Neutral Citation No: [2012] NIQB 80 | *Ref:* **GIR8589**

Judgment: approved by the Court for handing down | *Delivered:* 31/10/12
(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Graham's (Jason) Application [2012] NIQB 80

IN THE MATTER OF AN APPLICATION BY JASON GRAHAM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DIRECTOR OF PUBLIC PROSECUTIONS ON OR ABOUT 15 FEBRUARY 2012

MORGAN LCJ, HIGGINS LJ and GIRVAN LJ

GIRVAN LJ

Introduction

[1] In this application Jason Graham ("the applicant") seeks judicial review in relation to a purported decision by the Director of Public Prosecutions to discontinue criminal proceedings against him in respect of an allegation of rape. The application raises some interesting and complex questions of law in respect of the powers of the Director to discontinue or withdraw criminal proceedings against an accused person who has been properly returned for trial by a Magistrates' Court following a preliminary inquiry. Unusually the applicant opposes the Director's decision. He does so because he wishes the proceedings to continue so that he can establish his innocence of the charge.

[2] The applicant is 27 years old with a long criminal record. He was convicted of rape in 2002 and was sentenced to 14 years' custody. In 2008 he was released on an Article 26 licence and was subject to a number of licence conditions until 2015.

[3] In June 2011 allegations of rape and assault were made against him by K, the rape allegedly having occurred on 31 May and the assaults between 30 May and 1 June 2011. The defendant consistently and vigorously denied the allegations asserting that he had had consensual sex with the complainant. He was remanded in custody and claims that his home was attacked and his family suffered abuse because of the allegations made against him. He has been made subject to Sexual Offences Prevention Order proceedings and an interim SOPO was made subject to restrictions additional to his Article 26 licence conditions.

[4] A preliminary inquiry in respect of the charges was heard on 26 January 2012 and the relevant District Judge (Magistrates' Court) found that the applicant had a prima facie case to answer. He was accordingly returned for trial to Newry Crown Court. He was remanded in custody on those charges until his trial. The applicant does not challenge the propriety or regularity of the decision to commit him for trial.

[5] On 15 February 2012 the applicant's solicitor was informed by telephone by a member of the Prosecution Service that there was no longer any credible case against the defendant and that the case was going to be withdrawn or discontinued at the Crown Court on 16 February 2012. In a telephone conversation the applicant's solicitor was informed by the PPS Directing Officer that the case was to be brought forward to be withdrawn because the prosecution now had information which undermined the prosecution case. This was because the complainant could not give the prosecution satisfactory answers to their questions.

[6] On 16 February 2012 when the case was listed before the court at the prosecution's request counsel for the PPS purported to withdraw and discontinue the case. Counsel was unable to cite any authority to support the prosecution's authority to withdraw or discontinue the prosecution at that stage of the proceedings. Defence counsel objected and indicated that the applicant was entitled to a jury verdict on the basis of lack of credible evidence against him. When the Crown Court judge very properly indicated that he was minded to direct skeleton arguments on the withdrawal/discontinuance issue and to admit the defendant to bail, counsel for the PPS asserted that the court had no power to do anything in respect of the case as the case was no longer in existence having been withdrawn-discontinued by the PPS. The court directed that the applicant be immediately released from custody and that the court should receive skeleton arguments to be filed by any party who wished to lodge one fixing a hearing of the issues on 28 February 2012. The PPS declined to file any skeleton argument because they asserted that the case was over. Notwithstanding the prosecution's attitude the question whether the proceedings were validly concluded was a matter entirely for the court to determine. The applicant filed a lengthy skeleton argument in which counsel for the applicant set out the reasons why it was argued that the applicant was entitled to ask for the presentment of an indictment and arraignment and a

directed acquittal before a jury if the prosecution could lead no proper evidence on which to convict him. The judge adjourned the application so that the applicant could bring a judicial review challenge in respect of the prosecution's purported decision to withdraw the case.

[7] It is the applicant's case that the complainant's allegations are entirely misconceived; that she had made similar false allegations against a large number of other individuals; that she was entirely unreliable as a witness; and that the false allegations against him must be demonstrated to be false in order to remove the stigma attaching to the applicant and his family. He claims that he was particularly vulnerable to such false allegations because of his past record. He points out that the PPS now fully recognises that it could not put forward K as a credible witness as to fact. According to the applicant, justice demanded that he be acquitted. That should follow from the presentment of an indictment and a decision by the prosecution not to call any evidence.

Parties' Submissions

[8] Mr Ferris QC who appeared with Mr Lannon on behalf of the applicant relied on the skeleton argument which had been put before the Crown Court Judge. Counsel drew attention to the obligation lying on the court to conduct the case in accordance with the overriding objective set out in the Practice Direction No 5 (2011) Protocol for Case Management in the Crown Court ("the Practice Direction"), namely that criminal cases be dealt with justly. Dealing with a criminal case justly includes acquitting the innocent and convicting the guilty, dealing with cases efficiently and expeditiously and ensuring that appropriate information is available to the court when issues of bail and sentence are considered. The Practice Direction obliges participants in Crown Court proceedings (inter alia) to be in a position to respond in detail to any queries raised by the court and to comply with any directions by the Judge that any skeleton argument or written submission be lodged in court and served on the other parties. Counsel reminded the court of a defendant's common law and Convention right to a fair trial. He argued that a purported unilateral withdrawal of the case by the prosecution was incompatible with his Convention rights under Articles 6, 8 and Article 1 of Protocol 1 to the Convention. Its withdrawal was an abuse of the process of the court. Article 6 conferred on the defendant a right to examine witnesses against him, a right to defend himself, a right to a public hearing before an independent and impartial tribunal and a right to public judgment. Where there is no credible evidence against him a jury acquittal can go some way to correct the public perception against a defendant who has been returned for trial on the basis of a court decision that there is a prima facie case against him. Article 8 entitles him to have his reputation publicly vindicated. The committal for trial was the order of a court of competent jurisdiction which was properly made and must be obeyed. Under section 48(5) of

the Judicature (Northern Ireland) Act 1978 the trial should begin no later than the period specified by Crown Court Rules unless the Crown Court judge has otherwise ordered. The trial is deemed to begin when the defendant is arraigned. A Crown Court judge has power to admit a defendant to bail whilst awaiting the trial (section 51 of the 1978 Act). Section 52 of the 1978 Act empowers the making of Crown Court Rules. Rule 31 thereof provides that an indictment shall be deemed to be presented when it has been received in the Office of the Chief Clerk. Under Rule 32 an indictment shall be presented not later than 11.00am on the day prior to the arraignment of the accused. Where the judge considers that a preparatory hearing is likely to be ordered he may direct that the indictment be presented within 14 days of the date of his direction. The requirements of Rule 31 may be waived if the court gives leave and the accused consents to this course. Under Rule 38 a person charged on indictment shall be supplied before arraignment with a copy of the indictment. A valid indictment is essential to a valid trial (R v Clarke [2008] 2 All ER 665). To vindicate the accused's Article 6 rights the PPS must present an indictment. Where the PPS is the party in default of its obligations it can be compelled to present an indictment. Counsel referred to the decision of Deeny J in R v Marshall, Phillips, Clarke & McMullan [2005] NICC 43 in which the judge said that the Crown Court must have the necessary power to enforce its orders and all other matters incidental to its jurisdiction.

[9] As noted, the PPS declined to provide a skeleton argument when invited to do so by the Crown Court. The approach adopted by the prosecution and by prosecution counsel ran quite contrary to the requirements of the spirit and intent of the Practice Direction which calls on participants in proceedings in the Crown Court to comply with judges' directions in relation to the provision of skeleton arguments. It should have been evident to the PPS and to counsel instructed that the issues raised before the Crown Court were important and difficult questions of law and that the Crown Court judge was entitled to proper assistance in dealing with them. The unhelpful and discourteous approach adopted by the prosecution led the judge to take the course which he did though, in fact, the Crown Court judge was properly bound to rule on the question whether the course adopted by the prosecution was in the circumstances a proper procedure to follow.

[10] In this court Mr McAlister, who was not the counsel instructed by the Prosecution Service before the Crown Court judge, submitted a skeleton argument the thrust of which was that the prosecution and prosecution counsel appearing on its behalf have power to discontinue proceedings subsequent to a defendant being committed for trial and before arraignment, and indeed, up to the close of the prosecution case. The PPS Professional Code provides that prosecutors will not continue with a prosecution in circumstances where the test for prosecution is not met. Counsel referred to the provisions of section 31 and section 44 of the Justice (Northern Ireland) Act 2002. Under section 31(1) the DPP must take over and

conduct all criminal proceedings instituted on behalf of any police force and may conduct criminal proceedings in any other case where it appears appropriate for him to do so. Under section 44 the "conduct" of any proceedings includes discontinuing the proceedings and the taking of any steps which fall to be taken in relation to the proceedings. Mr McAllister submitted that to continue the proceedings rather than to discontinue them would require the presentment of an indictment in the Crown Court when the Prosecution Service was of the view that the test for prosecution was no longer met. The right to a fair trial does not include the right to a trial when the prosecution no longer intends to continue criminal proceedings when the test for prosecution is no longer met. There is no legitimate expectation that a defendant in criminal proceedings before the Crown Court will have the case determined by a jury. The defendant's concerns were equally met by the discontinuance and it was unnecessary to present an indictment, take the defendant's plea, swear a jury and call no evidence with the Crown Court having to direct the jury to acquit. Counsel however did feel compelled to accept that it was properly a matter for the Crown Court Judge to consider and rule on the issue of how the Crown Court proceedings should be dealt with and disposed of.

Discussion

[11] As noted, the issues raised between the defence and the prosecution in this matter were properly matters for determination by the Crown Court judge. As was pointed out by the court in the course of the argument it is not normally the function of the Divisional Court to act as a form of advisory court for other courts charged with determining questions falling within their jurisdiction. The course taken by the Crown Court judge in this instance was, as we have noted, understandable in view of the unhelpful attitude taken by the prosecution in respect of the questions raised. At the conclusion of the argument we indicated that the matter must be remitted to the Crown Court for its determination and the exercise by the judge of his powers and discretions as the Crown Court judge seised of the case. The arguments put before this court raise issues of difficulty and of general application. Having regard to the novelty of the points and in deference to counsel's arguments, we consider it appropriate to express our views on the points raised. Nevertheless, this court cannot determine the matter which must ultimately be a matter for the Crown Court judge who will have the benefit of this judgment when exercising his powers.

[12] Where a defendant has properly and regularly been committed to trial by a District Judge sitting in the Magistrates' Court following a preliminary inquiry the Magistrates' Court has carried out its limited function in deciding whether the defendant has a case to answer. The Crown Court, thereafter, has control of subsequent proceedings.

[13] Following the committal, and assuming no application under article 158A, in the ordinary course of events the prosecution must present an indictment. By virtue of Rule 32(3) of the Crown Court Rules this must be presented within 28 days of committal. An indictment is deemed to be presented when it has been received in the office of the chief clerk (Rule 31 CCR). The presentment must be no later than 11.00am of the day prior to the arraignment of the person accused. Since Crown Courts must organise their business and fix dates for arraignments in advance of the presentation of indictments, the Crown Court Rules clearly envisage that in the ordinary course of events indictments will be presented within fixed timetables. Arraignment must not take place earlier than 8 days after committal and should normally take place not more than 14 weeks from committal. The fixing of a time for arraignment is not dependent on the prior existence of an indictment but a valid indictment is a prerequisite to taking a plea or conducting a trial. Bail ceases on arraignment but it may be renewed on fresh terms. Once the Crown Court is seised of the case it must be for the Crown Court judge to make sure that the accused is afforded Convention compatible protection in respect of his rights.

[14] This case raises three questions:

(a) Can the prosecution discontinue or withdraw or abandon proceedings against an accused person after committal but before arraignment?

(b) In the absence of any steps taken to set aside the order committing the accused for trial is the prosecution entitled to decide not to present an indictment against an accused person properly returned for trial?

(c) Has the Crown Court any role to play in relation to the prosecution's decision that the criminal proceedings should not continue?

[15] In England and Wales the Legal Guidance published by the Crown Prosecution Service ("the CPS") helpfully sets out the methods for the termination of Crown Court proceedings by the prosecution. After presentment of the Bill of Indictment these are:

(a) the entry of a nolle prosequi;

(b) the offering of no evidence in court;

(c) leaving an indictment or counts on the file; and

(d) applying for a motion to quash the indictment.

In England and Wales there is in addition a statutory power of discontinuance under the provisions of Section 23A of the Prosecution of Offences Act 1985 which expressly covers the period between committal and the presentment of the indictment.

[16] Section 23A of the 1985 Act does not apply in Northern Ireland and there is no equivalent statutory provision. The other mechanisms for discontinuance discussed by the CPS in their legal guidance document apply in Northern Ireland. In Northern Ireland the court itself retains a power to enter a "no bill" in respect of an indictment after presentment if the court is satisfied there is no evidence to justify a trial. It may be theoretically possible for the prosecution to apply to the court for a "no bill" but this rarely if ever happens in practice. It is to be noted that apart from the power of discontinuance under Section 23A of the 1985 Act all of the other methods presuppose the existence of a presented indictment.

[17] A nolle prosequi may be entered by the Attorney General in England and Wales at any stage after the indictment has been presented. The power of entering a nolle prosequi in Northern Ireland is now exercisable by the Director of Public Prosecutions. The power is most often used in cases where the defendant is physically or mentally unfit to be produced and the defendant's incapacity is likely to be permanent. A nolle prosequi cannot be entered before an indictment is presented. It is not an acquittal on the merits and does not amount to a discharge of the defendant. The English CPS Legal Guidance points out that "the power is used sparingly, usually to prevent oppression (for example because the defendant is seriously ill). Traditionally it has been used to protect a person to whom an undertaking or immunity has been given." The Guidance points out that the defence may invite the Attorney General to enter a nolle prosequi but the prosecution may do so where it does not wish termination to lead to an acquittal and there is no other procedure available for technical or legal reasons.

[18] The CPS guidance points out that in the Crown Court, section 23A of the 1985 Act aside, the only method by which the prosecutor can terminate proceedings altogether is to offer no evidence. Advance notice in writing should always be given of the intention to offer no evidence to the Clerk of the Crown Court. In practice a court cannot compel the prosecution to proceed if it decides to offer no evidence, and if no evidence is offered the judge will order a verdict of not guilty. If a jury has not been sworn in England there is a power for the judge to enter such a verdict under Section 17 of the Criminal Justice Act 1967. In Northern Ireland the procedure would be for the judge to direct the jury to acquit. The verdict once entered gives rise to an acquittal.

[19] The effect of leaving an indictment or count to lie on the file is that there can be no further proceedings against the defendant without the leave of the court. The

consent of the judge is required to leave an indictment or counts on the file. In practice the judge usually consents provided that the defence consents. The ability to do so is useful where the defendant has pleaded guilty or has been convicted on other counts on the indictment or the defendant has pleaded guilty to other offences in another indictment and continuation of the proceedings on remaining matters is no longer needed in the public interest. In R v AH [2008] NICA 44 Kerr LCJ observed that if an accused wishes to proceed with his trial this should weigh heavily with a judge asked to accede to an application that charges should be allowed to remain on the books. If, by adopting that course, the court condemns the accused to an open ended period of uncertainty as to when, if ever, he may be required to stand trial, article 6 considerations will be relevant. Kerr LCJ's observations underline the fact that an accused person should know where he stands in proceedings.

[20] A motion to quash an indictment may be made by the defence but it can be used by the prosecution to abandon proceedings in which the indictment is defective and the defect cannot be corrected by amendment.

Sections 23 and 23A of the 1985 English Act

[21] Section 23 of the 1985 Act, which does not apply in Northern Ireland, empowers the Director to discontinue criminal proceedings at the preliminary stage of the proceedings. He must give reasons for doing so. This power does not apply to any stage of the proceedings after the accused has been returned for trial or after the commencement of evidence in a summary trial. A defendant may object by notice to such discontinuance and in that event the proceeding must continue. An additional power of discontinuance was given to the Director or other prosecuting authority after an accused has been sent for trial in Section 23A of the 1985 Act inserted by the Crime and Disorder Act 1998 Section 119 and Schedule 8. The Director must give reasons for his decision to discontinue but he is not bound to disclose those to the accused. The proceedings are discontinued with effect from the date of the giving of the notice. The discontinuance of any proceedings under Section 23A does not prevent the institution of fresh proceedings in respect of the offence. The decision to discontinue a prosecution may be challenged by way of judicial review if the decision is based on an irrational application of the provisions of the code for Crown Prosecutors which govern the decision to prosecute.

The Northern Ireland law and practice.

[22] Section 31(1) and (2) of the Justice (Northern Ireland) Act 2002 provide:

> "(1) The Director must take over the conduct of all criminal proceedings which are instituted in Northern

> Ireland on behalf of any police force (whether by a member of that force or any other person).
>
> (2) The Director may institute and have the conduct of criminal proceedings in any other case where it appears appropriate for him to do so."

Section 44(4) provides:

> "For the purposes of this Part references to the conduct of any proceedings include discontinuing the proceedings and the taking of any steps which may be taken in relation to the proceedings (including making representations on appeals or applications for judicial review or in bail applications)."

[23] These provisions reflect what the Court of Appeal determined in Raymond v AG [1982] QB 839. In that case the Director of Public Prosecutions had taken over a private summary prosecution and through his representative offered no evidence with the result that the defendant was discharged. The Director concluded that continuing with the prosecution was against the public interest and the interests of justice. R sought a declaration that the Director had acted unlawfully in not allowing the defendant's prosecution to continue. Refusing the declaration the Court of Appeal held that the Director's decision was not open to attack unless it was manifestly wrong and irrational. Sir Sebag Shaw said at 846h:
"Section 4 of the Prosecution of Offences Act 1979 has already been cited. It may be observed that while any person may institute or `carry on' any criminal proceedings the Director may undertake, at any stage, the "conduct" of those proceedings. The word "conduct" appears to us to be wider than the phrase "carry on" and suggests to our minds that when the Director intervenes in a prosecution which has been privately instituted he may do so not exclusively for the purpose of pursuing it by carrying it on but also with the object of aborting it; that is to say, he may conduct the proceedings in whatever manner may appear expedient in the public interest. The Director will thus intervene in a private prosecution where the issues in the public interest were so grave that the expertise and resources of the Director's office should be brought to bear in order to ensure that the proceedings are properly conducted from the point of view of the prosecution. On the other hand, there may be what appear to the Director substantial reasons in the public interest for not pursuing a prosecution privately commenced. What may emerge from these proceedings might have an adverse effect upon a pending prosecution involving far more serious issues. The Director in such a case, is called upon to make a value judgement. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot in our opinion be impugned."

[24] It is clear that the Director may in proper circumstances lawfully decide in the words of the court in that case to "abort" criminal proceedings. That case, however, does not deal with the question of the proper manner whereby they may be "aborted". That case was one in which the form of termination was by means of presenting no evidence, thus leading to an acquittal. The case is, therefore, not authority for the proposition that the Director may terminate the proceedings by simply deciding not to pursue them further nor was it a case in which the defendant had been returned for trial by a court of competent jurisdiction on foot of an order still in force.

[25] Section 23 of the English Act was held in Cooke v DPP [1992] 156 JP 497 to be additional to the common law power to offer no evidence. As pointed in the 2000 Edition of Blackstone (which predated Section 23A of the 1985 Act) this confirms the regular practice of the Crown Prosecution Service in offering no evidence in appropriate cases and thus bringing proceedings to an end.

[26] The 2002 Act provides in Northern Ireland that where the DPP has conduct of proceedings in relation to an offence he may discontinue the proceedings (without the leave of any court) at any time before the person has appeared or been brought before the court in connection with the offence. That discontinuance does not prevent the subsequent institution of proceedings against him in relation to the offence or any other offences. Section 32 of the 2002 Act differs from Section 23 of the English Act in that under the English provision the Director must give reasons for not wanting to continue and the defendant may give notice if he wishes the proceedings to continue. Section 32 has no application in a case such as the present because by its clear terms it relates only to proceedings before a person has been brought before a court and thus deals with cases before the presentment of any indictment. It therefore covers situations in which a nolle prosequi could not be issued.

[27] Section 23A of the 1985 Act represents a statutory power conferring on the DPP in England and Wales a power which is not exercisable by the DPP in Northern Ireland. It fills a lacuna in criminal procedure in the period between the committal of an accused person for trial and the presentment of the indictment and would have been unnecessary if the Director had the power which the PPS asserts exists in the present case. In Section 23A Parliament confers powers on the English Director which by implication he did not otherwise have. It represented a useful additional power of discontinuance to cover a situation such as has arisen in the present case where between committal and arraignment the prosecution are satisfied that the case should proceed no further. As in the case of Section 23 it is additional to but does not replace the option of offering no evidence or following the other established means of discontinuance.

[28] The other methods of discontinuance (nolle prosequi, presenting no evidence, applying to leave a count on the books and quashing an indictment) as noted all presuppose the existence of an indictment. As Lowry LCJ in R v Campbell [1985] 9 NIJB 17 pointed out:

> "One must be clear about the different stages of criminal proceedings on indictment. The first relevant stage consists of the committal proceedings. It is the magistrate's duty to hear the prosecutor's evidence, or to receive it, so far as it consists of written statements, then to hear the defendant, if he wishes to say anything, and his witnesses, if he wishes to call any, and finally either to discharge the defendant or, if he finds a prima facie case, to commit him to the Crown Court for trial.
>
> Formerly at assizes the next step was to prefer a bill of indictment before the grand jury, which had the duty (after hearing at least one witness) to ignore the bill by finding `no bill' or to find a true bill and present an indictment on which the defendant was then arraigned."

[29] Lowry LCJ went on to note the abolition of Grand Juries by the Grand Jury (Abolition) Act (Northern Ireland) 1969 ("the 1969 Act") and that thereafter an indictment could be presented (since 18 April 1979 to the Crown Court) although not found by a Grand Jury. He noted the provisions of (inter alia) section 2(8) of the 1969 Act which provided that, except as provided by the section, an indictment presented in accordance with the 1969 Act shall be proceeded with in the same manner as it would have been proceeded with before the commencement of the Act, and without prejudice to any other provision of the Act all enactments and rules of law relating to procedures in connection with indictable offences "shall have effect subject to such modifications as are necessary to give effect to the provisions of this section."

[30] Where the PPS have concluded after committal and before arraignment that the case no longer passes the test for prosecution it appears at first sight incongruous that the prosecution should be obliged to present an indictment in respect of charges which the prosecution no longer considers appropriate. The powers in Section 23A of the English Act avoid this apparent incongruity. However, absent such a power, the law as it still stands in Northern Ireland requires effect to be given to the continued validity of the order of committal. To demonstrate that there is in fact no incongruity it is necessary to briefly explore the historical background to the presentment of an indictment. The cases of R v Campbell (cited) and R v Clarke

[2008] 2 All ER 665 (particularly the speech of Lord Carswell) set out clearly and succinctly the historical development leading to the current law and practice in Northern Ireland in respect of the presentment of indictments.

[31] In Northern Ireland until 1969 any person could appear before the Grand Jury with a bill of indictment which was in effect a draft indictment. In more recent times this was invariably the function of the prosecution authority. The Grand Jury privately heard the witnesses, the names of each witness examined being initialled by the foreman. If and when the Grand Jury had heard enough to be satisfied that there was a prima facie case they endorsed the bill as a "true bill". If there was insufficient evidence it was marked "no true bill". They then came into court and handed the bill of indictment so marked to the Clerk of the Court who would say "Gentlemen, you find a true bill" or "no true bill" (as appropriate) against the named individual for felony or misdemeanour. If the finding was a true bill the bill became an indictment. The endorsement of the Grand Jury was part of the indictment and perfection of it. Even if it was not signed by the foreman it was the affirmation in open court of the bill which constituted the indictment (see generally Lord Carswell's discussion in R v Clarke at 680-681 and Husband Juries in Ireland 1896.) As pointed out in Valentine's Criminal Procedure in Northern Ireland the Clerk of the Crown and Peace or the Clerk of Quarter Sessions was responsible for the actual drafting of the bill of indictment which was considered by the Grand Jury.

[32] As Lord Lowry explained in R v Campbell, following the abolition by the 1969 Act an indictment fell to be presented in the Crown Court although not found by a Grand Jury. An indictment cannot be presented unless one of the sets of circumstances referred to in Section 2(2)(a)-(f) of the 1969 Act applies. One of the relevant and most common circumstances arising is where the defendant is committed for trial for the offence. Section 2(3) empowers the judge to order the entry of "no bill" in the Crown Court in respect of an indictment presented to the court if he is satisfied that the depositions or statements of witnesses on behalf of the prosecution which had been lodged do not disclose a sufficient case to justify the trial. This perpetuates the fiction that the indictment starts off as a bill or draft indictment which becomes the indictment when presented and read out in court and passes the stage at which it could be treated as a "no bill". The provisions of Section 2(8) of the 1969 Act have already been noted.

[33] Under the old procedure the sequence of events in relation to the presentment of an indictment was as follows: (a) a draft of the bill of indictment was made by the clerk of the relevant court; (b) the accused appeared before the grand jury which had the bill of indictment before it; (c) the grand jury had to determine whether it was a "true bill"; (d) the bill was then delivered to the court and affirmed; (e) thereupon the indictment was valid and once read to the accused the trial process began. The modern procedure differs in the sequencing of events. The defendant appears

before the examining magistrate who has to be satisfied that there is a case to answer. No bill of indictment exists at that stage. The magistrate, therefore, does not determine that there is a true bill but by returning the defendant to trial the effect is that a trial must ensue. The existence of a valid indictment remains a pre-requisite to a valid trial. When the magistrate commits an accused for trial Rule 32(3) of the Crown Court Rules requires that a bill of indictment must be drafted and presented within 28 days as a necessary consequence of giving effect to the committal. The drafting of the bill of indictment is now the responsibility of the prosecuting authority which carries out functions formerly carried out by the court. The drafting and presentment of the indictment are ministerial acts which must necessarily and properly be carried out to give effect to the magistrate's return of the defendant for trial. The giving of effect to the committal for trial by the drafting and presentment of the bill of indictment is a ministerial act which must be considered as distinct and separate from the manner in which the prosecution considers it proper to conduct the prosecution. The prosecution's conduct of the proceedings may properly involve the decision by the prosecutor that there is no sufficient evidence. It is thus open to the prosecution to decide to call no evidence against the accused or it may consider it proper to apply to the court for a stay or to apply to the court for leave to leave the charges on the file or to enter a nolle prosequi. Where the decision is made by the prosecution to present no evidence the court must direct the jury to acquit the accused. Any application by the prosecution to stay the proceedings or to leave charges on the file would necessitate an application to the judge who would have to rule on such application in the light of all matters properly put before him in relation to such an application and any defence objection to it. If a nolle prosequi were entered by the prosecution an aggrieved party may have a right to bring judicial review proceedings in respect of that decision depending on the circumstances but the trial judge would have no role to play in relation to it.

Disposal of the application

[34] At the conclusion of the hearing before us we indicated that we were satisfied that there was a sufficient case upon which to grant leave to the applicant to apply for judicial review. We consider that instead of ordering any particular form of relief we should remit the matter to the Crown Court which has not yet reached a determination of the issues raised before it to consider the matter in accordance with this ruling.