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Judgment: approved by the Court for handing down | *Delivered:* **02/04/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

BETWEEN:

CA

Appellant

-and-

PUBLIC PROSECUTION SERVICE (No 2)

Respondent

_____

Before: Morgan LCJ and Coghlin LJ

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MORGAN LCJ

[1] The applicant is the subject of an allegation of having inflicted grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861 ("OAPA"). The allegations relate to an incident that occurred in 2012 when she was 16. During the course of 2013 she challenged a Public Prosecution Service ("PPS") conclusion that the allegation was not suitable for diversionary disposal, as an alternative to prosecution, as provided for by the Criminal Justice (Children) (Northern Ireland) Order 1998 ("1998 Order"). On 9 September 2013 the Divisional Court granted her application, quashing the decision of the prosecutor and remitting the matter to the PPS for the decision to be made according to law (CA (A Minor) and Public Prosecution Service [2013] NIQB 139). When the matter was re-considered by an Assistant Director of the PPS it was again concluded that this was not a case in which it was appropriate to direct diversionary disposal. By the present application the applicant now challenges that decision. Mr Sayers appeared for the applicant and Mr McLaughlin for the respondent. We are grateful to both counsel for their helpful written and oral submissions.

Background

[2] The applicant is a school pupil who plays for a ladies' football club in her free time. She was born in October 1995 and has no previous convictions. The circumstances of the allegation were that on 16 May 2012 the football match in which she was playing was abandoned following an incident in which she struck a player from the opposing team. During police interview on 18 May 2012 the applicant admitted punching the victim but denied kicking her in the face while she was on the ground. She showed remorse and stated that she did not mean to inflict the level of injury that she did. The injured party alleged that the applicant did kick her and there are other witnesses who support the injured party's account. The PPS prosecuted the case on the basis that they will seek to establish that she did inflict a kick on the applicant.

[3] At an earlier stage in the proceedings the applicant's previous solicitors sought to persuade the PPS to deal with the matter by way of a pre-court diversionary disposal. When the PPS declined to do so she entered a plea of guilty on 8 October 2012. The court ordered a youth conference report. Counsel for the applicant then approached the PPS later that morning and requested that the allegation of kicking be removed as it was not accepted. The PPS refused and the representatives then spoke to the District Judge and lay magistrates in chambers. Counsel for the applicant asked if the allegation of kicking would affect sentence. The District Judge indicated that it would not but that the injuries were serious and the applicant would be sentenced accordingly. There was no request for a Newton hearing.

[4] The applicant attended the youth conference and the victim did not. The report of the conference, dated 22 November 2012, set out the applicant's version of events that she had not kicked the victim, the applicant's circumstances, the steps which the applicant had taken to address her behaviour and the applicant's acceptance of a youth conference plan designed with the wishes of the victim in mind. The Youth Court did not accept the recommendations of the report and imposed a 12 month Juvenile Justice Centre Order. The applicant appealed and changed solicitors. On 4 December 2012 the County Court granted the applicant's unopposed application to vacate her guilty plea. On 1 March 2013 the solicitors now acting for the applicant requested the PPS to consider the matter afresh, which culminated in the decision by the PPS that the matter should be prosecuted rather than dealt with by way of diversionary disposal. The applicant sought review of this decision before the Divisional Court.

[5] The correspondence on behalf of the PPS in respect of that decision indicated that the public interest considerations surrounding a decision to divert could not be considered where the offender had made limited admissions about such an important part of the prosecution case. That contradicted paragraph 2.3 of the Guidelines for Diversion issued by the PPS which provided that in exceptional

circumstances where limited admissions were made diversion could be directed if there were cogent public interest considerations supporting it. The court was satisfied that consideration of whether or not exceptional circumstances were established required consideration both of the nature of the limited or partial admissions and whether there were cogent public interest considerations in favour of diversion thereby leading to a balanced decision in the public interest as to whether or not diversion was appropriate. Accordingly the court quashed the decision to prosecute on the basis that this was an exceptional case.

[6] On 8 October 2013 an Assistant Director at the PPS wrote to solicitors for the applicant stating that he had carefully weighed the competing public interest considerations and had concluded that this was not a case where exceptional circumstances existed. Following a request for full written reasons, on 22 October 2013 the PPS Assistant Director again wrote to the applicant setting out those reasons.

[7] Having concluded that the evidential test for prosecution was met, the Assistant Director considered whether prosecution was required in the public interest. He considered whether the public interest might be met by a diversionary disposal. When considering the appropriateness of diversion he assessed the case on its individual merits and stated that he had regard to all the circumstances including the seriousness of the offence and the circumstances of the offence and the offender. He also had regard to paragraph 2.3 of the Guidelines.

[8] The Assistant Director considered that the absence of a full admission did not preclude him from directing a diversionary disposal. He was required to determine whether exceptional circumstances were established so as to make a diversion appropriate. He considered the nature of the limited or partial admissions and whether there were cogent public interest considerations in favour of diversion leading to a balanced decision in the public interest that diversion would be appropriate.

[9] He considered that the limitation of any admissions and their consequences had to be carefully considered having regard to the circumstances of the case. In this case the denial related to an important aggravating element of the assault. It significantly undermined the effectiveness of the previous court-ordered youth conference for the victim who, he had been informed, refused to attend as it would have caused considerable stress to her to hear the applicant maintain her denial in relation to the kick. He was advised that, were the applicant to maintain this denial, the victim would not wish to attend and actively participate in any further youth conference.

[10] He identified several public interest considerations in favour of diversion as follows:

(i) the age of the applicant and the strong presumption in favour of dealing with first time youth offenders by way of diversion if circumstances permit;

(ii) the applicant's family circumstances;

(iii) that admissions were made at the first opportunity;

(iv) that there was evidence of remorse;

(v) that the incident arose from a momentary loss of control in the context of a contact sport;

(vi) that the applicant had been disciplined and penalised by the relevant sport association;

(vii) that the applicant did not have previous convictions and had positive character references;

(viii) that the applicant waited for 17 months for the decision as to how the matter was to proceed and had been subject to a Juvenile Justice Centre Order. She had to await the outcome of a second decision so there was an element of double jeopardy;

(ix) evidence of the applicant's positive approach to the previous court ordered conference; and

(x) the impact on the applicant's future of a conviction for a serious criminal offence.

[11] He identified several public interest considerations in favour of prosecution as follows:

(i) the gravity of the injuries and the long-term effect of the incident on the victim;

(ii) the fact that there were a number of blows including a kick to the face of a victim lying defenceless on the ground;

(iii) the unprovoked nature of the attack; and

(iv) the view of the victim who is not supportive of a diversionary disposal.

[12] In considering the weight to be attached to these factors, the Assistant Director considered that factors (viii) to (x) were strong factors in favour of diversion

but that this was not an exceptional case. An important factor was the nature of the limited admissions and the effect they had on the victim and the effectiveness of the restorative process. The seriousness of the injuries constituted a strong public interest factor in favour of prosecution.

Statutory Background

[13] Part 3A of the 1998 Order provides for diversionary youth conferences which enable the Director of Public Prosecutions to make recommendations pursuant to Article 10(A)(2). Under Article 10A(3)(a) such a disposal can only occur if the child admits to the Director of Public Prosecutions that she committed the offence:

> " 10A. - (1) The Director may, where he considers it appropriate to do so, refer a case to a youth conference co-ordinator for him to convene a diversionary youth conference with respect to a child and an offence if-
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> (a) the Director has the conduct of proceedings instituted against the child in respect of the offence (whether by him or any other person); or
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> (b) he would (but for this Article) institute proceedings against the child in respect of the offence.
>
> (2) A diversionary youth conference is a youth conference convened with a view to the making to the Director by a youth conference co-ordinator of one of the following recommendations-
>
> (a) that no further action be taken against the child in respect of the offence;
>
> (b) that proceedings against the child in respect of the offence be continued or instituted;
>
> (c) that the child be subject to a youth conference plan in respect of the offence.
>
> (3) The Director must not make a reference under this Article unless the child-

(a) admits to the Director that he has committed the offence; and

(b) agrees with the Director that he will participate in a diversionary youth conference with respect to the offence."

[14] That admissions are a pre-condition of diversion is also reflected in Article 10B of the 1998 Order:

> "10B. - (1) If a child withdraws an admission or agreement made under Article 10A(3) before the diversionary youth conference is completed-
>
> (a) the diversionary youth conference is terminated (or, if not yet started, does not take place); and
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> (b) a youth conference co-ordinator must make to the Director a written report stating that the child has withdrawn such an admission or agreement (and nothing else).
>
> (2) The fact that a child has made or withdrawn such an admission or agreement is not admissible in any criminal proceedings as evidence that he committed the offence."

[15] The form of a youth conference is provided for in Article 3A of the 1998 Order.

> "3A. - (1) In this Order "youth conference", in relation to a child and an offence, means a meeting, or series of meetings, for considering how the child ought to be dealt with for the offence.
>
> (2) A meeting does not constitute, or form part of, a youth conference unless the following persons participate in it-
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> (a) a youth conference co-ordinator (as chairman);
>
> (b) the child;
>
> (c) a police officer; and

(d) an appropriate adult…..

(6) The following persons are entitled to participate in any meeting constituting, or forming part of, a youth conference-

(a) the victim of the offence or, if the victim is not an individual, an individual representing the victim;

(b) a legal representative of the child acting as his adviser; and

(c) if a community order or youth conference order is in force in respect of the child or the child is subject to supervision under a juvenile justice centre order or custody care order, the supervising officer."

Policy

[16] The PPS published Guidelines for Diversion in November 2008. These identify the policy applied by the PPS. There is no challenge to that policy in this judicial review. The Guidelines recognise that there are circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, prosecution is not required in the public interest. Public Prosecutors should positively consider the appropriateness of a diversionary option, particularly if the defendant is a youth, when considering where the public interest lies. Whether diversion is appropriate will depend on the seriousness of the offence and the circumstances of the offence and the offender in each case.

[17] Paragraph 2.3 of the Guidelines deals with the question of admissions.

"2.3 For diversion to be directed, the offender must admit the offence. The admission must be clear and reliable for the restorative process to be effective. This admission may be made in the course of formal police interview or at any stage up until trial. The admission may be made to police or to the Public Prosecutor either by the offender in person or through his or her solicitor.

In exceptional circumstances it may be appropriate to direct a diversionary option where the offender has made limited or partial admissions and where there

> are cogent public interest considerations in favour of diversion."

The PPS make the obvious point that it is only in exceptional circumstances that diversion will be appropriate where there are limited or partial admissions.

[18] Paragraphs 2.10 and 2.11 explain how the attitude of the offender and victim are taken into account.

> "2.10 The attitude of the offender will be a crucial factor as he/she will have admitted the offence which will make diversion possible. In addition to the admission it is also relevant if he/she has made an immediate or early admission of guilt, expressed remorse or offered restitution. The Public Prosecutor will take into account the recommendations of police, as the Investigating Officer will have had direct contact with the offender and the victim.
>
> 2.11 Whilst the consent of the victim is not necessary, the attitude of the victim should always be considered. The decision whether to offer a diversionary disposal remains one for the Public Prosecutor... Where an issue of diversion may arise, the police report should also contain the views of the victim in relation to the suitability of the case being disposed of by way of diversion."

[19] Chapter 3 of the Guidelines considers the factors to be taken into account for and against diversion. The first of the factors in favour of prosecution is the seriousness of the offence. There are then set out various factors relevant to the culpability of the offender, the vulnerability of the victim, the harm suffered by the victim, the background of the offender and the risk of recurrence. Similarly, the first of the factors in favour of diversion is that the court is likely to impose a very small or nominal penalty or sentence. The Guidelines then refer to issues of reduced culpability, delay, effect on the physical or mental health of the victim or witness and reparation. Where the public interest lies in the particular case is not simply a matter of adding up the number of factors on each side. It is a matter of judgement. In making that judgement Public Prosecutors must decide the weight to be attached to each factor in the circumstances of each case and go on to make an overall assessment.

Consideration

[20] At the commencement of his oral submissions Mr Sayers sought to add an additional ground of challenge. He noted that no Newton hearing had been held in the original case before the Youth Court and maintained that it must, therefore, follow that the applicant was sentenced on the basis that her account of the incident was accepted. In those circumstances he submitted that it was not open to the prosecuting authority thereafter to maintain that the offence occurred in a manner other than that disclosed by the account on which the court dealt with the offender.

[21] In R v McGrade [2014] NICA 8 this court approved the approach set out in R v Cairns and others [2013] EWCA Crim 467 dealing with the circumstances in which a Newton hearing is required. Such a hearing is normally required where there is a dispute between the prosecution and defence about the factual circumstances of the offence but the court in Cairns identified three exceptions, one of which was where the difference between the two versions of fact was immaterial as to sentence. That was the course taken by the court of first instance and it did not, therefore, follow that there was any concession by the PPS that the applicant should be sentenced on the basis of her account. We do not, therefore, accept that the prosecution was prohibited from relying on the account which it sought to prove and which was always maintained before the lower court. If the case proceeds before the County Court it will be a full re-hearing. If a plea is entered the court will need to decide whether to hold a Newton hearing. In reaching that decision neither the court nor the parties will be bound by the earlier decision of the Youth Court. We refuse leave on this ground.

[22] We note that the material before us indicates that on appeal the applicant was allowed to vacate her plea without objection. It is not clear whether the County Court had its attention drawn to the provisions of Article 140 (1) of the Magistrates Courts (Northern Ireland) Order 1981 which gives the court jurisdiction to entertain an appeal against conviction if the applicant did not plead guilty. The English authorities dealing with their similar provision tend to suggest that the defendant can only appeal against a conviction on a plea of guilty if the plea was equivocal or involuntary. This matter was not argued before us nor is there any challenge to the vacation of the plea but since it is a matter of jurisdiction it is something that the County Court might wish to look at if the matter comes before it again.

[23] The first substantive point argued on behalf of the applicant was that the PPS had wrongly taken into account the limited nature of the admissions as a factor weighing against a diversionary disposal. It was submitted that the making of limited admissions was always a positive factor in favour of diversion and the PPS had erred in taking into account the consequences of those limited admissions against the applicant.

[24] We accept that the making of limited admissions is a factor in favour of diversion. Indeed without such admissions the Director has no power under Article 10A(3) of the 1998 Order to convene a diversionary youth conference. It is, however, implicit in limited admissions that the offender is either silent as to some aspect of the case which the prosecution seeks to prove or, as in this case, positively denies part of the prosecution case. Where that denial has an effect upon the victim's willingness to participate by attendance in the proposed youth conference we do not accept the submission that this factor should be left out of account in making the public interest assessment. The weight to be given to the factor is clearly a matter of judgement for the decision maker which will vary from case to case.

[25] Mr Sayers submitted that in its correspondence in relation to this matter the PPS continually referred to limited admissions having an adverse effect upon the victim and the effectiveness of the restorative process. He submitted that there was no express reference to the denial of that part of the prosecution case which remained in dispute. It followed, therefore, that it was the admissions which were being held against the applicant. We consider, however, that the term "limited admissions" within the correspondence includes both the admissions and the denial. The reason that the admission was limited was because it included the denial. We are satisfied that the PPS was entitled to take into account the consequences of the denial that a kick had been administered in weighing the public interest considerations as to how to proceed.

[26] The second submission advanced on behalf of the applicant was that the PPS was in error in concluding that the applicant's denial of the kick had significantly undermined the effectiveness of the earlier youth conference. The victim had participated in discussions with the Youth Justice Agency on a number of occasions and although not willing to attend the conference had requested that the offender carry out some work by way of reparation. She had agreed that the offender should do reparative work in relation to mental health by way fundraising or supporting fundraising. There was some debate about the reasons for the victim not attending the conference but it is clear that the PPS were informed by the victim that she would not do so because she could not bear to hear the offender deny the kick.

[27] We accept that the offender was anxious to participate fully in the youth conference and demonstrated remorse and the taking of steps to address anger issues with the help of her family. We also accept that the victim did participate to some degree in the original youth conference in the discussion of reparation. There was, however, clear material before the PPS to indicate that the victim did not benefit fully from the restorative process as a result of the continued denial of the kick. As a result of this she felt unable to meet the offender. The PPS were entitled to make a judgement about the extent to which this had undermined the effectiveness of the earlier youth conference. We can find no error in their approach.

[28] The last point concerned the materiality of the four points identified as factors favouring prosecution and set out at paragraph 11 above. Mr Sayers argued that the first three factors were all elements of the seriousness of the offence and that by giving each of them weight the PPS was triple counting the same factor. In setting out the factors within the Guidance favouring prosecution the PPS gave individual weight to particular aspects of the offending which are not uncommon. The first factor relied upon in this case was the harm caused to the victim. That is separately identified within the Guidelines as a factor favouring prosecution.

[29] The second factor set out at paragraph 11 above is the fact that there were a number of blows including a kick to the face of the victim lying defenceless on the ground. That is an indication of vulnerability which is also separately identified as a factor within the Guidelines. The third factor was the unprovoked nature of the assault. That was not separately identified as a potential factor but clearly falls within the assessment of the seriousness of the offence. It represents an aggravating factor different from the other factors mentioned.

[30] We do not accept therefore that there was any over-counting of factors relating to the seriousness of the offence. We also consider in any event that these Guidelines can only be indicative of the approach which the PPS may take. They cannot provide for every case and there may be circumstances where the PPS may be perfectly entitled to depart from them if there is some proper reason to do so. Such a course is consistent with the conscientious undertaking of the prosecutor's responsibilities referred to by Lord Judge in R v A [2012] EWCA Crim 434 (at paragraph 83). It does not follow, therefore, that breach of the Guidelines of itself necessarily gives rise to any unlawfulness.

Conclusion

[31] For the reasons given we do not consider that the applicant has demonstrated any departure from the Guidelines for Diversion. It has not, therefore, been necessary for us to consider whether any breach constituted exceptional circumstances which would have justified interference with this prosecutorial decision (see Sharma v Antoine [2007] 1 WLR 780). The application is dismissed.