[2015 Gib LR 20]

R. (FARRUGIA) v. GIBRALTAR MAGISTRATES' COURT

SUPREME COURT (Jack, J.): October 24th, 2014

Criminal Procedure—mode of trial—offences triable either way—if accused indicates intention to plead not guilty and Magistrates' Court accepts jurisdiction, accused has reasonable expectation of being sentenced in Magistrates' Court—if accused indicates intention to plead guilty, only limited scope to have reasonable expectation of being sentenced in Magistrates' Court—committal to Supreme Court for sentence not precluded by Magistrates' Court seeking pre-sentence reports but should make clear to accused that all options still remain open

The claimant was charged in the Magistrates' Court with assault occasioning actual bodily harm, threats to kill and witness intimidation.

The first two charges arose from an incident when the claimant hit his mother in the face and showed her a razor blade with which he threatened to kill her. He was arrested and released on bail. Four months later, he went to his mother's house in breach of his bail conditions and was arrested. He telephoned her and again threatened to kill her, leading to the charge of witness intimidation.

The offences were triable either way. The claimant appeared in the Magistrates' Court and it accepted jurisdiction before asking the claimant to indicate his plea. He then entered guilty pleas and the matters were adjourned for a pre-sentence report. When the pre-sentence report became available, the Magistrates' Court committed him to the Supreme Court for sentencing.

The claimant sought judicial review of the decision to commit him for sentencing. He submitted that he had a reasonable expectation that he

would be sentenced by the Magistrates' Court, where the maximum sentence was 12 months' imprisonment, and not by the Supreme Court, where the potential sentence was much higher.

Held, allowing the application:

(1) The claimant's conviction following his guilty pleas and the subsequent orders of the Magistrates' Court, including the order committing him to the Supreme Court for sentencing, would be quashed. The court had not followed the procedure in the Criminal Procedure and Evidence Act 2011, s.140(4) and (5), in that it had determined the venue before the claimant had pleaded to the charges and it had not explained to him the consequences of a plea of guilty or not guilty, as required by s.140(4), and the subsequent proceedings were therefore a nullity (paras. 31–33).

(2) If the defendant were to indicate that he intended to plead not guilty and the Magistrates' Court then accepted jurisdiction, he would have a reasonable expectation, if he elected summary trial and was convicted, that he would be sentenced in the Magistrates' Court (para. 26).

(3) If, on the other hand, the defendant were to plead guilty, the scope for him to have a reasonable expectation that he would be sentenced by the Magistrates' Court would be much more limited. If the court, after hearing the defendant's antecedents, were to decide to obtain pre-sentence reports, that would not preclude it from subsequently sending the case to the Supreme Court, but it should make clear to the defendant that all options, including imprisonment and committal to the Supreme Court for sentence, were open to it, as the defendant might otherwise have a legitimate expectation that he would be sentenced in the Magistrates' Court. Such a legitimate expectation did not necessarily preclude the Magistrates' Court from subsequently committing the defendant to the Supreme Court for sentencing, but it would often do so (paras. 28–30).

(4) As the proceedings in the Magistrates' Court were a nullity, the matter would be remitted to that court for the correct procedure to be followed and for the claimant to give a fresh indication of plea in respect of the offences alleged (para. 34).

Cases cited:

(1) *R.* v. *Norwich Mags.' Ct., ex p. Elliott*, [2000] 1 Cr. App. R. (S.) 152, referred to.

(2) *R.* v. *Warley JJ., ex p. D.P.P.*, [1999] 1 W.L.R. 216; [1999] 1 All E.R. 251; [1998] 2 Cr. App. R. 307; [1999] 1 Cr. App. R. (S.) 156, referred to.

(3) *R. (Rahmdezfouli)* v. *Wood Green Crown Ct.*, [2014] 1 W.L.R. 1793; [2014] 1 Cr. App. R. 20; [2014] Crim. L.R. 158; [2014] A.C.D. 31; [2013] EWHC 2998 (Admin), applied.

Legislation construed:
Criminal Procedure and Evidence Act 2011, s.140: The relevant terms of this section are set out at para. 22.
s.144: The relevant terms of this section are set out at para. 25.

P. Canessa for the claimant;
R. Fischel, Q.C. for the Crown.

1 **JACK, J.:** By an application for judicial review filed on October 14th, 2014, the claimant seeks judicial review of the decision of the magistrates on September 4th, 2014 to commit the claimant to the Supreme Court for sentence pursuant to s.217(3)(b) of the Criminal Procedure and Evidence Act 2011.

2 The application is formally defective in that it does not exhibit the evidence on which the claimant relies, but the court and the parties have available the record of the Magistrates' Court and the statement of the claimant's grounds prepared by Mr. Canessa and the parties were happy for matters to proceed on the basis of fact revealed by that documentation.

The facts

3 The claimant was born on November 14th, 1975. He lived at home with his parents until his father died two years ago, after which he lived alone with his mother in Gibraltar. After leaving school at the age of 15, he became addicted to drugs. In 2002, he was able to attend Bruce's Farm where he managed to overcome his addiction. He was assisted in this by the support of a priest. About two years ago, around the time of his father's death, his relationship with the priest worsened and he relapsed into drug use.

4 On June 16th, 2013, the claimant was sentenced to a term of imprisonment for making threats to kill; no separate penalty was imposed on charges of intimidation and improper use of a communications network.

5 On March 5th, 2014, at about 4 o'clock in the morning, the claimant returned home and entered his mother's bedroom. He hit her in the face and showed her a razor blade with which he threatened to kill her. His mother was able to calm him to a degree but he continued to threaten her until he left the house at about 7 o'clock in the morning. The police were able to arrest the claimant on March 27th, 2014. He was subsequently bailed to attend the police station on May 14th, 2014 and rebailed to attend on June 26th, 2014.

6 On that day, he was charged with assault occasioning actual bodily harm and threats to kill on March 5th, 2014. He appeared at the Magistrates' Court on June 27th, 2014 and was bailed with conditions that

he should not go within 50m. of his mother's residence, nor approach, molest, communicate or interfere with his mother.

7 On July 1st, 2014, the claimant was arrested at his mother's residence for breach of the bail conditions. He was held in the cells overnight and produced to the magistrates the following day for the breach. The magistrates took the brief period of incarceration into account and permitted his release. They warned him not to go to his mother's again.

8 Notwithstanding that warning, on July 5th, 2014, the claimant went to his mother's residence. The police arrested him there and took him to the police station. Whilst there, he asked to call his lawyer. Instead of calling his lawyer he called his mother and said to her: "La otra vez no te mate pero como sarga en bail te mato" ("Last time I did not kill you but if I get out on bail I'll kill you"). This resulted in a further charge of witness intimidation being brought against him.

9 He was kept in custody until he appeared before the magistrates on July 7th, 2014, who further remanded him in custody. On July 10th, 2014, they heard evidence of the breach, which they found proved, and remanded the claimant in custody.

10 On July 22nd, 2014, the claimant appeared before the stipendiary magistrate, Mr. Pitto, facing the three charges of assault occasioning actual bodily harm and threats to kill, both on March 5th, 2014, and witness intimidation on July 5th, 2014. The record of the proceedings that day is not before this court. The parties agree that the claimant said (I assume through counsel) that he wanted to plead guilty, but the learned magistrate said he would not take the pleas because he wanted the Crown to consider the jurisdiction point.

11 On July 30th, 2014, the matter came before lay justices. The record reads as follows: "Court accepted jurisdiction. Summary Trial elected. defendant pleads guilty, guilty, guilty and guilty. Adjourned 20.8.14 pre-sentence report." (The record appears to show more guilty pleas than offences before the court, but nothing turns on this.)

12 On August 20th, 2014, the matter came before the stipendiary magistrate, but the pre-sentence reports were not available and the case was adjourned further to September 4th, 2014.

13 On that day, a pre-sentence report was available. The probation officer commented:

> "It is of concern that the defendant has committed [offences] of such [a] similar and serious nature within a relatively short period of time. I gained the impression during interview that the defendant maintains a minimized view of the extent and the impact of his drug use on his behaviour. I also highlighted to the defendant his failure to be frank

and open in discussing the underlying causes for his drug problems and persistent relapse. I also indicated to the defendant that he displayed much physical discomfort wh[en] questioned about his relations [with the priest] and why this had played such a significant part in his escalating drug use. The defendant's recent pattern of behaviour indicated that he poses a high risk of re-offending. The circumstances under which the defendant poses a [risk] of harm to the public also make the risks of harm he is likely to pose . . . high . . . [H]e is unmotivated to address [the] underlying causes for his entrenched drug addiction."

14 The lay justices heard a full presentation of the facts and the claimant's previous convictions and a plea in mitigation from Mr. Canessa, who then and now represents the claimant. At the conclusion of his plea, the magistrates committed the claimant to the Supreme Court for sentence under s.217(3)(b). They fixed a date for the hearing before the Supreme Court of October 13th, 2014.

15 The claimant's complaint then and now is that, in the events outlined, he had a reasonable expectation that he would be sentenced by the Magistrates' Court, where the maximum sentence which might be imposed would be 12 months' imprisonment, and not by the Supreme Court, where the potential sentence is much higher.

16 Initially, the claimant issued a notice of appeal seeking to challenge the magistrates' decision to commit him to the Supreme Court. This appeal was given the number 2014-CRIAPP-008, and was also returnable on October 13th, 2014.

17 When the matter came before Mrs. Justice Prescott on October 13th, 2014, she indicated that a challenge to the magistrates' decision to commit should not be made by way of appeal but rather by way of judicial review. She adjourned the committal for sentence, so that judicial review proceedings could be issued, as indeed they were the following day.

Discussion

18 Both English and Gibraltarian law recognize three types of criminal offence: those triable only in the Magistrates' Court, those triable only in (as the case may be) the Crown Court or the Supreme Court, and those (known as offences triable either way) triable in both the Magistrates' Court and the higher court. The procedures for determining where offences triable either way should be tried have in both jurisdictions been changed. In England, the change was brought about by the (UK) Criminal Procedure and Investigations Act 1996, which made amendments to the Magistrates' Courts Act 1980. In Gibraltar, virtually identical changes were introduced by the Criminal Procedure and Evidence Act 2011.

19 Under the old procedure, when a defendant appeared before the magistrates, the Magistrates' Court had first to consider whether its sentencing powers were sufficient to deal with the facts of the offences charged. In making this determination, the court did not take into account the character and antecedents of the defendant; it simply took the prosecution case at its highest and determined whether, if the defendant were of good character, its sentencing powers were adequate. If they were not, then the court declined jurisdiction and sent the case to the higher court. When this occurred, the defendant did not enter a plea: that was dealt with in the higher court.

20 If the Magistrates' Court determined that it did have adequate powers, then it first asked the defendant whether he wished his case to be heard in the Magistrates' Court or in the higher court. As part of the procedure for putting the defendant to his election, the court warned the defendant that, if he chose to remain in the Magistrates' Court and pleaded guilty or was found guilty, the court would hear all about his character and antecedents, and that, if the court then considered that its sentencing powers were inadequate, it had the power to send the defendant to the higher court. The effect of that warning was that, if the defendant were of good character, he would have a justifiable expectation that he would only be sentenced by the Magistrates' Court, whereas, if he were of bad character, there was the possibility of committal to the higher court for sentence.

21 The 1996 and 2011 legislation fundamentally changed this procedure. The policy behind the new provisions was to encourage early guilty pleas and the means adopted was "plea before venue," whereby a defendant had to indicate how he intended to plea before the Magistrates' Court determined whether the matter was suitable for trial before it or before the higher court.

22 Section 140 of the 2011 Act (which mirrors s.17A inserted into the 1980 UK legislation) provides:

> "(1) This section has effect if a person who has attained the age of 18 years appears or is brought before the Magistrates' Court on an information charging him with an offence triable either way.
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> (2) Everything that the court is required to do under the following provisions of this section must be done with the defendant present in court.
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> (3) The court must cause the charge to be written down, if this has not already been done, and to be read to the defendant.
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> (4) The court must then explain to the defendant in ordinary language that he may indicate whether (if the offence were to

proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty—

(a) the court must proceed as mentioned in subsection (6); and

(b) he may be committed for sentence to the Supreme Court under section 217 if the court is of the opinion as mentioned in subsection (3) of that section.

(5) The court must then ask the defendant whether (if the offence were to proceed to trial) he would plead guilty or not guilty.

(6) If the defendant indicates that he would plead guilty the court must proceed as if—

(a) the proceedings constituted from the beginning the summary trial of the information; and

(b) section 159 (Procedure at trial) was complied with and he pleaded guilty under it.

(7) If the defendant indicates that he would plead not guilty, section 143 applies.

(8) If the defendant fails to indicate how he would plead, for the purposes of this section and section 143(1) he must be taken to indicate that he would plead not guilty.

(9) Subject to subsection (6), the following do not for any purpose constitute the taking of a plea—

(a) asking the defendant under this section whether (if the offence were to proceed to trial) he would plead guilty or not guilty;

(b) an indication by the defendant under this section of how he would plead."

23 Under this new procedure, the Magistrates' Court may not consider the issue as to whether the matter should be dealt with by it or by the Supreme Court before the defendant gives an indication as to whether he intends to plead guilty or not guilty. In the current case, the procedure in s.140(4) and (5) does not appear to have been followed at the hearing on July 22nd. The account of what occurred in the statement of the claimant's grounds and the absence of any Magistrates' Court record of the proceedings that day strongly implies that the case was simply adjourned without any formal indication of plea being taken. Certainly the procedure on July 30th did not follow s.140(4) and (5), because the indication of plea has to come before determination of venue, not (as occurred there) afterwards.

24 The failure to follow s.140 on July 30th led to subsequent confusion. Under the new procedure for either way offences, there is a bifurcation once a defendant indicates a guilty or not guilty plea.

25 If a defendant indicates an intention to plead not guilty, then s.144 of the 2011 Act provides:

> "(1) The court must decide whether the offence appears to be more suitable for summary trial or for trial on indictment.
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> (2) Before making a decision under this section, the court—
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> (a) must give the prosecution an opportunity to inform the court of the defendant's previous convictions (if any); and
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> (b) must give the prosecution and the defendant an opportunity to make representations as to whether summary trial or trial on indictment would be more suitable.
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> (3) In making a decision under this section, the court must consider—
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> (a) the nature of the case;
>
> (b) whether the circumstances make the offence one of a serious character;
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> (c) whether the sentence which the Magistrates' Court would have power to impose for the offence would be adequate;
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> (d) any representations made by the prosecution or the defendant under subsection (2)(b); and
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> (e) any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other."

26 It can be seen that this is very similar to the old procedure with the important exception that, whereas under the old procedure the Magistrates' Court did not take the defendant's previous convictions into account, under the new procedure it does. The effect is that, if a defendant indicates that he intends to plead not guilty and the Magistrates' Court accepts jurisdiction, then the defendant has a reasonable expectation, if he elects summary trial and is convicted, that he will be sentenced in the Magistrates' Court.

27 By contrast, when a defendant indicates a plea of guilty, he is presumed to have been convicted: see s.140(6)(b) in conjunction with s.159(3). The Magistrates' Court then has full powers to deal with the matter itself or to commit the defendant to the Supreme Court under s.217 of the 2011 Act. The Supreme Court can then deal with the defendant as if he had been convicted on indictment: see s.219(1).

28 On a guilty plea, the scope for a defendant to have a reasonable expectation that he will be dealt with by the Magistrates' Court is much more limited than on a not guilty plea in a case where the Magistrates' Court accepts jurisdiction. Normally, of course, as soon as the guilty plea indication is given, the Magistrates' Court will determine whether to keep the case or commit to the Supreme Court. In the current case, the magistrates on July 30th adjourned for a pre-sentence report. Their view at that time was that it would be the Magistrates' Court which would sentence the claimant, however, it is unclear whether their decision to accept jurisdiction was taken after hearing the claimant's previous convictions.

29 If magistrates, after hearing the defendant's antecedents, decide to obtain pre-sentence reports, that does not, as a matter of law, preclude them from subsequently sending the case to the Supreme Court. In a case such as the present, where the pre-sentence report is damning of the defendant, it may well be appropriate to commit that defendant to the Supreme Court, whatever the initial view of the magistrates as to venue. However, it is important that magistrates who decide to obtain pre-sentence reports in cases where a committal to the Supreme Court is possible make it clear to the defendant that all options, including prison and committal to the Supreme Court, are open to the court. There is otherwise a risk that a defendant will have a legitimate expectation that he will be sentenced in the Magistrates' Court.

30 Such a legitimate expectation is not necessarily fatal to a change of heart on the part of the magistrates, not least because in appropriate cases the prosecution can apply for judicial review of a Magistrates' Court's decision not to commit to the higher court: see *R.* v. *Warley JJ., ex p. D.P.P.* (2). However, often it will be: *R.* v. *Norwich Mags.' Ct., ex p. Elliott* (1).

31 I do not need to determine that issue in this case because the proceedings in the Magistrates' Court have a more fundamental flaw. The magistrates on July 30th did not follow the procedure set out in s.140 and, in particular, did not tell the claimant the vital information contained in s.140(4). Instead the court followed a hybrid of the old and the new procedures.

32 A similar defect was considered by the English Queen's Bench Division Court in *R. (Rahmdezfouli)* v. *Wood Green Crown Ct.* (3). There the court had left it to the defendant's counsel to give him the information required by the English equivalent of s.140(4). The court, after an exhaustive review of the authorities, concluded ([2014] 1 W.L.R. 1793, at paras. 16–17) that—

> "16 . . . [T]he legislature in enacting section 17A must have intended . . . acting in line with then existing authority, that where a

> magistrates' court declined or failed to follow the requirements of the section it was acting without jurisdiction every bit as much as if, for instance, it had purported to try a defendant on a charge of homicide. The requirement that the defendant be present in court throughout this procedure, and to explain the effect of the section 'in ordinary language' fortify the view . . . that the defendant should be informed of his rights by the court itself and not merely by an advocate acting on his behalf.
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> 17 In my judgment therefore . . . the consequent proceedings in the Crown Court were invalid and a nullity. The conviction must be quashed . . ."

33 The parties are agreed that the consequence is that the conviction recorded under s.159(3) following the claimant's plea of guilty on July 30th, 2014 is a nullity and that the procedure for obtaining an indication of plea needs to be recommenced from the beginning in the Magistrates' Court with the claimant informed of his rights under s.140 of the 2011 Act and then invited to give an indication of plea. If the claimant pleads guilty, then the Magistrates' Court will have to consider afresh whether to deal with the offences itself or commit the case to the Supreme Court. Given that a pre-sentence report is already available, the Magistrates' Court should be able to deal with all these issues on the same day. If it commits the matter to the Supreme Court, then it should be capable of being listed speedily in this court.

Conclusion

34 Permission to apply for judicial review is granted. An order of certiorari will issue removing the record of the Gibraltar Magistrates' Court into the Supreme Court. The conviction of the claimant entered following his pleas of guilty on July 30th, 2014 and the subsequent orders of the Magistrates' Court, including the order committing the claimant to Supreme Court for sentence, will be quashed. The matter will be remitted to the Magistrates' Court for the court to follow the procedure set out in s.140 of the Criminal Procedure and Evidence Act 2011 and for the claimant to give an indication of plea afresh in respect of the offences alleged against him.

35 For the avoidance of doubt, this does not affect the lawfulness of the claimant's having been remanded in custody; he remains rightly in custody. This is without prejudice to any right he may have to apply for bail. The existing committal proceedings in the Supreme Court lapse following the quashing of the order committing the claimant to the Supreme Court for sentence.

Orders accordingly.