposed defendants.

13. In Attorney General's Reference (No 3 of 2003) [2005] QB 73 the court defined the common law offence of misconduct in public office thus: A public officer, acting as such, wilfully neglecting to perform his duty and/or wilfully misconducting himself to such a degree as to amount to an abuse of the public's trust in the office holder, without reasonable excuse or justification. The court pointed out that failure to insist on a deliberately high threshold would necessarily constrain public officers in the exercise of their duty.

14. The facts upon which Mr Beardmore sought to rely to sustain his allegation of misconduct in public office may be summarised thus: Mr Enzor and Miss Williams misconducted themselves as to their decisions as senior employees of the Crown Prosecution Service when they reviewed whether or not to take action in respect of his allegations of criminal misconduct (his letter of 25 June 2012) against a wide range of potential defendants.

15. The Crown Prosecution Service, we should remind ourselves, has no and has never had any investigative powers. Its functions and its duties are set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions, a public declaration of the principles which drive decisions made by the Crown Prosecution Service and its officers.

16. Section 10 Prosecution of Offences ACt 1985 Act reads where relevant:

> "(1) The Director shall issue a Code... giving guidance on general principles to be applied by them...
>
> (a) in determining, in any case-
>
> (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
>
> (ii) what charges should be preferred..."

17. The functions and the duties of Crown Prosecutors are set out in section 2, and section 3 offers guidance on their decisions to prosecute. It recites that the police and other investigators are responsible for conducting enquiries into an allegation of crime. Every case a prosecutor receives from the police or others is reviewed. Prosecutors must ensure they have all the information needed before an informed decision about how best to deal with the case is made. This will often involve their providing guidance and advice to the police and others. However, prosecutors cannot direct the police or other investigators.

18. The lay magistrate considering on Christmas Eve whether or not to issue a summons, was, in the exercise of his judicial discretion, obliged to enquire into whether the elements of the offence of misconduct in public office were capable of being established against either party on the facts alleged.

19. We have read a statement by the magistrate. Several things are plain. He did not address whether the action of making their respective decisions, writing the letters to which we have referred, and conveying the contents of their decisions in their letters were, in law, capable of amounting to misconduct by Mr Enzor and Miss Williams in a public office. Consideration of the 1985 Act, the legal framework and the then current Code for Crown Prosecutors would have led him to conclude that no prima facie evidence of a wilful breach of duty was made out.

20. He would have been required to find that the role of the Crown Prosecutor is not that of an investigator nor can it ever be. He would have found that any guidance provided by a Crown Prosecutor is issued only to the police or other investigative agencies and is discretionary, as we have set out.

21. A full and proper consideration not only of supporting documentation but also of the legal framework would have shown the magistrate that nothing before him could in any way serve to alter or vary the functions and duties of Mr Enzor and Miss Williams so as by that means to establish a basis for the allegation of wilful breach of duty.

22. In any event he was obliged to come to a judicial conclusion on whether or not to issue either or both summonses, and that required a review of whether there were prima facie evidence of the ingredients of the common law offence. We have set them out. Had he conducted a rigorous analysis of the legal framework, he could not reasonably have concluded that there was such.

23. The citizen enjoys the right to bring a private prosecution in England and Wales. It is an important safeguard against improper inaction by a prosecuting authority. It is, however, not unfettered. No summons may be issued "on the nod" nor in reliance on any irrelevant fact. Rather, the issuing magistrate must be scrupulous to ensure all elements of the alleged offence are established.

24. We readily accept that the lay magistrate issuing summonses on Christmas Eve 2013 would, had he sent for the entirety of the documents relating to it, have had a mass of papers to read. But it was necessary for him to identify from the supporting material what allegations precisely were made and whether they amounted to the offence alleged.

25. We have a good deal of sympathy for him because he was without advice from the legal adviser. So far as we can see, although the papers are not explicit as to it, no advice was offered to him but, in any event, he either did not ask for any or, if he asked, none was forthcoming.

26. This case shouted out for legal advice to a lay magistrate. That advice should have been that he should consider the letters of summer 2013 to which we have referred, the interstices of which would have led him to read back to letters of summer 2012. Such a course would have shown beyond peradventure that to issue those summonses would be Wednesbury unreasonable.

27. It would be astonishing if, in a magistrates' court such as this, there were not widely known awareness of Mr Beardmore and his abiding interest in what to him was a cause he was reluctant to abandon.

28. The second ground is that the issuing of the summonses was unlawful as vexatious, or as further information would have revealed them so to be. The submission is that both summonses were, on their face, vexatious. Any doubt should have been resolved after a request for further information or documentation and/or after hearing from the proposed defendants.

29. We were surprised to be told that before Christmas Eve there had been consideration of the potentially vexatious basis for the private prosecutions. A letter dated 13 November 2013 to Mr Beardmore from the Clerk to the Justices reads in part:

> "Draft information you submitted in these cases were considered on 11 November 2013 and it was decided [by DJ Elsey] that no summons should be issued upon them for the following reasons:
>
> While the information related to an offence known to the law, the elements of the offence may prima facie be present (ie the allegation that the defendant abused his powers of a public official), the reality is this is a collateral attack on the decision of the Crown Prosecution Service not to prosecute. That is a matter which ought properly to be considered by the Administrative Court and in my opinion therefore this is an appropriate case in which we should decline jurisdiction by refusing to issue the summons."

30. Particularly in light of the ex parte procedure for issuing the summonses for private prosecutions where, as here, a district judge or a lay magistrate has previously refused to issue a summons on the basis that it is vexatious, no other tribunal should be asked to issue a summons based on the same information. Were such a procedure permissible, the second tribunal on these facts should, at the very least, have had the supporting evidence suggesting this was a collateral attack. That that did not occur is, sadly, illustrative of the failings which are part and parcel of the background.

31. Much of this judgment has been a recitation of a chronicle of surprising decisions. We come now to another to which we promised to return. The Claimant suggests that the position is aggravated by the conclusion of the district judge that the informations should be laid not before another district judge but before a lay magistrate for consideration because the view was Mr Beardmore was likely judicially to review Her Majesty's Courts & Tribunals Service.

32. We are puzzled by that approach on more than one front. We have already explained why we accept the Claimant's submission that likely judicial review was without relevance, but on what we might describe as a more human note, the decision to move the decision whether or not to issue to a lay magistrate is surprising.

33. The Claimant suggests that although there were fundamental procedural failures in the way the defendant handled the issue of the summons, his primary argument is that informations were on their face vexatious or on a proper consideration of the documentation should so have been seen. The documentation was available, known, and should have been supplied or sent for.

34. We agree. These summonses were issued as a result of an abuse of the process of the court. It is a matter of significant regret that the founding informations did not establish the elements of the offences alleged, or, upon further inquiries, would have been seen not to have done. The informations were plainly vexatious or would have been seen as such upon inquiry.

35. We repeat: we have sympathy for the lay magistrate who, just before Christmas, issued these summonses. He was ill-served. He should have been offered clear legal advice and we are surprised that he was not. We were also surprised that a professional judge thought fit to move the now challenged decision to a lay magistrate. We are satisfied that the lay justice did not properly exercise his discretion under S1 Magistrates' Court Act 1980.

36. It is tempting but unnecessary for us to express ourselves more strongly. The chronology demonstrates a disappointing inattention to the legal framework, to the necessary support for a lay justice where he is required to exercise his judicial discretion, and to the interests of the public. It is important that private prosecutions are launched on a proper basis, not as here.

37. Before we leave the topic, we note that letters from Mr Nigel Gibbs of the Crown Prosecution Service to the Clerk of the Justices which are lucid, helpful and moderate, sought a brief adjournment for the purposes of further thought. A district judge who set out his determination, newly appointed, to guard the interests of justice and the public purse, saw fit to refuse that also.

38. We declare that the informations dated 24 December 2013 did not disclose all elements of the offence of misconduct in public office, they are vexatious, and we quash them.