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*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

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Delivered: 21/10/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION  
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY DANIELLE HENRY  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PUBLIC PROSECUTION  
SERVICE FOR NORTHERN IRELAND

Mr O'Donoghue KC (instructed by Burnside & Logue Solicitors) for the Applicant  
Mr Henry KC and Mr O'Hara (instructed by the Public Prosecution Service) for the  
Crown

Before: Keegan LCJ and Scoffield J

**KEEGAN LCJ** (*delivering the judgment of the court*)

***Introduction***

[1] This is an application for leave to apply for judicial review in relation to a 'no prosecution' decision of the Public Prosecution Service ("PPS").

[2] The applicant is the sister of Aaron Law, now deceased. Mr Law died as a result of being punched by Fergal Gerard Doherty at Pat's Bar, Portglenone, Co Antrim, on 30 October 2022. This incident was investigated by police and on 3 November 2022, Mr Doherty was charged with the offence of manslaughter.

### *Criminal case history*

[3] In relation to the above a file was submitted to the PPS and a decision was taken to proceed with a prosecution of Mr Doherty. This matter progressed to Ballymena Magistrates' Court where committal proceedings were anticipated. However, before these took place, on 21 September 2023, the applicant was informed by the PPS that a review of the prosecution decision had occurred and that the decision to prosecute had been reversed. Subsequently, on 28 September 2023, the PPS withdrew the charge against Mr Doherty at Ballymena Magistrates' Court "without prejudice", in view of the fact that the PPS was aware that the victim's family were intending to seek a review of the decision to discontinue the prosecution.

### *This challenge*

[4] On 25 September 2023 the applicant's solicitor sent a pre-action protocol letter to the PPS challenging the legality of the decision not to proceed with the prosecution. A decision upholding the 'no prosecution' decision was made by Assistant Director Ciaran McQuillan. There was a request for this decision to be reviewed. On 23 February 2024, the review decision by another Assistant Director, Ms Eilis McGrath, was communicated to the applicant. It maintained the PPS position that no prosecution against Mr Doherty should proceed. This was based on the PPS analysis of the evidential test, rather than the public interest test. It is this decision which is the subject of the present application for leave to apply for judicial review.

[5] We note that there is no issue taken with the leave application having been brought outside the time limit provided by Order 53, rule 4. There is an affidavit from the applicant's solicitor which explains the short period of delay, which was by way of oversight, and Mr Henry KC, on behalf of the PPS, was content that we proceed on the basis that, should we grant leave, time could be extended.

### *The impugned PPS decision*

[6] Ms McGrath's decision letter of 23 February 2024 sets out in detail the basis for the PPS position. In it she analyses the available evidence in relation to this incident, which we summarise as follows. Witness statements describe Mr Doherty striking Aaron Law with one blow, a punch to his head. This much is not in dispute, as Mr Doherty accepts that he did, indeed, strike one blow. The blow caused Mr Law to fall back and strike his head and he died as a result of his injuries. However, although Mr Doherty admitted that he struck Mr Law, he claimed during interview that he was acting in self-defence. Essentially, Mr Doherty claimed that Mr Law was acting aggressively and swung a punch at him first and Mr Doherty said he reacted to this by punching Mr Law once. The PPS evidence is that there is other available evidence which supports his contention.

[7] It is apparent that Mr Doherty was not immediately forthcoming with this account of self-defence. He initially denied any involvement when spoken to by police that night or early the following morning. However, upon learning of the seriousness of the injuries several hours later, he contacted his solicitor and arranged to speak with police again. It was during this subsequent account that he explained that he had been attacked first and that he reacted by punching back. As the PPS decision letter states, there is evidence from several individuals present in the bar who say that Mr Law was very drunk and making a nuisance of himself; and he appears to have been involved in an argument with another patron which led to him being removed. Whilst aggressive during some of this, as Ms McGrath frankly states in her letter, no one says that Mr Law was violent inside the bar before he was removed, and he did not resist when he was removed. However, he is described by some as having subsequently thrown the first punch at Mr Doherty when outside. Mr Doherty is the publican and was said to have himself consumed alcohol although there is no direct evidence of how much this was. It seems that, in the course of a bail application, mention was made of Mr Doherty having consumed a very significant amount of alcohol. The case made by Mr Law's legal team is that he was also intoxicated.

[8] There was CCTV available but, as the PPS has explained (and the applicant is in no position to challenge), the quality of this was poor. However, the PPS case is that what can be viewed is consistent with Mr Doherty's account and the account of the doorman about what happened outside, namely that Mr Law swung the first punch.

[9] As Ms McGrath reflects in her letter, the main issue at any future trial of Mr Doherty would be self-defence. The law of self-defence means that a person is entitled to use force when it is necessary to defend himself or herself. However, an individual is only permitted to use such force as is reasonable in the circumstances, as the person believes them to be. If they use excessive force, they would not be acting in lawful self-defence.

[10] Thus the first issue to consider in the case is whether the defendant would discharge the evidential burden in respect of raising self-defence. Ms McGrath was satisfied that he would be able to discharge that evidential burden, which she describes as modest, in any future trial. Thereafter, the prosecution must disprove self-defence beyond a reasonable doubt, ie the prosecution must prove that any defendant was not acting in lawful self-defence, either proving beyond reasonable doubt that it was not necessary to use force and/or proving beyond reasonable doubt that the level of force used was excessive. In the course of argument, we were provided with a range of texts and authorities addressing the law in relation to self-defence in much more detail. The simple summary offered above is obviously not designed to be authoritative but is adequate for the purposes of this judgment in light of the discussion below.

*The crux of the PPS decision not to prosecute*

[11] This is put by Ms McGrath as follows:

“In this case the prosecution would face difficulties in both aspects of self-defence. In respect of whether it was necessary to use force, there is evidence that Aaron swung the first punch. The prosecution will encounter difficulties in proving beyond reasonable doubt that it was not necessary for the accused to use force to defend himself. In respect of whether the level of force used was excessive (more than was reasonable) in the circumstances, making allowances for decisions made in the heat of the moment as the law allows, the available evidence is that Mr Doherty threw a single punch in response to a similar blow thrown toward him. The prosecution will encounter difficulties in proving beyond reasonable doubt that this was excessive in the circumstances.

After carefully considering all the evidence and the opinion of senior counsel, I have reached the conclusion that the evidential test is not met, ie there is not a reasonable prospect of securing a conviction based on the admissible evidence available.”

*Relevant legal principles*

[12] There was no dispute between counsel as to the relevant legal principles and so we need only briefly summarise them. Firstly, as is well known, a decision by the PPS not to prosecute is amenable to judicial review in limited circumstances as per *R v DPP ex parte C* [1995] Cr App R136. In that case it was held that a decision not to prosecute could be reviewed:

- “(i) Because of some unlawful policy ...
- (ii) Because the DPP failed to act in accordance with its own settled policy as set out in the Prosecutorial Code.
- (iii) Because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.”

[13] Further, in *Re Duddy and others' Application* [2022] NIQB 23, I summarised the principles which apply when challenging prosecutorial decision-making having discussed the development of the law in this area as follows:

“[53] ... The jurisprudence we have been referred to highlights the fact that successful judicial reviews in this area are rare. These cases serve to underline the need for the court to respect the fact that the task of deciding when, and when not, to prosecute is primarily one for the prosecuting authority and the court’s function is one of review.

...

[58] In addition, at para [46] the court distilled the following propositions from the authorities and the principles underlying them:

‘(1) Particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: *L’s case* 177 JP 502, para [32].’

...

[63] We are also aware of the decisions in *Brady* [2018] NICA 20 and *Mooney* [2014] NIQB 48 in our courts where prosecutorial decisions were quashed for different reasons. Each case will depend on its own facts and context. Following from the above, we in this court distil the following:

- (i) Prosecutorial decisions are not immune from judicial review, but the review must bear in mind the nature of the decisions at issue.
- (ii) Absent mala fides or dishonesty there must generally be a clear error of law or breach of policy.
- (iii) There is a possibility that cases may also hinge on an error of fact, however that will also be in rare cases and the error of fact must be stark and material.
- (iv) There is a significant margin of discretion available to the prosecutor in reaching a judgment in a particular case.

- (v) Decisions may also be quashed on satisfaction of the traditional judicial review ground of irrationality or unreasonableness.
- (vii) The court cannot exercise a merits-based review or quash a decision which is a matter of reasonable judgement on the part of the prosecuting decision maker."

### *Consideration*

[14] Advancing the case for the applicant, Mr O'Donoghue KC maintained that the PPS decision was perverse in that it was a decision which no reasonable prosecutor could have arrived at. In advancing this argument Mr O'Donoghue accepted that perversity is a high threshold to pass in a particular case. He accepted that the Assistant Director had made no error of law or fact, had followed the Code for Prosecutors and had applied the relevant law. However, Mr O'Donoghue nonetheless maintained that she had reached a decision that no reasonable prosecutor could have reached and impermissibly removed from the jury a judgment call on the evidence.

[13] In reply, Mr Henry rightly recognised that it is entirely understandable that different individuals might take different views of the same evidence. In particular, victims and their families will often take a different view of evidence, or place different emphasis on a particular piece of evidence. However, Mr Henry went on to submit that "professional prosecutors view the evidence objectively, with the benefit of experience of knowing how evidence is likely to be interpreted by a jury at the end of a criminal trial." He also highlighted the fact that there was no new evidence to consider in this case which had given rise to the decision to discontinue the prosecution. Rather, this was a re-evaluation of the case following senior counsel's advice as to the reasonable prospects of a successful conviction.

[14] As Mr Henry reminded us, the position reached by the PPS is in principle permissible and in accordance with the Code for Prosecutors, which provides as follows:

- "4.9 It is necessary that each element of this definition is fully examined when considering the Evidential Test for each particular offence (see below). The Public Prosecutor must also take into account what the defence case may be and whether it would affect the prospect of conviction. If a case does not pass the Evidential Test, it cannot proceed, no matter how serious or sensitive it may be."

[15] The applicant maintains in her skeleton argument that the PPS ought to be presenting a case to the jury that, on the available evidence, this was a punch thrown by Mr Doherty in drunken irritation that was wholly unnecessary in the circumstances. Mr O'Donoghue drew our attention to various pieces of evidence which might be woven together to support this narrative, many of which reflect poorly on Mr Doherty and his behaviour. These included Mr Doherty's level of intoxication; his position of both power and responsibility as the publican in charge of the bar; the sorry state in which Mr Law was in at the time of the attack; the assistance available to Mr Doherty from his employee, the doorman; Mr Doherty's apparent lack of care for the victim after the incident; and his obviously dishonest immediate account to police.

[16] Dealing with the argument outlined above, we accept Mr Henry's submission was that this may be the way the applicant would like a prosecution to be presented in pursuit of a conviction. However, this is only one potential narrative which could be made based on the evidence. It is not the only one. The prosecutor must consider all of the evidence, what the prosecution would have to prove, and the various ways in which the jury might consider the evidence, applying their professional judgment to these matters. As such, we consider that the proposed respondent's decision was one that was reasonably open to it.

[17] We have carefully considered the arguments made in relation to voluntary intoxication, how the deceased was treated by Mr Doherty immediately after blows were exchanged, and the issue that he initially misled the police at the scene. However, the important point is that these factors were all considered by the decision maker. This court must avoid the temptation to substitute its own judgment on these matters, or sympathy we may have for the victim or his family, in place of the decision-making conferred on the prosecutor.

[18] Having considered this case carefully and applied the appropriate legal test for review of a prosecutorial decision, we agree with Mr Henry's submission that employing her skill and experience, the Assistant Director decided, reasonably, that it would be very difficult to satisfy a jury to the criminal standard of proof that throwing a single punch in response to a punch having been thrown was excessive force. Her decision that there was not a reasonable prospect of doing so is not *Wednesbury* unreasonable, nor does it meet the high standard required to establish perversity. This is a decision which was well reasoned, in accordance with the Code for Prosecutors, and which is clearly within a range of reasonable decisions that a prosecutor could reach on the evidence available in this case.

[19] All of the above said, we agree that there are some very concerning aspects of Mr Doherty's behaviour, not least that he was a publican in charge of these premises who ended up inflicting a blow on a customer whilst under the influence of alcohol. We can well understand how the bereaved family would feel aggrieved by such behaviour. His admitted conduct may well be an issue to be considered further in relation to him obtaining or renewing a liquor licence. However, the potential of

some other censure is beyond the remit of a criminal prosecution decision. Put simply, the obligation in any criminal prosecution is for the prosecution, to decide dispassionately (and keep under review) whether the evidential test can be met however tragic the circumstances of case.

### *Conclusion*

[20] Accordingly, on the facts of this case, we do not consider that the threshold for leave to apply for judicial review is met. In other words, we do not find that an arguable case of irrationality with a realistic prospect of success is established. We end this judgment by expressing our own sympathies with the family of the deceased as the Assistant Director did. However, applying the established legal principles to the facts of this case, as is our duty, we have decided that this application must be dismissed for the reasons we have given.