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Judgment: approved by the Court for handing down | *Delivered:* **15/12/2014**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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DIVISIONAL COURT (CROWN SIDE)

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IN THE MATTER OF APPLICATIONS BY DAMIEN PATRICK MATTHEW GRACEY AND SEAN PAUL FITZSIMMONS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Before: Coghlin LJ, Gillen LJ and Weir J

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COGHLIN LJ (delivering the judgment of the court)

[1] The applications brought by the applicants Damien Gracey and Sean Fitzsimmons are for judicial review of separate decisions taken by District Judge (Magistrates' Courts) Peter King ("the District Judge") at Downpatrick Magistrates' Court on 19 March 2014. Mr Frank O'Donoghue QC and Mr Kyle Gribben appeared on behalf of Damien Gracey while Sean Fitzsimmons was represented by Mr Barry Macdonald QC and Mr Tim Jebb. Mr Henry was instructed on behalf of the Public Prosecution Service ("PPS"). The District Judge did not enter an appearance or swear an affidavit in the course of the proceedings. We are grateful to all counsel for their industrious research and well-prepared written and oral submissions which have been of considerable assistance to the court in the course of its deliberations.

Factual background

[2] It appears that on 26 September 2013 some form of physical confrontation developed between Damien Gracey and Sean Fitzsimmons. One of the consequences of this confrontation was that Mr Fitzsimmons lost one of his front teeth and Mr Gracey was charged with assault occasioning actual bodily harm contrary to Section 47 of the Offences Against the Person Act 1861.

[3] On 14 August 2013 a full file was submitted by the Police Service of Northern Ireland ("PSNI") and allocated to a Senior Public Prosecutor on the same date. On the following day, 15 August 2013 a decision was taken to prosecute Mr Gracey and on 20 August 2013 the PPS issued a summons in the name of the DPP for Northern Ireland to be heard before the Magistrates' Court for the Petty Sessions District of Ards containing the following charge:

> "Damien Patrick Matthew Gracey was charged with an assault occasioning actual bodily harm on Sean Paul Fitzsimmons contrary to Section 47 of the Offences Against the Persons Act 1861 on 30 June 2013."

[4] The return date for the summons was 26 September 2013 at Downpatrick Magistrates' Court. On that date the case was adjourned for one week and on 3 October 2013 Mr Gracey entered a plea of not guilty. The case was then listed as a contested matter for hearing on 9 December 2013.

[5] On 9 December 2013 the case was adjourned. While it is difficult to decipher the manuscript entries on the Court Progress Record it seems that the defendant's representative raised a number of issues and notes were made about arranging for the attendance of a medical witness. There also appears to be a reference to the need for an x-ray examination. The case was adjourned to 19 December 2013 for the purpose of arranging a new date for the contest. On that date the case was again adjourned to be reviewed on 16 January 2014. On that date the contest was fixed for 10 February 2014. Reference was made to Mr Fitzsimmons attending the dentist but there was a note to indicate that the case would proceed regardless on 10 February.

[6] A further review took place on 30 January 2014 when the defence made a request for a complete set of Mr Fitzsimmons dental records. The case was unable to proceed on 10 February because of the death of Mr Gracey's grandfather and the desire of a number of witnesses to attend the funeral. The case was further adjourned to 20 February 2014.

[7] On 20 February 2014 and 13 March 2014 the case had to be further adjourned. On the latter date the record shows that there were difficulties in contacting Mr Fitzsimmons. A further arrangement was made to hold the contest on 19 March 2014. On 26 February 2014 the police had provided a contact number for Mr Fitzsimmons' father and Ms Kirk, the prosecutor, directed that the number should be brought to the attention of the Victim and Witness Care Unit. A communication was received from the Unit on 10 March 2014 confirming that calls had been placed to the number on four different days but there had been no response.

[8] On 19 March 2014 Ms Kirk attended at Court 3 in Downpatrick Courthouse for the purpose of conducting the contest on behalf of the PPS. Prior to the

commencement of the court she spoke to the Investigating Officer who informed her that there had been no contact with Mr Fitzsimmons. The telephone number was not responding and he had not been able to speak to anyone when he called at Mr Fitzsimmons address. The investigating officer was instructed to try to locate Mr Fitzsimmons within the courthouse building but that proved unsuccessful. It appears that the investigating officer then left the building in order to make a further attendance at Mr Fitzsimmons house.

[9] When the case was initially called on for contest Ms Kirk applied to the District Judge for further time to enable efforts to be made to ensure the attendance of the injured party. The application was granted and the case was called again shortly before 12.00 pm. No indication had been received from the investigating officer that the attempt to locate Mr Fitzsimmons had been successful. At this point Ms Kirk informed the District Judge of the difficulties that had been encountered in attempting to locate Mr Fitzsimmons. Ms Kirk then offered no evidence "given that the case had been listed on three separate occasions for contest and that there had been no contact from the injured party".

[10] Within a very short time of the application made by Ms Kirk it appears that another PPS prosecutor present drew her attention to the fact that Mr Fitzsimmons mother was at the back of the courtroom. Ms Kirk then sought the leave of the District Judge to consult and that was granted.

[11] Ms Kirk then held a consultation with Mr Fitzsimmons and his parents all of whom appear to have been present in the court at the material time. It appears that they had attended the court at approximately 10.30 am and had been sitting at the door of the Court. They confirmed that they had not spoken to any members of the PPS, the Court Service or Victim Support since their arrival at court. They agreed that they had received correspondence from the PPS in relation to attending the court but confirmed that they had not responded by way of written reply or telephone call. When Ms Kirk raised the efforts that had been made to contact Mr Fitzsimmons by telephone she was advised that the numbers in question were "out of service". During the course of her consultation Ms Kirk was assured by Mr Fitzsimmons and his family that they had been seen both by Mr Gracey and by his solicitor who, therefore, had been fully aware of their presence in the building that day.

[12] Following the consultation with Mr Fitzsimmons and his family the case was again mentioned before the District Judge who, despite objections advanced by counsel instructed on behalf of Mr Gracey, agreed to re-list the case on 27 March 2014 for the purpose of fixing a new date for the contest. Ms Kirk subsequently spoke to the Victim Support representative in Downpatrick Court who advised her that they had been unaware of an expected attendance by Mr Fitzsimmons and therefore had not made any efforts to locate him within the courthouse.

The impugned decisions

[13] In the context of the factual circumstances set out above two decisions of the learned District Judge were subject to challenge in these proceedings:

(*i*) Mr Sean Fitzsimmons challenged the decision by the District Judge to dismiss the prosecution of Damien Gracey as a consequence of the PPS offering no evidence.

(*ii*) Mr Damien Gracey sought judicial review of the decision taken by the learned District Judge to reinstate that prosecution.

[14] Helpfully, both Mr O'Donoghue and Mr Macdonald confirmed to the court that they did not dispute that the decision to reinstate the prosecution was ultra vires and, consequently, must be quashed. Mr Macdonald had earlier sought to uphold the decision as a legitimate exercise of the powers of the District Judge in accordance with Section 158A of the Magistrates' Courts (NI) Order 1981 which affords a Magistrates' Court power to re-open cases in order to vary or rescind the sentence or other order if it appears to be in the interests of justice to do so. However, on reflection, Counsel were agreed that the powers available to a Magistrate by virtue of Section 158A do not include the power to rescind an acquittal or a conviction – see Re DPP's Application [2000] NI 49.

[15] In such circumstances the sole remaining issue for this court was whether the decision by the learned District Judge to acquit Mr Gracey of the charge of assault should now be quashed.

The respective submissions

[16] On behalf of the applicant Sean Fitzimmons, Mr Macdonald submitted that it was well settled by the relevant authorities that an order could be set aside if made under a material misapprehension of fact although such an order was presumed to be lawful and valid until a court of competent jurisdiction declared otherwise. He submitted that both the PPS and the District Judge had acted under the material misapprehension that there was no evidence available because the injured party had failed to attend court. That was the express basis upon which the court had acted. The District Judge had been informed both at 10.30 and again later in the morning that the injured party had failed to attend and his absence had clearly been understood as grounding the decision by Ms Kirk to offer no evidence. The fact that her decision and, consequently, that of the District Judge had been based upon a material misapprehension of fact was discovered within a very short time of the prosecution being dismissed. Mr Macdonald drew the attention of the court to the letter dated 3 April 2014 from the Departmental Solicitor's Office ("DSO") to the solicitors acting on behalf of Mr Gracey the relevant portion of which read:

> "The PPS sought an adjournment of your client's case, in the mistaken belief that an essential witness had not attended Court. The Court refused the application, and dismissed the case at 11.40 am. When the District Judge was later informed that the witness had in fact been waiting in court from 10.30 am he rescinded the dismissal order, and reinstated the case, as he considered it to be interests of justice to do so …."

[17] The primary submission advanced by Mr O'Donoghue, on behalf of Damien Gracey, was that the decision of the District Judge had been based in fact upon the statement by Ms Kirk that she did not intend to offer any evidence. Mr O'Donoghue submitted that the District Judge was entitled to rely upon such a decision which was well within the discretionary area of judgment available to the PPS. He rejected the suggestion made by the DSO in the letter of 3 April 2014 that Ms Kirk had sought an adjournment as being inconsistent with paragraph 12 of Ms Kirk's affidavit and the manuscript entry for 19 March 2014 in the Court Progress Record. Mr O'Donoghue argued that, while he did have power to decide whether to dismiss the prosecution, there could be no real criticism of the District Judge in his reliance upon Ms Kirk's decision not to offer any evidence.

[18] On behalf of the PPS Mr Henry referred the court to the case of R v Hendon Justices (1993) 96 Criminal Appeal Reports 227 as authority for the proposition that an acquittal could be quashed because it was a nullity. Mr Henry noted a series of cases in this jurisdiction in which this court had ruled that refusals to adjourn cases by District Judges had been unlawful because of a failure to make necessary and relevant enquiries. Despite acquittals consequent upon the prosecution ultimately offering no evidence, such cases had been remitted by the Divisional Court for consideration by an alternative tribunal. Mr Henry argued that the logical consequence of making such decisions must also have involved this court quashing the acquittal of the accused as a nullity. Mr Henry further submitted that the victim and his family had not been to blame and that, in such circumstances, to dismiss the prosecution against Mr Gracey without the benefit of a fair and public hearing would be contrary to the principles of natural justice. He referred the court to the triangulation of interests involved in the criminal law encapsulated in the remarks of Lord Steyn in Attorney General's Reference (No. 3 of 1999) [2001] 2 AC 91 when he said:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court

> to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

Those remarks were quoted with approval by this court in Re Millar and Others [2013] NIQB 57 at paragraph [9] of the judgment when the learned Lord Chief Justice emphasised that:

> "It is important to note the emphasis on the public interest in effective prosecution and the place of the victim in the criminal justice system."

Discussion

[19] There is now well established authority to support the proposition that the court has jurisdiction to quash a decision reached on the basis of a material error of fact. In R v Criminal Injuries Compensation Board ex p. A [1999] 2 AC 330 Lord Slynn referred to the following passage from Administrative Law (Wade and Forsythe, 7th Edition) at page 316-318:

> "Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact', [Secretary of State for Education The Thameside MBC [1977] AC 1014, 1030] or acting 'upon an incorrect basis of fact ...' This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong fact are a cause of injustice which the court should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon an apprehension of law."

[20] R v CICB ex p. A involved the case of a claimant who had been medically examined on behalf of the police, consequent upon her allegations of rape and buggery, in which the Board had been given the impression by police witnesses that there was nothing in the medical evidence to support her case. In fact, the police doctor had reported findings that were consistent with the allegation of buggery. Lord Slynn concluded his judgment in the following terms:

> "I consider therefore, on the special facts of this case and in the light of the importance of the role of the police in cooperating with the Board in the obtaining

> of the evidence, that there was unfairness in the failure to put the doctor's evidence before the Board and if necessary to grant an adjournment for that purpose. I do not think it possible to say here that justice was done or seen to be done."

The other members of the House of Lords agreed with Lord Slynn's reasoning. Lord Slynn confirmed his views in the subsequent case of R v Secretary of State for the Environment ex parte Alconbury [2003] 2 AC 295 when he referred to the jurisdiction to quash a decision for "misunderstanding or ignorance of an established and relevant fact" as meeting the requirements of the European Convention on Human Rights".

[21] In E v Secretary of State for the Home Department [2004] EWCA Civ. 49 Carnwath LJ reviewed the relevant authorities and expressed the following opinion at paragraph [66]:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First there must have been mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the Appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

[22] The impact of the principle upon judicial review applications relating to the correct approach by a District Judge's Court in determining whether to grant or refuse adjournment applications has recently been considered by Divisional Courts in this jurisdiction in Re Millar and Others [2013] NIQB 57 and Re Maria Morrison [2013] NIQB 67. In Millar Morgan LCJ, delivering the judgment of the court, referred to the case of DPP v Picton [2006] EWHC 1108 (Admin) and noted that there was a line of authority in England and Wales suggesting that the courts would be slow to adjourn cases because of prosecution failures because to do so was to condone such failures but that such a culture of adjournment had not been reached

in this jurisdiction. He also noted the absence in the Picton case of any specific reference to the interests of the victim. At paragraph [7] the learned LCJ said:

> "We consider that Picton would have been decided differently in this jurisdiction. The interests of the victim and the desirability of having prosecutions determined on their merits would have made it unfair not to wait until later in the day to assess the position once the witnesses arrived, and in particular to assess whether the case might have been completed in a shorter time or possibly finished shortly thereafter."

[23] In the same judgment Morgan LCJ also included references to the Northern Ireland cases of Re DPP [2007] NIQB 3 and Re DPP [2007] NIQB 10. In the former case the essential witness had attended court but was not located in her waiting room while, in the latter, the prosecutor had been advised by the police that the witnesses were not present whereas they had been in a court building all along but placed in a discrete waiting room. In each case the Divisional Court criticised the relevant Resident Magistrate on the basis that there had been a lack of enquiry and quashed the decisions to refuse adjournments. At paragraph [16] Morgan LCJ expressed agreement with paragraph [30] of the judgment of McCloskey J in Re Quigley and Others [2010] NIQB 132 when he set out the following general principles:

> "The overarching general principle which emerges is that it is in the public interest that every person charged with a criminal offence should *normally* be tried: a prosecution should *usually* result in an adjudication of guilt or innocence and should not *ordinarily* be concluded in any other way. This, in my view, is properly characterised a strong general rule. General principles of this nature are the bedrock of both the common law and the jurisprudence of the European Court of Human Rights."

[24] In Morrison Morgan LCJ confirmed the views that he had expressed in Millar and again referred to the importance of the emphasis being placed upon the public interest in effective prosecution and the place of the victim in the criminal justice system by Lord Steyn in Attorney General's Reference (No. 3 of 1999). In Morrison the applicant and her son were the main witnesses in a prosecution alleging that the defendant had possession of an offensive weapon, namely a knife, in a public place. The learned Lord Chief Justice concluded that the indication from prosecution counsel that there was no point in the investigations into the absence of the witnesses continuing after lunch was, in the circumstances of the case, effectively an invitation to the District Judge to dismiss the complaint. It would appear that if the suggestion of an adjournment over lunch had been adopted the attendance of the

witnesses might have been secured. In such circumstances the court found that the decision to adjourn had been made without the rigorous enquiry required by the case law. Accordingly, the applicant's rights were vindicated by the court making an appropriate declaration.

[25] It is important to bear in mind that this court discharges a supervisory function. It is not a disciplinary tribunal the jurisdiction of which may be utilised to punish the prosecuting authorities. That is not to say that fault on the part of a party may not be a relevant factor in the consideration of what are inevitably fact specific circumstances and the court must not be perceived as a ready means of rescuing the prosecution from the consequences of incompetence. In this particular case it is absolutely clear that the decision to offer no evidence and the subsequent dismissal of the charge by the District Judge were based solely upon an erroneous belief that the complainant had not attended. Within a very short time, it was apparent to all that the relevant decisions had been taken on the basis of that erroneous belief. Despite the lack of appreciation on behalf of the prosecution, the arrangements had been effective and, in fact, the complainant and his family had been present. At that point, there was nothing to prevent a fair and public hearing by an impartial tribunal from taking place. Any difficulty would almost certainly have been resolved, once the prosecutor had indicated that she had been unable to locate the complainant, by a simple direction from the bench to have him publically called within the court building precincts, a formal precaution which is routinely resorted to by courts at all levels.

[26] Had the triangulation of interest referred to by Lord Steyn been fully considered there is no doubt that the proper conclusion would have been to proceed with the hearing. As it was, the interests of the victim and the public were not respected and the dismissal of the charge against the accused was brought about by a simple failure of identification on the part of the prosecuting authorities. While there is no equivalent in this jurisdiction of the Criminal Procedure Rules SI2010/60 that apply in England and Wales, it is worthwhile noting the general guide provided therein in the following terms:

> *1.1.-(1)* The overriding objective of this new code is that criminal cases be dealt with justly.
>
> (*2*) Dealing with a criminal case justly includes –
>
> (*a*) Acquitting the innocent and convicting the guilty;
>
> (*b*) Dealing with the prosecution and the defence fairly;
>
> (*c*) Recognising the rights of a defendant, particularly those under Article 6 of the

European Convention on Human Rights;

(*d*) Respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;

(*e*) Dealing with the case efficiently and expeditiously; …"

[27] During the hearing the court was referred to the decision of the Divisional Court in England and Wales in R on the Application of O v Stratford Youth Court [2004] EWHC 1553 (Admin). In that case the Crown, not having their witnesses present when the case was called on at 11.30 am, sought an adjournment. That application was opposed by the complainant and refused by the Justices. The Crown then offered no evidence and the Justices dismissed the charge. It would appear that the complainant arrived at the court "a few minutes later". In delivering the judgment of the court Rose LJ said, at paragraph [8]:

> "The crucial question which arises for determination today, as it seems to me, is whether or not, the prosecution having offered no evidence and the court having dismissed the charge, it was open to the court to reopen matters in the way which they did. In my judgment it was not. Events having taken the course which I have described, the court, as it seems to me, was functus officio and any further hearing against the defendant in relation to this matter would inevitably give rise to a plea of autre-fois acquit on his part. It is unnecessary to go into the authorities which support those conclusions."

[28] As Rose LJ observed that decision depended upon the *events concerned*. In the circumstances, we note that, at the time of the prosecution decision to offer no evidence, the complainant had not been present at the court and, perhaps of greater significance, prior to delivery of the judgment by the Divisional Court the complainant had left the jurisdiction and would not be returning thereby rendering any potential retrial of the claimant impossible. In the instant case all parties appreciated that the case could proceed and the court could properly discharge its function within minutes of the decision to acquit. We accept the importance of securing finality in litigation. However we are not persuaded that, in the particular circumstances of this case, the application of the common law concept of functus officio should effectively thwart all of the relevant interests in the fair and public conduct of criminal proceedings. In our view the decision to acquit based, as all parties accept, upon a demonstrable and self-evident error of fact must be quashed.

Accordingly, we propose to set aside the decision of the District Judge and remit the case to an alternative tribunal.

[29] The unfortunate situation giving rise to this application was clearly the product of an inadequate system and poor co-ordination between prosecution agencies which requires urgent attention.