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*(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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**BEFORE A DIVISIONAL COURT**

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**AN APPLICATION BY JESSICA HAMILL FOR JUDICIAL REVIEW (No. 2)**

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**Before: Stephens LJ and Keegan J**

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**STEPHENS LJ (delivering the judgment of the Court)**

**Introduction**

[1] Jessica Hamill ("the applicant") seeks an order of certiorari to quash the decision dated 3 September 2014 of a District Judge declining to commit Robert Atkinson, Eleanor Atkinson and Kenneth Hanvey for trial in the Crown Court on charges arising out of the investigation into the death on 8 May 1997 of her son Robert Hamill, following an assault in Portadown on 27 April 1997. Robert Atkinson was a Reserve Constable in the PSNI who had been on duty in Portadown in the vicinity of the assault. It is alleged that at 8.37am on Sunday 27 April 1997 from his home he telephoned Allister Hanvey, who was a suspect in relation to what transpired to be the fatal assault on Robert Hamill. It is also alleged that Robert Atkinson and his wife Eleanor Atkinson conspired together with Andrea Louise Jones ("Andrea Jones") her then husband, James Michael Robert McKee ("Michael McKee") and others to give false information to police officers about that telephone call. It is also alleged that Kenneth George Hanvey ("Kenneth Hanvey"), the father of Allister Hanvey, gave false information to the police about the telephone call.

[2] On the basis of his assessment of the credibility of the evidence of Andrea Jones the learned District Judge held that there was insufficient evidence to put the accused on trial. The applicant acknowledges that there can be no challenge in these proceedings to the learned District Judge's assessment of the *general* credibility of Andrea Jones. In summary the ground on which the applicant relies is that the learned District Judge failed to consider all of the evidence against the defendants neglecting to take into account three matters which supported the central evidence of Andrea Jones that there was a conspiracy involving the defendants. Those matters were (a) the conviction of Andrea Jones for an offence in relation to giving false information to the police as to the telephone call; (b) the conviction of Michael McKee for the same offence; and (c) evidence in relation to a telephone call to a taxi company and the records of the taxi company which supported Andrea Jones' evidence that she was not at the Atkinsons' home on the night of 26 – 27 April 1997 but rather was at her own home. The evidence was that there was a telephone call from the McKee home to the taxi company at 1.30 am on 27 April 1997 and the taxi company had a record that a taxi was to collect a person with the name of "Smith" from her home at 2.15 am in circumstances where this was one of the persons whom Andrea Jones states was at her home that evening.

[3] Mr O'Donoghue QC and Mr McKenna appeared on behalf of the applicant. The respondent did not appear. Mr McGleenan QC and Mr McLaughlin appeared for the Public Prosecution Service which was a notice party. Robert Atkinson and Eleanor Atkinson were also notice parties but they were not represented at the hearing nor did they seek to make any oral submissions. However Mr Rodgers QC and Mr Mallon submitted skeleton arguments to the court on their behalf dated April 2015, 7 May 2015 and 6 November 2017 all of which we have taken into account in arriving at our decision. Kenneth Hanvey was also a notice party and was informed as to the date of the hearing. There was no appearance on his behalf and he did not seek to make any representations.

**Background**

[4] The Learned District Judge in his judgment dated 3 September 2014 incorporated the background to this case as set out by Morgan LCJ at paragraphs [2] - [17] in the judgment of the Divisional Court *In the Matter of an Application by the Public Prosecution Service for Judicial Review* [2014] NIQB 29. That judgment was in respect of an earlier judicial review application relating to an earlier decision of another District Judge in respect of these committal proceedings. We are grateful for and have drawn heavily on the background as set out by the Lord Chief Justice but with some updates to reflect the current position and with some minor revisions.

[5] At the time of the events on 27 April 1997 Andrea Jones being married to Michael McKee was called Andrea McKee. For the purposes of this judgment we consider it simpler to refer to her throughout by her present name of Andrea Jones.

[6] In the early hours of Sunday 27 April 1997 Robert Hamill was violently attacked and beaten by a group of persons on a street in Portadown. He died from

his injuries on 8 May 1997. A total of six individuals, including Allister Hanvey, were charged with the murder of Robert Hamill. However, the charges against five of them, including Allister Hanvey, were subsequently withdrawn due to insufficient evidence to prosecute and the sixth person was acquitted following trial.

[7] Reserve Constable Atkinson had been on duty on 27 April 1997 and in the vicinity when Robert Hamill had been attacked. Later on the morning of 27 April 1997, at 08:37 hours, a phone call was made from the home of Reserve Constable Robert Atkinson ("the Atkinsons' home") to the home of Allister Hanvey (which was also the home of Kenneth Hanvey) ("the Hanveys' home"). It is alleged that Reserve Constable Atkinson advised Allister Hanvey to destroy the clothing he was wearing at the time of the incident. On the basis of those allegations the telephone call was made by Reserve Constable Atkinson from the Atkinsons' home to Allister Hanvey at the Hanveys' home.

[8] Reserve Constable Atkinson was interviewed by police on 9 September 1997 about these allegations. He denied making the telephone call. When the telephone records were later put to him in a further police interview, he claimed that Michael McKee and Andrea Jones had stayed overnight at the Atkinsons' home and that the telephone call had been made by Michael McKee, who was the uncle of Tracey Clarke, Allister Hanvey's girlfriend. Reserve Constable Atkinson claimed that Michael McKee was aware that there had been trouble in the town the previous night and had been concerned about his niece, Tracey Clarke. The police investigated the matter further and Michael McKee, his wife Andrea Jones and Eleanor Atkinson all provided statements to police which supported Reserve Constable Atkinson's version of events. The statement of Andrea Jones was given on 29 October 1997 through a solicitor (John P Hagan). Kenneth Hanvey also gave information to the police supporting this version of events. On the basis of Kenneth Hanvey's account the telephone call was made by Michael McKee from the Atkinsons' home to Kenneth Hanvey at the Hanveys' home.

[9] Three years later in June 2000, following the breakdown of her marriage to Michael McKee, Andrea Jones approached police and provided them with a further statement dated 20 June 2000 and subsequently with a more detailed statement dated 25 October 2000 in both of which she admitted that neither she nor her husband stayed at the Atkinsons' home on the night in question and that she had been asked by her husband to make the false statement to police dated 29 October 1997 following a request from Reserve Constable Atkinson to provide a false explanation for the telephone call. Michael McKee was interviewed by police and admitted to making a false statement in 1997. Both he and Andrea Jones were prosecuted for doing an act tending to pervert the course of justice and pleaded guilty at Craigavon Crown Court. On 7 May 2002 Michael McKee was sentenced to 6 months imprisonment while Andrea Jones was sentenced to 6 months imprisonment suspended for 2 years.

[10] In April 2003 the Director of Public Prosecutions ("DPP") initiated a prosecution against Reserve Constable Atkinson and his wife for conspiracy to do an act tending to pervert the course of justice along with Kenneth Hanvey, the father of Allister Hanvey. A preliminary investigation was listed for hearing on 22 December 2003 at which Andrea Jones was due to give evidence. She did not attend court on that date claiming that her young child was ill. The committal was adjourned and the prosecution and police made further investigations as to the reason for Andrea Jones' non-attendance. At that stage she was residing in Wales. She claimed she had received a threatening letter telling her not to give evidence and also that she needed to attend a medical examination in respect of a job which she had been offered. The PPS considered the matter and a memo by the then Assistant Director of Public Prosecutions, Ivor Morrison, dated 16 March 2004, directed that the criminal proceedings be withdrawn on this basis:

> "in view of the threadbare state of Andrea (Jones') credibility there is no longer a reasonable prospect of convicting any of the defendants of the offences with which they are charged … it has always been clear that she was the key witness in this case. Without her testimony there is not a shred of evidence upon which the defendants could now be convicted."

The criminal charges against the three defendants were formally withdrawn by the PPS in open court on 19 March 2004.

[11] On 16 November 2004 the Secretary of State announced a public inquiry into the circumstances surrounding the death of Robert Hamill. Between January 2009 and December 2009 the Inquiry heard evidence from, inter alia, Andrea Jones, Reserve Constable Atkinson, Eleanor Atkinson and Kenneth Hanvey. Andrea Jones maintained the version of events in her witness statements of 20 June and 25 October 2000 which had led to her prosecution. In its interim report dated 12 March 2010 the Inquiry recommended the DPP reconsider its decision not to prosecute Reserve Constable Atkinson for the offence of conspiracy to pervert the course of justice.

[12] Following a review of the case, including a further assessment of the credibility of Andrea Jones following her evidence to the Inquiry, a decision was taken by the PPS in December 2010 to again prosecute Reserve Constable Atkinson, and Eleanor Atkinson for conspiracy to pervert the course of justice and to prosecute Kenneth Hanvey for giving false information to the police about the telephone call with intent to pervert the course of justice. Fresh complaints in respect of these offences were laid on 30 June 2011.

[13] The prosecution requested the Magistrates' Court to conduct a preliminary inquiry. The defendants required the attendance of Andrea Jones and other witnesses pursuant to Article 34 of the Magistrates' Courts (NI) Order 1981. On

9 May 2012 the other District Judge refused two preliminary applications by the defence. The first was to stay the proceedings as an abuse of process on the ground that the PPS had reversed its previous decision not to prosecute and the second was to exclude the evidence of Andrea Jones under Article 76 PACE. The District Judge, however, noted that he had a continuing duty to consider the question of the fairness of putting any of the defendants on trial.

[14] Andrea Jones attended and gave evidence on 11 June 2012. She did so in accordance with her statements of 20 June and 25 October 2000. She was not cross examined by counsel for Robert Atkinson or Eleanor Atkinson but was questioned by the solicitor for Kenneth Hanvey. During this cross-examination she was asked about her divorce from Michael McKee. She stated that whilst she was divorced she had not been the Petitioner because she did not know where Michael McKee was living. She stated that she remarried in 2007, but had not taken her husband's surname. When asked to provide her husband's surname she refused to do so claiming that identifying him may place him or their child at risk. It was then realised that she would need to sign the deposition with her true name and, therefore, an application for an anonymity order would need to be made if she persisted in refusing to give her name publicly.

[15] The hearing of the application for an anonymity order pursuant to section 87 of the Coroners and Justice Act 2009 commenced on 26 October 2012. In accordance with section 89(2)(e) of the 2009 Act, all three defendants were permitted to cross-examine her in relation to whether she had a tendency to be dishonest. During cross-examination she was asked about the reasons for her non-attendance at court in December 2003. She reiterated her original account, namely, the requirement for medical treatment for her child, receipt of a threatening letter and the need to attend a medical examination for a job. She suggested the letter may have been sent to her following the reporting in the press of her new address in Wales. She confirmed that she had not received any further threatening letter. She maintained her refusal to provide the name of her husband. She stated she was divorced from Michael McKee and believed this had occurred in 2003. She gave birth to her son in October 2001 and married her present husband in a religious ceremony in Tunisia on 27 July 2007. She refused to disclose the religion in question.

[16] The solicitor for Kenneth Hanvey produced a marriage certificate indicating that Andrea Jones had married her current husband at Wrexham Registry Office on 9 February 2001, that she was a lens process technician and that her father was David Peter Jones and was a lorry driver. She denied attending the Registry Office, that she was a lens process technician on that date, or that her father was called David Peter Jones or was a lorry driver. She refused to give her husband's date of birth because of the risk to his safety. The District Judge formally required her to answer the questions put but she refused to do so despite being warned that she may be held in contempt of court. Following further discussion with the legal representatives, the District Judge again warned Andrea Jones. However, she again

refused to answer questions relating to her son's birth certificate which had also been obtained by the solicitor.

[17] Although she denied that she had been a lens process technician at the time of her son's birth she later conceded that after his birth she had brought proceedings in an Industrial Tribunal arising out of her employment as a lens process technician. This had been reported in the local press together with her address. She also stated that in October 2001 she did not live with her current husband, which was contrary to the contents of the birth certificate. It was put to the witness that she had married her husband on 9 February 2001 which she denied. She then refused to write her husband's name and date of birth on a piece of paper to be seen by the District Judge only and thereafter kept in a sealed envelope in a safe. The committal proceedings were then adjourned on 26 October 2012 to allow police to investigate the issues raised during the cross-examination, especially the sequencing of events as to the dates of her divorce and second marriage.

[18] On 2 November 2012, during the course of this police investigation, Andrea Jones reported to local police in Wales that she had received a further threatening letter, purportedly from the LVF, warning her to have nothing to do with the criminal proceedings against the defendants. Subsequent examination of the postmark on the envelope revealed that the letter had been processed at Chester Mail Centre in England which also covers the area of North Wales in which Ms Jones lives. This gave rise to concerns that she had posted the letter to herself.

[19] When the case was adjourned on 26 October 2012 the other District Judge advised Andrea Jones that she should not discuss the nature of the anonymity application with any person who could influence any answers she may give in evidence. Permission had previously been given to Mr Hedworth QC to consult with the witness on the anonymity application. On 23 February 2013 Mr Hedworth and his solicitor together with two police officers consulted with the witness on whether to pursue the anonymity application. As a result of that consultation, the notes of which were made available to the parties, the application was withdrawn.

[20] In April 2013 the PPS made a decision not to prosecute Andrea Jones for perjury or perverting the course of justice on the basis of advice from senior counsel not associated with the case. The alleged bigamy took place in Wales and this was passed to the relevant authorities in Wales for investigation and prosecution. Andrea Jones was subsequently prosecuted by the Crown Prosecution Service in England and Wales for the offence of bigamy, contrary to section 57 of the Offences Against the Person Act 1861, in relation to her marriage at Wrexham Registry Office on 9 February 2001. On 6 November 2013 she pleaded guilty to the offence and was fined £100.

[21] On 16 April 2013 the Magistrates' Court was informed of the PPS's decision not to prosecute Andrea Jones and also that her application for anonymity was being

withdrawn. On 21 May 2013 the PPS indicated to the court that, having reviewed the matter, it had decided to continue with the present prosecution against the three defendants despite the issues surrounding Andrea Jones' credibility raised during the anonymity application. It was this decision by the PPS which grounded a second abuse of process application by the defendants to the other District Judge who on 5 July 2013 stayed the committal proceedings as an abuse of process on the basis of his concerns as to the lack of credibility of Andrea Jones. The PPS brought an application for judicial review of that decision and on 12 March 2014 the Divisional Court quashed the order of 5 July 2013 (see [2014] NIQB 29). The case was remitted with a direction that the preliminary inquiry commence afresh before another judge.

[22] In accordance with those directions a fresh preliminary inquiry under Article 31 of the Magistrates' Court (Northern Ireland) Order 1981 to determine whether the three defendants should be committed to the Crown Court for trial commenced on 11 August 2014 before the District Judge. Andrea Jones gave evidence over three days being examined in chief by Mr Hedworth QC for the prosecution and cross examined on behalf of their respective clients by Mr Rodgers QC, Mr Duffy QC and Mr Monteith. The result of her evidence was a deposition of some 184 pages. The committal papers were augmented by two further statements, one by Michael Irwin dated 17 August 2014 and one by William Richard Cross dated 18 August 2014. Both of these statements were admitted without objection. The learned District Judge had previously refused a prosecution application brought under Article 20(2)(b) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 to admit hearsay evidence of Michael McKee. At the conclusion of the hearing written submissions were received from Mr Hedworth, Mr Rodgers, Mr Duffy and Mr Lindsay. Mr Monteith also closed proceedings with oral submissions.

[23] The thrust of the defence submissions to the learned District Judge was that the credibility of Andrea Jones was so seriously undermined that the evidence was insufficient to return them for trial. Both sets of defence submissions contended that she had told lies not only about collateral matters but also in relation to events in the Atkinsons' home. The prosecution submissions centred upon the existence of evidence to support the charges and also the divisibility of her credibility.

[24] The learned District Judge in his written judgment dated 3 September 2014 expressed very serious concerns regarding the credibility and truthfulness of Andrea Jones as a witness. He found that the evidence was insufficient to put the defendants on trial declining to return them to the Crown Court.

[25] The PPS then gave consideration as to whether they would seek to apply for judicial review of the decision dated 3 September 2014 or whether they would proceed by way of a voluntary bill. By 13 October 2014 it had become clear to the applicant that the PPS was not intending to challenge the decision dated 3 September 2014 nor intending to proceed by way of voluntary bill. The applicant then instructed her solicitors to give consideration to whether she had grounds to

challenge the decision of 3 September 2014. Advices were obtained from counsel on 19 November 2014 and an emergency application was made for legal aid. This was initially refused but was granted on appeal on 28 November 2014. Thereafter these proceedings were commenced on 2 December 2014.

[26] These proceedings were listed for hearing in 2015 but before the date for hearing, a new witness was identified to the PSNI by the Hamill family relating to the death of Robert Hamill. The witness, who was not previously known to police or identified at any stage during the public inquiry, had not previously provided a statement to police and did not give evidence to the public inquiry. By consent these proceedings were adjourned to allow police to investigate. Following police enquiries and consideration by the PPS, in March 2017, the PPS informed the family in person that it did not intend to prosecute anyone as a result of the information provided by the witness. This was also communicated in writing to the family in June 2017.

**The police statements of Andrea Jones and her evidence in chief before the District Judge**

[27] A summary of Andrea Jones' statement dated 29 October 1997 is that she and her husband Michael McKee were friends of Robert and Eleanor Atkinson. Andrea Jones stated that she and her husband stayed the night on Saturday 26 April 1997 at the Atkinson's home with Eleanor Atkinson. They did not see Robert Atkinson that night as he was working and she did not see Robert Atkinson in the morning. Andrea Jones stated that Eleanor Atkinson told her husband at breakfast that there had been a row in the town centre. Her husband then asked Andrea Jones for Allister Hanvey's telephone number as he had a relationship with Michael McKee's niece, Tracey Clarke. Andrea Jones gave him the telephone number. Michael McKee then went to the hall and telephoned. On returning he said that Tracey was not there.

[28] A summary of Andrea Jones statement dated 20 June 2000 is that she stated that parts of her statement of 29 October 1987 were untrue. She was not at the Atkinson's home on the night of 26 - 27 April 1997 and she was not present when a telephone call was made to the Hanveys' home. Rather that night she was at her own home with her husband, Michael McKee. They did not go out but she believed that they were watching boxing on Sky television and that the boxing event involved Prince Naseem. She went on to say that her husband was approached by Robert Atkinson to cover a phone call made earlier in the morning to the Hanveys' home. That as a result she made her statement to the police on 29 October 1997. In her statement of 20 June 2000 she does not mention anyone else being at her home that evening apart from her husband.

[29] Andrea Jones' further statement dated 25 October 2000 (232) contains substantially more detail. The statement records a number of matters including that

it had been explained to Andrea Jones that she had not subscribed to Sky television on the night of 26-27 April 1997 and that Sky had not broadcast a boxing event involving Prince Naseem. She stated that when she thought about it again it is possible that this was not the night that they watched the Naseem fight, but that she recalled something on the television that night involving boxing. She also recalled a phone call that was made from her home to a taxi firm in Portadown at 1.30 am on Sunday 27 April 1997. She explained why a taxi was called to her house by reference to a couple of friends "Anto" and "Sharon Wickham" whom she recalled had visited their house and got a taxi home. She stated that they had arrived that night in a taxi and left to return home in a taxi. She remembered making the phone call for the taxi but she could not recall who she spoke to.

[30] A summary of the main features of Andrea Jones' evidence in chief to the learned District Judge is:

(a) She pleaded guilty on 7 May 2002 to the offence of perverting the course of justice.

(b) Michael McKee pleaded guilty to the same offence on the same date.

(c) Those offences related to making a false statement to the police in relation to the telephone call.

(d) She described how they came to make the false statements in line with police statements of 20 June and 25 October 2000 stating that she and Michael McKee were in their own home on the evening of Saturday 26 April 1997 together with Rodney Smith and Joy Kitchen.

(e) She described a meeting in the kitchen of the Atkinsons home involving herself, Michael McKee, Robert Atkinson and Eleanor Atkinson:

> "The purpose of this conversation that we were having was that Robbie had said that he had made a phone call that he needed to cover and he asked us if we would cover it for him. He said he had made the phone call to the Hanvey's house. He told me that he had attempted to get in contact with (Allister) to tell him to get rid of the clothes that he had been wearing on the night of the fighting, the night when Robert Hamill had been attacked. Having told me that he had made a telephone call he said that it was very serious. Robbie led the conversation, he asked if Michael would go to the police station to make a statement to say that it was him that made the phone call. Mr Atkinson came up with a story

> to suggest why it would be that Michael was making a phone call from Mr Atkinson's house, the story was that we went the night before to have some drinks and that we stayed over at Robbie's house and that Eleanor told us in the morning that there had been some fighting in the town and Michael was to ring to see if Tracey was okay. Neither Michael nor I in fact stayed at the house on that night we were at home."

(f) She described then making her police statement dated 29 October 1997 which was a false statement.

**The certificates of conviction for Andrea Jones and Michael McKee**

[31] The certificate of conviction of Andrea Jones is that at the Crown Court sitting at Craigavon on 4 March 2002 she was indicted, arraigned and convicted on the charge that on 29th day of October 1997, in the County Court Division of Craigavon, with intent to pervert the course of public justice did an act which had a tendency to pervert the course of public justice in that, when asked by a police officer about a telephone call made from a certain house on 27 April 1997 at 8.37 am, she gave false information to the police officer that it had been Michael McKee, her husband, who had made the telephone call, doing an act tending and intended to pervert the course of public justice, contrary to Common Law. The certificate also records that on 7 May 2002 it was ordered that the defendant be dealt with by six months imprisonment suspended for a period of two years.

[32] The certificate of conviction of Michael McKee is that at the Crown Court sitting at Craigavon on 4 March 2002 he was indicted, arraigned and convicted on the charge that on (2)9th day of October 1997, in the County Court Division of Craigavon, with intent to pervert the course of public justice did an act which had a tendency to pervert the course of public justice in that, when asked by a police officer about a telephone call made from a certain house on 27 April 1997 at 8.37 am, he gave false information to the police officer that he had made the telephone call, contrary to Common Law. The certificate also records that on 7 May 2002 it was ordered that the defendant be dealt with by six months imprisonment.

**The evidence in relation to the taxi**

[33] In her statement dated 29 October 1997 Andrea Jones asserted that she and Michael McKee were at the Atkinson's home on the night of 26-27 April 1997. In her subsequent statements she stated that this was false and that they had been at their own home. She also asserted in her deposition that Rodney Smith and Joy Kitchen were also at their home that night leaving in the early hours of Sunday morning in a taxi. The prosecution relied on evidence in relation to a telephone call to the taxi company and the records of the taxi company as supporting Andrea Jones' assertion

that she was at her own home that night in the company of Rodney Smith and Joy Kitchen.

[34] The statement of William Richard Cross which was admitted in evidence at the preliminary inquiry establishes that a telephone call was made from the landline of the McKee's home to the taxi company, Call-a-Cab at 0130 hours on Sunday 27 April 1997 lasting 39 seconds.

[35] Irene McKee was an employee of Call-a-Cab. Her statement also admitted in evidence at the preliminary inquiry was that she made an entry in the firm's records that a taxi was to collect someone called "Smith" from 107 Parkmore (which was the McKee's home) at 2.15 am on 27 April 1997 "to take them to town." The driver was Alf Annesley.

[36] In her deposition Andrea Jones stated that the persons at her home on the night of 26 April 1997 were Rodney Smith and Joy Kitchen. Rodney Smith when interviewed by police on 4 November 2000 could not recollect what he did over the weekend of 26 and 27 April 1997. He stated that it was possible that he was at the McKee's home that weekend and it was possible that he got a taxi.

**The District Judge's decision**

[37] The learned District Judge relying on the decision of the Divisional Court in *Public Prosecution Service's Application* [2014] NIQB 29 proceeded on the basis that in certain cases credibility can be material to the issue of whether the evidence in the committal proceedings is sufficient to put the accused on trial. On that basis the learned District Judge stated that the credibility of Andrea Jones was clearly material to his determination. He adopted the assessment of credibility as postulated in *McCook v Department of Regional Development for Northern Ireland* [2014] NIQB 80 and *Thornton v Northern Ireland Housing Executive* [2010] NIQB 4. The learned District Judge held at paragraph 10 that:

> "I found Ms Jones to be an entirely unreliable and utterly unconvincing witness. She was evasive, obstructive and untruthful peppering her evidence with inconsistencies and outlandish assertions of having no recollection of pivotal moments in her life. Her testimony in respect of key moments contradicted evidence of other Crown witnesses and material disclosed by the prosecution. She deployed the tactics of obfuscation and deflection liberally throughout her performance in the witness box. I came to the firm conclusion at the end of her evidence that I had been treated to a series of lies and half-truths from a witness who was unwilling or unable to provide the court with a truthful account in respect of any aspect of her life since 1997."

[38] The learned District Judge then set out at paragraph 12 what he considered to be the "most egregious" examples Andrea Jones' evidence, including:

a) She gave evidence that her first meeting with police in May 1997 was in a grave yard despite having no objection to meeting in the police station; Detective Inspector Irwin, however, was clear that "she had refused to come anywhere near the police station, scared for her life, scared for her property".

b) Her statement to Detective Inspector Irwin at their second meeting in October 1997 was completely at odds with what she had told him during their first meeting in the grave yard.

c) In September 2000, having first asked "nicely" for Mr McKee to commence divorce proceedings against her, she attempted to blackmail him into commencing divorce proceedings by threatening to tell Detective Inspector Irwin that he was involved in a theft.

d) She made a further statement to Detective Inspector Irwin in June 2000 resiling from her previous statements and attempting to give veracity by giving great detail of watching a particular boxing match on Sky TV on the evening of the murder; police investigations show Andrea Jones was never a Sky customer, nor did Sky or any other television channel broadcast a boxing match that night.

e) Her claim to have instructed solicitors in 2000 to commence divorce proceedings; but her inability to recall which firm she instructed, the grounds pleaded in the divorce and how the solicitor's fees were discharged, despite claiming to have detailed recollection of other preceding matters and despite being convicted of bigamy.

f) During a police interview regarding the threatening letter allegedly from a loyalist terrorist organisation she engaged in "wild speculation" by attempting to blame a solicitor for one of the defendants; in evidence she denied she ever did so despite the transcript of the interview clearly showing she had.

[39] In paragraph 13 of his judgment the learned District Judge further rejected Andrea Jones' evidence relating to, inter alia, her reasons for failing to attend court on 22 December 2003; her belief that her marriage to Michael McKee had been annulled; the circumstances regarding her marriage in 2001, her understanding of the immigration status of her husband and the reason for the non-attendance of her family at the wedding; her recollection of a conversation with police transporting her to the airport in 2002; issues relating to her prosecution for bigamy; and her explanation for the untruthful answers she had provided to the Court on previous occasions.

[40] The learned District Judge noted that he had to consider whether Andrea Jones' credibility was so undermined that the evidence before him was not sufficient to put the accused on trial. He recounted that the credibility of a witness is divisible, citing *R v Cairns, Zaidi and Chaudhary* [2003] 1 Cr App R 38, *R v Daniels* [2011] Cr App R 18 and *McCook v Department of Regional Development for Northern Ireland* [2014] NIQB 80, but concluded:

> "Following the reasoning in **Cairns** and **Daniels** the prosecution were perfectly entitled to call Ms Jones. They accept the difficulties with their witness but are, in simple terms, urging me to find a single island of truth in a vast ocean of lies. However, having had the opportunity over three days to assess her credibility I find myself in the wholly exceptional position of not being able to attribute any degree of credibility to any portion of her deposition. The fact that at the very end of her deposition she denied lying to council officials in Wrexham despite her conviction for a bigamous marriage by a registrar in Wrexham sums up neatly what the previous 179 pages disclosed - that the assessment of Ms Jones by Mr Morrisson in 2004 remains sound in 2014."

The learned District Judge found that the evidence was not sufficient to put any of the accused on trial and declined to return them to the Crown Court.

**Legal principles**

[41] The committal stage is a pre-trial screening procedure the purpose of which is to ensure that there is sufficient evidence to commit the accused to trial so that the question as to whether the accused is guilty or not guilty is determined at trial. The statutory test to be applied at committal is contained in Article 37(1) of the Magistrates' Courts (Northern Ireland) Order 1981 which provides:

> "Subject to this Order, and any other enactment relating to the summary trial of indictable offences, *where the court conducting the preliminary investigation is of opinion* after taking into account any statement of the accused and any evidence given by him or on his behalf *that the evidence is sufficient to put the accused upon trial by jury for any indictable offence it shall commit him for trial*; and, if it is not of that opinion, it shall, if he is in custody for no cause other than the offence which is the subject of the investigation, discharge him." (emphasis added)

[42] The Divisional Court in *Re Mackin's Application for Judicial Review* [2000] NIJB 78 considered the test for sufficiency of evidence. Carswell LCJ delivering the judgment of the court stated that the appropriate test is the clearly understood test which applies when a judge is considering an application for a direction at the close of the Crown Case. In that respect Carswell LCJ expressly approved the use at the committal stage of the formulation of Lord Parker CJ published in *Practice Note* [1962] 1 All ER 448 which includes the following statement:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) *when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.* Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer." (emphasis added).

The application, at the committal stage, of this formulation with its reference at (b) to the evidence adduced by the prosecution having been so discredited as a result of cross-examination or which is so manifestly unreliable, means that at committal there can be an assessment of the credibility of witnesses. However, the limited impact of an assessment of credibility at committal was emphasised by the Privy Council in *Brooks v DPP* [1994] 1 AC 568; [1994] 2 WLR 381. The judgment of the Privy Council was delivered by Lord Woolf who stated that:

> "Questions of credibility, except in the *clearest of cases*, *do not normally result* in a finding that there is no prima facie case. They are *usually* left to be determined at the trial." (emphasis added)

It can be seen that whilst credibility can be taken into account at committal ordinarily it will not result in a finding that there is insufficient evidence.

[43] As stated in *Mackin* the test for sufficiency of evidence at committal is the same as the test to be applied when a judge is considering an application for a direction at the close of the Crown Case. That test was not only set out in

Lord Parker CJ's *Practice Note* but was also set out in *R v Galbraith* [1981] 1 WLR 1039. In that case there were two schools of thought as to the proper approach to be adopted by the judge at the close of the prosecution case upon a submission of "no case." They were "(1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict" and "(2) *that he should do so only if there is no evidence upon which a jury properly directed could properly convict.*" (emphasis added). The Court of Appeal preferred the second school of thought stating that the judge should approach a submission of "no case" as follows

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, *taken at its highest*, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where however the prosecution evidence is such that its strength or weakness depends on *the view to be taken of a witness's reliability*, or other matters which are generally speaking within the province of the jury and *where on one possible view of the facts* there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury." (emphasis added)

The proper approach to be adopted by the judge at the close of the prosecution case upon a submission of "no case" was also considered in *R v Courtney* [2007] NICA 6 and *Chief Constable v Lo* [2006] NICA 3. The application of these principles mean that cases can be left to the jury with suitable directions even if "the witness is shown to have lied, to have made previous false complaints or to bear the defendant some grudge" see *R v Makanjuola* [1995] 1 W.L.R. 1348 [1995] 2 Cr. App. R. 469.

[44] In relation to the assessment of circumstantial evidence a particular approach to the evaluation of the evidence is required. That approach involves a requirement that all the evidence is taken into account. "In a case depending on circumstantial evidence, it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency

of individual elements by which it must be judged. A globalised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case" see paragraph [31] of *R v Courtney*.

[45] In relation to the assessment of a witness's credibility and reliability there is not an overall globalised approach as those qualities are divisible between different issues. Credibility and reliability is not a "seamless robe," see *R v G* [1998] Crim LR 483 (transcript 23 January 1998) so that a jury might take a different view as to the credibility or the reliability of a witnesses' evidence in relation to different issues, for which see also *R v H* [2016] NICA 41, *R v Fanning* [2016] EWCA Crim 550. In *R v Cairns and others* [2002] EWCA Crim 2838; [2003] 1 W.L.R. 796 the Court of Appeal held that "it is open to the prosecutor to form the view that part of a witness's evidence is capable of belief, even though the prosecutor does not rely on another part of his evidence, …" In *R v Daniels* [2010] EWCA (Crim) 2740; [2011] 1 Cr. App. R. 18 the Court of Appeal stated that if the prosecution considered core features of a defendant's evidence against his co-defendants to be capable of belief, it was entitled to put him forward as a witness even if he was not considered to be telling the whole truth about his own involvement. In *R v C* [2008] 1 WLR 966, [2007] EWCA Crim 2581, Sir Igor Judge, in giving the judgment of the court at paragraph 40 stated that:

> "The verdicts of a jury are not to be treated as inconsistent simply because the jury is sure about some parts of a complainant's evidence, but unable to be sure to the requisite standard about others. *Here the jury was sure about the reliability of the complainant's evidence, where it was provided with a measure of independent support, but unprepared to be sure where it was not.* This was an entirely rational approach, properly seeking to give the benefit of any doubt to the defendant. The verdicts are not logically inconsistent." (emphasis added)

We consider that whilst credibility and reliability have to be considered in relation to different allegations there remains the requirement of a globalised approach in relation to the evaluation of the individual allegations, so that all the evidence is taken into account in relation to each allegation, including as in *R v C* as to whether there is a measure of independent support.

[46] We consider that this is also the approach set out by Gillen J in *Thornton v NIHE* [2010] NIQB 4. In that case at paragraph [13] he stated that:

> "In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following:

a) The inherent probability or improbability of representations of fact;
b) The presence of independent evidence tending to corroborate or undermine any given statement of fact;
c) The presence of contemporaneous records;
d) The demeanour of witnesses e.g. does he equivocate in cross examination;
e) The frailty of the population at large in accurately recollecting and describing events in the distant past;
f) Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;
g) Does the witness have a motive for misleading the court;
h) Weigh up one witness against another."

Applying that approach there is a requirement for the court to consider all the factors in coming to an overall conclusion as to credibility and reliability in relation to each issue.

[47] At the committal stage, if evidence of the offence charged has been given, we consider that before the court could reach the conclusion that a defendant should not be returned for trial based on an assessment of the credibility and reliability of a witness the following principles should be applied:-

> "a) Credibility and reliability are usually left to be determined at trial (*Brooks v DPP*) being within the province of the jury (*Galbraith*).
>
> b) The exception to this is only in the *clearest of cases* (*Brooks v DPP*).
>
> c) In determining whether the case falls into the category of the *clearest of cases*;-
>
> > i) The prosecution evidence is taken at its height (*Galbraith*) by which we mean that both the primary facts and all inferences from those facts are taken at their height. It would be erroneous in law at committal to prefer an inference favourable to a defendant over an inference favourable to the prosecution;
> >
> > ii) Credibility and reliability are divisible so that those qualities have to be considered in relation to each of the allegations;

iii) When considering those qualities in relation to each of the allegations all the evidence is to be taken into account so that for instance the court must consider whether there is a measure of independent support (*R v C*), the presence of independent evidence tending to corroborate any given statement of fact (*Thornton v NIHE*), the presence of contemporaneous records (*Thornton v NIHE*), whether the evidence is tainted by a motive to mislead the court (*Thornton v NIHE*).

iv) The conclusion that a defendant should not be returned for trial should only be reached "where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict" see paragraph [14] of the judgment of Kerr LCJ delivering the judgment of the Divisional Court in *Chief Constable of the PSNI v Lo* [2006] NICA 3. In that case Kerr LCJ also stated at paragraph [11] that where there is evidence whose reliability fell to be assessed by the jury, it would not be right to stop the case, whatever view the judge had formed of it.

v) An alternative articulation is that the conclusion that a defendant should not be returned for trial should only occur *where there is no possible view of the facts* upon which a jury could properly come to the conclusion that the defendant is guilty (*Galbraith*). That emphasis upon *no possible view of the facts* is also the basis of the preferred second school of thought in *Galbraith* which is that there is *no evidence* upon which a jury properly directed could properly convict. It can be seen that the alternative articulations involve the use of the expressions such as "not conceivably," "no possible view of the facts" and "no evidence."

[48] A decision at committal *to return an accused for trial* is susceptible to judicial review where committal was based solely on inadmissible evidence or was based on evidence not reasonably capable of supporting it, see *R v. Bedwellty Justices, ex parte Williams* [1997] A.C. 225. In relation to both of those classes of cases it was stated that "the question will more appropriately be dealt with on a no case submission at the

close of the prosecution evidence, when the worth of that evidence can be better assessed by a judge who has heard it, or even on a pre-trial application grounded on abuse of process" with the result being that in "practice successful judicial review proceedings are likely to be rare in both classes of case, and especially rare in the second class." *Bedwellty* is also authority for the proposition that the "Queen's Bench Division of the High Court has normally in judicial review proceedings jurisdiction to quash a decision of an inferior court, tribunal or other statutory body for error of law" which proposition was applied in *Re Belfast City Council's Application* [2008] NI 277 where a sentence imposed by a magistrate was quashed on the basis of an error of law being obviously wrong in the sense that it fell clearly outside the broad area of the lower court's sentencing discretion.

[49] A decision at committal *not to return an accused for trial* can be subject to a judicial review challenge, (see *In the Matter of an Application by the Public Prosecution Service for Judicial Review* [2014] NIQB 29).

[50] We consider that it would be an error of law if the supporting evidence in relation to the core allegation of Andrea Jones was not considered at committal.

**Discussion**

[51] There clearly was evidence of a conspiracy given by Andrea Jones for which see the details of her deposition set out at paragraph [30]. On that basis this case does not fall within (a) of the formulation of Lord Parker CJ published in *Practice Note* (see paragraph [42] above) or in (1) of *Galbraith* (see paragraph [43] above).

[52] The decision not to return the defendants for trial was based on an assessment of the credibility and reliability of Andrea Jones within (b) of the formulation of Lord Parker CJ and within (2) of *Galbraith*.

[53] The assessment of the evidence of Andrea Jones was that the learned District Judge had been "treated to a series of lies and half-truths from a witness who was unwilling or unable to provide the court with a truthful account in respect of any aspect of her life since 1997." We consider that the reference "to any aspect of her life since 1997" was metaphorical rather than literal as there were aspects of her life since 1997 about which she had given truthful evidence. However, the general assessment of the learned District Judge was of an untruthful witness. There was no challenge to that general assessment in this court nor was there any challenge in this court to the various egregious examples given by the learned District Judge in paragraph [12] of his judgment.

[54] The issue for this court is whether in arriving at the decision not to return the defendants for trial the learned District Judge took into account the evidence supporting the central or core allegation of Andrea Jones so that despite that evidence he considered that in relation to the core allegation that there was insufficient evidence. In considering that issue we make due allowance for the proposition that just because a judge does not refer expressly to an item of evidence,

or just because he does not analyse the impact of that evidence it does not mean that he left it out of account. However, where evidence is not expressly referred to or is not expressly analysed the question remains to be addressed as to whether the supporting evidence was taken into account. This is particularly so in circumstances where, as here, we consider that the decision in relation to the credibility and reliability of Andrea Jones in relation to the core allegation, taking into account the supporting evidence, is not manifestly or obviously that the evidence was insufficient.

[55] The supporting evidence included the conviction of Andrea Jones and the conviction of Michael McKee. Mr O'Donoghue relied on Article 72 of the Police and Criminal Evidence (Northern Ireland) Order 1989 which Mr McGleenan agreed had the effect of being supportive evidence of false information having been given to the police by both Andrea Jones and Michael McKee. The only express reference to the convictions of Andrea Jones and Michael McKee are to be found in the "Background" section of the learned District Judge's judgment and are incorporated into his judgment by virtue of the fact that they were contained in the judgment of Morgan LCJ in the earlier judicial review application. They are not referred to in any other part of the judgment of the learned District Judge. There is no consideration of the impact of those convictions on the assessment of the reliability and credibility of the evidence of Andrea Jones in relation to the core allegation and in particular there is no assessment of the impact of the conviction of Michael McKee. Inferences are at this stage to be taken at their height in favour of the prosecution. In relation to the conviction of Andrea Jones there might be an inference or an explanation for that conviction given the background of the break-up of her marriage but absent an express acceptance of that explanation by her it would be inappropriate and an error of law at the committal stage to rely on such an inference to undermine or to explain away the support of her conviction to her core allegation. In relation to the independent supporting evidence of the conviction of Michael McKee we cannot discern any inference taken at its height in favour of the prosecution which explains why he pleaded guilty so as to undermine or explain away the support of his conviction to the core evidence of Andrea Jones.

[56] The independent supporting evidence in relation to the telephone call to the taxi company and the record of the taxi company are only referred to in the judgment of the learned District Judge by reference to the committal papers being augmented by two statements, one of which was the statement of William Richard Cross dated 18 August 2014. A reading of that statement discloses that it refers to both the telephone call to the taxi company from the McKee home and to the taxi company dispatching a taxi to the McKee home. However, these pieces of evidence are not referred to in any other part of the judgment and there is no consideration of the impact of that evidence on the assessment of the reliability and credibility of the evidence of Andrea Jones in relation to the core allegation.

[57] We consider that it was the conclusion of the learned District Judge that the evidence of Andrea Jones was so unreliable that it *alone* could not provide the basis

for a finding of sufficient evidence. However, her evidence in relation to the core allegation had to be considered in conjunction with other supporting evidence to determine whether given that support there was sufficient evidence to return the defendants for trial bearing in mind that insufficient evidence is that there is no possible view of the facts upon which a jury could properly come to the conclusion that a defendant is guilty. We have formed the view that the decision in relation to the credibility and reliability of Andrea Jones, given the supporting evidence does not manifestly or obviously lead to the conclusion that there is insufficient evidence and that given the fleeting references to that supporting evidence and the lack of any express analysis of it we consider that there was an error of law in that it was not taken into account when considering the sufficiency of the evidence of Andrea Jones in relation to the core or central allegation.

**Conclusion**

[58] We quash the decision dated 3 September 2014. We remit this case with a direction that the preliminary inquiry commence afresh before another judge who should feel free to make decisions on the basis of the evidence without regard to any conclusions previously reached.