*933 Regina v West London Metropolitan Stipendiary Magistrate

Positive/Neutral Judicial Consideration

Court
Divisional Court

Judgment Date
20 February 1979

Report Citation
[1979] 1 W.L.R. 933

ICLR

Queen's Bench Division

Lord Widgery C.J. , Eveleigh L.J. and Stephen Brown J.

1979 Feb. 20

Justices—Summons—Issue of—Proposed defendant seeking to be heard before issue of summons —Whether magistrate having power to hear objections to issue of summons— Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 1 (1)

The applicant, a solicitor, had acted for the plaintiffs in a High Court action and, in the course of those proceedings, he had given evidence on affidavit. The defendant to those proceedings applied to the magistrate for a summons to be issued under section 1 (1) of the Magistrates' Courts Act 1952 [1] , alleging that the applicant had committed perjury in the High Court proceedings. The applicant instructed counsel to appear on his behalf to object to the issue of a summons, but the magistrate held that he had no power to hear counsel on behalf of the applicant and that the applicant had no right to be heard.

On an application for an order of mandamus directed to the magistrate, requiring him to hear and determine the applicant's objections to the issue of the summons:—

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Held, dismissing the application, (1) that the laying of an information before a magistrate was not a preliminary hearing between parties but an ex parte application preliminary to the institution of Crown proceedings and a proposed defendant had ***934** neither the right to be informed of the application nor the right to be heard.

(2) That, before a summons was issued under section 1 (1) of the Magistrates' Courts Act 1952, the magistrate had to be satisfied that it was a proper case for the issue of a summons and, although he had a residual discretion to hear a proposed defendant for the purpose of reaching his decision, that discretion would be exercised only in exceptional circumstances and, accordingly, the magistrate had correctly held that the defendant had no right to be heard and was fully justified in refusing to hear counsel on behalf of the applicant.

The following cases are referred to in the judgment of the court:

Rex v. Bros (1901) 85 L.T. 581, D.C.
Rex v. Wilson, Ex parte Battersea Borough Council [1948] 1 K.B. 43 [1947] 2 All E.R. 569, D.C.

The following additional cases were cited in argument:

Reg. v. Byrd & Pontypool Gas Co., Ex parte Williams (1890) 60 L.J.M.C. 17, D.C.
Reg. v. Humphrys [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497, H.L.(E.) .

JUDICIAL REVIEW for an order of mandamus.

The applicant, Peter Klahn, a solicitor and partner in the firm of Davis Hanson, applied for a judicial review for an order of mandamus, to be directed to the metropolitan stipendiary magistrate, P. G. N. Badge, Esq., sitting at West London Magistrates' Court requiring him to hear and determine the applicant's objections to the issue of a summons against him on the information laid by Michael Marshall, a defendant in High Court proceedings. The grounds on which the relief was sought were that the magistrate was wrong in law when on November 4, 1978, he held that the applicant had no right to be heard on the application by Mr. Marshall for the issue of a summons or to object to the issue of the summons, and that the magistrate erred in law in holding that he had no power to hear the applicant's objections.

The facts are stated in the judgment.

Representation

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G. A. Bathurst Norman for the applicant.
Harry Woolf as amicus curiae.
Mr. Marshall in person.

LORD WIDGERY C.J.

March 2. read the following judgment of the court drawn up by Stephen Brown J. Mr. Bathurst Norman, on behalf of the applicant, moves the court for a writ of mandamus directed to the metropolitan magistrate sitting at the West London magistrates' court requiring him to hear and determine the applicant's objections to the issue of a summons against him on the complaint of Mr. Michael Marshall.

The applicant is a solicitor who had acted on behalf of a Mr. and Mrs. Gaan, who were plaintiffs in civil proceedings in the Watford County Court in which judgment was entered against Mr. Marshall as a defendant. Mr. Marshall subsequently commenced an action in the High Court against Mr. and Mrs. Gaan and others alleging that they had conspired to defraud and injure him by giving false evidence in the county court proceedings. On October 17, 1978, he applied to Boreham J. for leave to join the applicant and members of his firm as defendants in these ***935** proceedings and also sought certain injunctions against them. Those applications were dismissed with costs by the judge who held that no cause of action was disclosed.

Following this, on October 26, 1978, Mr. Marshall applied to the metropolitan magistrate sitting at the West London Magistrates' Court for the issue of a summons against the applicant alleging that he had committed perjury by wilfully making a statement false in a material particular about the said Michael Marshall in an affidavit used in the High Court proceedings before Boreham J. The magistrate adjourned the application until November 4, 1978, when he proposed to consider it further.

On November 4, 1978, the applicant, having become aware of Mr. Marshall's application, instructed counsel to apply to the magistrate to be heard on his behalf before the magistrate came to a decision on the matter. On November 4, Mr. Kenneth Machin Q.C., on behalf of the applicant, duly applied to the magistrate to be heard in relation to Mr. Marshall's application for the issue of the summons. The magistrate, who had little, if any, notice of Mr. Machin's application, took the view that he had no power to hear counsel on the matter, and that the applicant had no right to be heard. In an affidavit filed with this court he has further stated that, even if he had been persuaded that he had a discretion to hear representations on behalf of the applicant, he would not have done so in this instance.

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Mr. Bathurst Norman has submitted to this court that the magistrate was wrong in law in holding that he had no power to hear the applicant; that the applicant in fact had a right to be heard and to object to the issue of a summons, and that the magistrate was wrong in saying that he would not hear the applicant.

The issue of a summons by a magistrate is governed by section 1 (1) of the Magistrates' Courts Act 1952 , which provides:

> "Upon an information being laid before a justice of the peace for any county or borough that any person has, or is suspected of having, committed an offence, the justice may …
>
> (a) issue a summons directed to that person requiring him to appear before a magistrates' court for the county or borough to answer the information; …"

According to *Stone s Justices' Manual* , application for the issue of a summons is made ex parte in private and usually out of normal court hours. It is a step which is preliminary to the institution of proceedings and there is no provision for the giving of notice to a proposed defendant. Once a summons has been issued, the proceedings become and are Crown proceedings: see *Rex v. Wilson, Ex parte Battersea Borough Council [1948] 1 K.B. 43* , 47.

The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding *whether or not to* issue a summons. As Lord Goddard C.J. stated in *Rex v. Wilson* , at pp. 46 47:

> "A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons."

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It would appear that he should at the very least ascertain: (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute.

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In addition to these specific matters it is clear that he may and indeed should consider whether the allegation is vexatious: see *Rex v. Bros (1901) 85 L.T. 581* . Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances.

In the overwhelming majority of cases the magistrate will not need to consider material beyond that provided by the informant. In my judgment, however, he must be able to inform himself of all relevant facts. Mr. Woolf, who appeared as amicus curiae, and to whom the court is indebted for his assistance, submitted that the magistrate has a residual discretion to hear a proposed defendant if he felt it necessary for the purpose of reaching a decision. We would accept this contention.

The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet; no charge has been made. A proposed defendant has no locus standi and no right at this stage to be heard. Whilst it is conceivable that a magistrate might seek information from him in exceptional circumstances it must be entirely within the discretion of the magistrate whether to do so.

Accordingly in this case, whilst we take the view that the magistrate was in error in holding that he had no power if he wished to do so to hear representations from the applicant, we are of the opinion that he was correct in his view that the applicant had no right to address him, and furthermore was fully justified in refusing to hear counsel on behalf of the applicant.

Accordingly, the application is refused.

[Reported by MYA MYA AYE, Barrister-at-Law]

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Representation

Solicitors: Davis Hanson; Treasury Solicitor.

Application refused. Applicant to pay Mr. Marshall's taxed costs of hearing.

Footnotes

1 Magistrates' Courts Act 1952, s. 1 (1) : see post, p. 935E.

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