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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Loughlin's (Jason) Application [2015] NIQB 33

IN THE MATTER OF AN APPLICATION BY JASON LOUGHLIN

FOR JUDICIAL REVIEW

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

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Before: Morgan LCJ, Weir J and Treacy J

MORGAN LCJ (delivering the judgment of the court)

[1] The Serious Organised Crime and Police Act 2005 (the "2005 Act") established a scheme for the reduction of the sentences of offenders who offered to assist in the investigation and prosecution of offending by others and the review of the sentences of those co-operating offenders in certain prescribed circumstances. The applicant, who was tried and acquitted in R v Haddock & Others [2012] NICC 5, seeks judicial review of the decision of a specified prosecutor by which the specified prosecutor ("the prosecutor") declined to refer the cases of Robert Stewart and Ian Stewart ("the Stewarts") back to the court which had sentenced them on 5 March 2010. Mr Scoffield QC and Mr Sayers appeared for the applicant, Mr McGleenan QC and Mr Coll QC appeared for the respondent and Mr Lyttle QC and Mr McGuinness appeared for the Stewarts. We are grateful to all counsel for their helpful written and oral submissions.

The statutory framework

[2] Section 73 of the 2005 Act provides for a reduction in sentence for a defendant who in specified circumstances has offered to provide assistance:

> "**73 Assistance by defendant: reduction in sentence**
>
> (1) This section applies if a defendant—
>
> (a) following a plea of guilty is either convicted of an offence in proceedings in the Crown Court or is committed to the Crown Court for sentence, and
>
> (b) has, pursuant to a written agreement made with a specified prosecutor, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence.
>
> (2) In determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered.
>
> (3) If the court passes a sentence which is less than it would have passed but for the assistance given or offered, it must state in open court—
>
> (a) that it has passed a lesser sentence than it would otherwise have passed, and
>
> (b) what the greater sentence would have been…."

It is an indication of the advantage which a defendant may gain from these provisions that section 73(5) of the 2005 Act enables the court to apply the reduction in sentence even when to do so would reduce the resulting sentence below the minimum term otherwise prescribed by law.

[3] Section 74 of the 2005 Act provides for the review of a sentence which has already been imposed. One of the ways in which this can arise is when a defendant who has received a discount thereafter knowingly fails to give assistance in accordance with the agreement (section 74 (2)(a)):

> **"74 Assistance by defendant: review of sentence**
>
> (1) This section applies if—

(a) the Crown Court has passed a sentence on a person in respect of an offence, and

(b) the person falls within subsection (2)

(2) A person falls within this subsection if—

(a) he receives a discounted sentence in consequence of his having offered in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence but he knowingly fails to any extent to give assistance in accordance with the agreement…

(3) A specified prosecutor may at any time refer the case back to the court by which the sentence was passed if—

(a) the person is still serving his sentence, and

(b) the specified prosecutor thinks it is in the interests of justice to do so.

(4) A case so referred must, if possible, be heard by the judge who passed the sentence to which the referral relates.

(5) If the court is satisfied that a person who falls within subsection (2)(a) knowingly failed to give the assistance it may substitute for the sentence to which the referral relates such greater sentence (not exceeding that which it would have passed but for the agreement to give assistance) as it thinks appropriate…."

Background

[4] On 4 August 2008 the Stewarts unexpectedly approached police at Antrim PSNI station. Both admitted a role in the murder of Tommy English on 31 October 2000 and named other persons whom they said had been involved. Each expressed a wish to become an assisting offender under the 2005 Act. A scoping exercise was conducted by the PSNI on behalf of the Historic Enquiries Team ("HET") which made recommendations to the PPS as to the suitability of the Stewarts for a 2005 Act agreement. The Stewarts each entered into an assisting offender agreement ("the

Agreements") with a prosecutor pursuant to Section 73 of the 2005 Act on 15 October 2008.

[5] Under the Agreements the Stewarts agreed to "assist the investigator in relation to the investigation being conducted by Police Service of Northern Ireland into offences relating to the murder of Thomas English on 31 October 2000 and … other offences connected and unconnected with [that] incident". The Agreements provided that that assistance would include:

(a) participation in a debriefing process;

(b) provision of all information available to the Stewarts and provision of a truthful account of the existence and activities of all others involved; and

(c) pleading guilty to the offences the Stewarts admitted.

The Agreements also required the Stewarts to maintain continuous and complete co-operation throughout the investigation and any consequent court proceedings and to give truthful evidence in any court proceedings arising from the investigation. The Agreements stated that failure to comply with their terms could result in any sentence the Stewarts might receive being referred back to the court for review pursuant to section 74 of the 2005 Act.

[6] Subsequent to the Agreements the Stewarts were each interviewed on more than 320 occasions. The interviews touched on the murder of Mr English but also dealt with other offences connected and unconnected to that incident. In accordance with the Agreements each pleaded guilty on 12 February 2010 to such of the offences admitted by them which the PPS deemed met the test for prosecution including in each case the murder of Mr English.

[7] A report dated 24 February 2010, prepared by the lead senior investigating officer of the HET, was provided to the trial judge prior to sentencing. On 5 March 2010 the sentencing court identified a tariff starting point of 22 years. Taking account of their assistance under the Agreements, the court applied a 75% reduction to the starting point, taking the tariff down to 5½ years. Further reductions were then made in light of their guilty pleas and personal circumstances. The practical effect was that both were required to serve a minimum term of 3 years' imprisonment before they could be considered for release on licence *(*see R v Robert John Stewart and David Ian Stewart [2010] NICC 8).

[8] Each of the Stewarts gave evidence at the trial. Robert was in the witness box for 26 days and Ian for 30 days. There were 37 counts. An application for a direction was granted in respect of two counts but refused in respect of the remainder. The learned trial judge convicted one defendant on counts 7 and 8 of possession of an

item for terrorist purposes, namely a sledgehammer, and doing an act with intent to pervert the course of justice. Neither of those convictions depended on the evidence of the Stewarts. In respect of the remaining counts the charges were dismissed. The learned trial judge summed up his assessment of the Stewarts in the following passages:

> "[532] I recognise that some of the evidence of the Stewart brothers may well be true in some or even large measure. However so flawed is much of their evidence that I have not been able to exclude the real possibility that it was false in its implication of one or more of the accused. In summary these are dishonest witnesses of very bad character who have lied to the police and to the court, on some occasions wrongly implicated a number of men who were clearly not present at the crimes suggested, on other occasions at worst falsely embellished or at best wildly confused the roles and words of those whom they alleged were present, have clear difficulties distinguishing one crime scene from another, have obviously colluded to produce certain parts of their testimony and have given evidence which is flatly contradicted by unchallenged independent evidence throughout the process.
>
> [533] Weighing up all these factors I have come to the conclusion that the evidence of the Stewart brothers, on which the core of the prosecution case rests, is so unreliable on the English murder, the Mr X incident and UVF membership that any supportive or additional evidence relied on by the prosecution evidence, is insufficient to satisfy me beyond a reasonable doubt as to the guilt of any of the accused on any of the remaining counts.
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> ...
>
> [544] There is no doubt that initially the implausibility of these witnesses coming to a police station to invent an account about Haddock seemed compelling. However the strength of that point crumbled considerably under the weight of doubt cast on the motivation of the Stewart brothers for coming forward and the sheer unreliability of their assertions when subjected to forensic scrutiny."

The prosecutor's approach

[9] In light of the judgment the prosecutor considered whether to refer the case back to the court. She set out the reasons for her decision not to refer the Stewarts in a 262 paragraph document dated 15 April 2013 in which certain portions of privileged material were redacted. At paragraph 18 of her decision she described the issue she had to address in the following terms:

> ".. Whether DIS and RJS knowingly failed to comply with the terms of their respective agreements and, if they did, whether the interests of justice required their discounted sentences to be referred back to the Crown Court for review pursuant to section 74 (5) of the 2005 Act."

[10] She considered the terms of section 74 of the 2005 Act and correctly concluded that there had to be a knowing failure to comply with the Agreements and that there was no materiality test. She then redefined the issue at paragraph 31 as whether either Stewart "breached his agreement by knowingly failing to any extent to give assistance in accordance with his agreement in relation to his evidence at the trial of Haddock and Others; or, whether having regard to what transpired at trial, it can now be determined that they knowingly failed to give assistance at any earlier stage of the process."

[11] In considering the interests of justice she made the following comments:

(i) There are different types of lie. If a lie implicated an innocent person in the commission of a crime, that would be the most serious type of lie and the interests of justice would almost invariably require a section 74(3) referral in those circumstances.

(ii) Where a lie did not put an innocent person at risk of prosecution or was not material in the context of the proceedings it would not necessarily follow that the interests of justice required a referral.

(iii) In determining whether a referral was in the interests of justice one consideration was whether there was a reasonable prospect that any part of the discounted sentence would be substituted.

(iv) Whilst a conviction for perjury would be helpful it was not necessary and reliance might be placed on the trial judge's findings although these would be relevant only in so far as they related to the precise terms of the written agreements.

At paragraph 44 of her decision she concluded that any knowing failure would have to be established beyond reasonable doubt and in respect of such failures that she would consider whether the interests of justice required that she referred the case back to the sentencing court for review.

[12] In the next part of her decision the prosecutor examined whether the available evidence provided a reasonable prospect of establishing beyond reasonable doubt that the Stewarts knowingly failed to provide the assistance required by the Agreements. She examined first the direction ruling made on 12 January 2012. Gillen J gave a direction on counts 12 and 17 alleging wounding with intent in respect of attacks on Caskey and Webster.

[13] In respect of the Caskey incident the learned trial judge stated at paragraph 22 of his direction ruling that he was making no finding on the overall credibility of Robert Stewart on that charge or others. That was to be contrasted with Caskey who had asserted that the original account given by him was untrue. The learned trial judge found that he could not place any weight on that witness's evidence. The judge concluded that the passage of time had affected Stewart's memory to such an extent that he could not place any or sufficient weight on his account. At paragraph 25 the judge stated that the passage of time and the number of incidents in which he had been involved had flawed and confused Robert Stewart's recollection of individual circumstances. At paragraph 26 the judge indicated that his concern was that Stewart had elided the various crimes in that area and unwittingly become confused about the differing events and personnel involved in each incident. The prosecutor considered that this material was insufficient to establish a knowing breach of the agreement.

[14] The Webster incident involved a charge of wounding with intent. Both Stewarts gave evidence about the incident and the learned trial judge repeated his concern about the passage of time and scope for confusion given the number of similar incidents. Both Stewarts indicated that a man called Bond was one of the five people who drew up in the car and participated in the assault. Prison records indicated that Bond was in prison at the relevant time. Robert indicated that he could have confused Bond with someone else whereas Ian was adamant that Bond was there. The learned trial judge accepted that Ian believed that Bond was present rather than that he was deliberately trying to falsely implicate Bond. The prosecution suspected that the prison records were not accurate and also had a statement, which was excluded from evidence in the trial, from Michael Webster indicating Bond as being one of his attackers. The prosecutor considered that the evidence was insufficient to establish that either Robert or Ian was in breach of the Agreements.

[15] The judge raised further issues in relation to the Webster incident. He noted that Ian erroneously identified some of those present and his account of the nature of the assault was not supported by the police or medical evidence. The judge considered, however, that this was yet another aspect of the case where memory was

false or so distorted that it fundamentally challenged the reliability of the whole recollection. He also found aspects of Robert's evidence about those involved and the role that each of them played unsatisfactory. The prosecutor considered that these failings could, again, be attributed to false or distorted memories arising from genuine error so that the evidence was insufficient to establish that either Stewart was in breach of his Agreement.

[16] The prosecutor then turned to the trial judgment. She noted those passages of the judgment where the learned trial judge recognised that in a case involving so many incidents stretching over a period of years memory was likely to be affected, particularly since many of the incidents had the same character. Secondly, the learned trial judge heard evidence that each of the Stewarts had a history of prolonged alcohol and drug abuse which had induced chaos, confusion and memory defects. Thirdly, each was a person of bad character. Fourthly, it was common case that prior to entering into the Agreements each had lied or failed to disclose the entire truth about some of the incidents in which they had been involved. All of those factors were, of course, material to the learned trial judge's conclusions on the reliability of the Stewarts.

[17] The learned trial judge also made specific findings that each of the Stewarts had lied on a number of occasions. The prosecutor examined each of these assertions and concluded in the case of Ian Stewart that there were five pieces of evidence which constituted a breach of his Agreement. The first related to what was described as the Hinds/McCrum incident. The Stewarts said that their role in the English murder was to hijack the taxi which was to be used by the perpetrator. After the murder they said that they made their way to the house of a man called Hinds and that McCrum got them fresh clothes and burned the clothes they were wearing. Ian Stewart claimed in evidence that McCrum had pointed out to him where the clothes had been burnt. The prosecutor concluded that the allegation that McCrum had pointed out the location to him was a lie and the giving of the evidence was a breach of the Agreement.

[18] Secondly, in 1995 Ian Stewart alleged that he had been the victim of a robbery at his employer's premises and subsequently maintained that he developed post-traumatic stress disorder as a result of which he claimed sickness benefit. In the course of his debriefing he accepted that the story about the robbery was untrue. He was seen by Dr Bownes in February 2011 and repeated the lie. In his evidence he denied that he had lied to Dr Bownes and said that he simply did not know why he had said what he said to him. The prosecutor was satisfied that he had lied in his evidence and that this was a breach of the Agreement.

[19] Thirdly, the trial judge was satisfied that at the time when the approach to police was made Ian Stewart thought that he was going to be killed. He denied that fear played any part in his actions and claimed that they were motivated solely by

conscience. The prosecutor was satisfied that his denial of his approach to police being related to his fear of being killed was a lie.

[20] Fourthly, the trial judge was satisfied that Ian Stewart was aware of an Irish News article on 31 July 2008 which stated that the HET was carrying out a substantial investigation into paramilitary activity with additional government funding. The Stewarts then conducted interviews with Constables Perry and Creighton on 5/6 August 2008 in which SOCPA and sentence reduction was discussed. Ian Stewart denied recollection of the article or the interviews. The prosecutor agreed with the trial judge that he must have thought that his credibility would be better served by withholding the details of how and why he had decided to enter the process. His evidence on this was untrue.

[21] Finally, in relation to the Hinds/McCrum incident Ian Stewart asserted that his original account concealing the involvement of Hinds and McCrum had been a mistake. The prosecutor accepted the view of the learned trial judge that this was a lie. She concluded that he may have been afraid to admit his initial lie to police in case it was a breach of his Agreement but in any event she accepted that his evidence about this constituted a breach.

[22] In respect of Robert Stewart the prosecutor similarly examined the trial judge's judgment. She concluded that there were two breaches of the Agreement. In a police interview on 5 August 2008 Robert Stewart described a conversation between Haddock, his brother and himself in which Haddock had asked for a volunteer to conduct the shooting and he and his brother expressed their unwillingness to be involved. In his evidence Robert Stewart said that he had not made up the conversation but he was so nervous in the original HET interview that he must have thought that this had happened. The learned trial judge concluded that this was a deliberate and creative embellishment to promote his role as a minor player forced to act against his own inclinations while elevating Haddock to the role of the key player. It was a plain lie. The prosecutor concluded that the original lie occurred before entering into the Agreement but that the explanation for the lie in evidence was a breach of the Agreement.

[23] The second breach concerned his motivation. Like his brother he claimed in evidence that he no longer recalled the detail or thrust of the Irish News article on 31 July 2008 and the SOCPA and sentence reduction discussions with police on 5 August 2008. The prosecutor was satisfied that this was also a breach of his Agreement.

The prosecutor's conclusion

[24] The prosecutor first examined the materiality of Ian Stewart's lies. She considered it significant that the lies did not attribute criminal conduct to any innocent person and did not allege against any other person any new criminal

conduct. In relation to the first lie concerning McCrum identifying where he burned the clothes she accepted that this had the potential to lend weight to the case against McCrum by adding an element of corroborative detail. In respect of his denial of lies to Dr Bownes she accepted that this harmed his credibility but noted that he had been honest about his role in the bogus robbery to police and in evidence.

[25] She accepted that the learned trial judge had considered the motivation of the Stewarts to be an important matter affecting their credibility. She accepted that his denial that the fear of being killed was a material reason for his approach to police and his further denial of knowledge of the Irish News article and the discussion about sentence reduction were self-serving lies that undermined the witness's credibility and therefore had the potential to weaken the prosecution case. Finally she recognised that Ian Stewart's account that he had been mistaken about the involvement of Hinds and McCrum was another self-serving lie which she considered may have been influenced by his reluctance to admit that he had lied at an early stage. She noted that he had previously admitted that his initial account to police was false and she considered this to be the least material of the breaches.

[26] The prosecutor then looked at the cumulative significance of the breaches and noted that they had to be seen in the context of the pre-agreement lies which also troubled the judge. In addition to that there were significant issues in relation to previous bad character, abuse of alcohol and drugs, contamination, difficulties with memory and tendency to confusion in respect of different incidents. She did not consider it possible to conclude that the breaches were in any way determinative of the outcome of the trial and expressed the view that they represented a small proportion of the many difficulties with Ian Stewart's evidence. She also noted that the learned trial judge had refused the direction application.

[27] There were a number of other factors identified by the prosecutor as material to the interests of justice. The first was the nature and extent of the assistance actually provided by Ian Stewart. Like his brother he was interviewed on more than 320 occasions. He gave evidence for 30 days. The prosecutor considered that he had given very significant assistance.

[28] Secondly, since she considered that any return to prison as a result of breaches of the agreement was likely to be for a relatively short period, she took the view that it was less likely that the court would exercise its discretion to return Ian Stewart to prison when he had been released from custody more than 18 months earlier. Thirdly, she noted a report from Dr Andrew Collins, chartered psychologist and systemic psychotherapist, provided by the PSNI and dated 20 September 2012 which indicated that Ian Stewart was diagnosed with bipolar disorder, post-traumatic stress disorder and obsessive-compulsive disorder and had attempted suicide on a number of occasions. She considered that the medical evidence strongly indicated that a return to prison would significantly impact upon Ian Stewart's

mental and physical health and create a risk to life. She accepted, however, that this would not necessarily result in any referral being contrary to the interests of justice.

[29] Fourthly, she recognised the potential damage to public confidence in the justice system if a referral was not made bearing in mind the importance attached to the proper sentencing of criminals. She considered, however, that since the particular breaches had not resulted in the acquittals and that the prospects of a successful referral were low public confidence was unlikely to be improved by an unsuccessful application to refer.

[30] The last issue considered was the prospect of a successful application before the reviewing court. She noted that section 74 (5) of the 2005 Act gave the court a discretion to substitute any greater sentence it thought appropriate. She noted that there was no legal authority or guidance as to the approach the reviewing court should take in the exercise of its discretion. She considered, however, that it was likely that the court would take into account the matters considered by her. She further considered that if the court took a similar view of the relevance and weight of the interests of justice considerations upon which her decision was based it was unlikely to exercise its discretion to substitute part of the discounted sentence. She concluded "that the prospects of a successful application in respect of [Ian Stewart] are low". Her overall conclusion, having considered the matter in the round, was "that it is not in the interests of justice to refer the discounted sentence of [Ian Stewart] back to the Crown Court for review".

[31] In respect of Robert Stewart the prosecutor concluded that neither of the lies found in respect of him placed anyone in jeopardy. She considered that the cumulative effect of the two lies in the context of the many difficulties which the trial judge encountered with Robert's evidence made the materiality of the lies even less in his case.

[32] In considering the interests of justice she noted that Robert had given evidence for a total of 26 days and had similarly been interviewed on more than 320 occasions. She asserted that he had co-operated with the process until the very end. She noted that a medical report from Dr Collins indicated that Robert's psychological well-being significantly deteriorated following the post-trial verdict. Dr Collins considered that if returned to prison Robert's PTSD symptoms would increase and his mental health would deteriorate. Dr Collins considered that one could not rule out self-harm although there was no reported history of such conduct. He considered that the impact of a return to prison would be significant and result in a chronic deterioration in his mental health.

[33] The prosecutor concluded that the link between the breach and the acquittals was arguably even more remote in Robert's case. She considered that the medical evidence provided a stronger basis for not referring in the case of Ian but taking everything into account she considered that a successful application in respect of

Robert was lower. She concluded that it was not in the interests of justice to refer the discounted sentence of Robert back to the Crown Court for review.

The submissions of the parties

[34] Mr Scoffield submitted that the task for the special prosecutor was to decide whether the sentencing court should be asked to revisit the matter. It was submitted that the room for the exercise of discretion was limited. In particular at paragraph 30 of R v P and Blackburn [2007] EWCA Crim 2290 the English Court of Appeal addressed the approach where the review arose from the defendant's failure or refusal to provide assistance in accordance with the written agreement. In that case the court doubted whether, save exceptionally, it would be right for the sentence which would have been imposed but for the assistance given or offered to be reduced. Both Stewarts lied on matters which the learned trial judge considered important in assessing their credibility. These were serious breaches and it was irrational to conclude that it was not in the interests of justice that the court should be asked to revisit the sentence.

[35] Secondly, in a press release issued by the Public Prosecution Service on 11 June 2013 it was confirmed that neither Stewart would be referred back to the sentencing court. The press release quoted from the prosecutor's decision saying that she had concluded "that the interests of justice do not require either of the Stewarts to be referred". The applicant contended that this disclosed the application of the wrong test. There was no provision that a sentence should be sent back only where it was required in the interests of justice. The test was wider and included referral back where it was desirable to do so. In a replying affidavit the prosecutor indicated at paragraph 22 that she had not applied a test of necessity. She accepted that on occasions the language used was whether the interests of justice required referral but said that this was a phraseology regularly used in the context of the exercise of her prosecutorial functions. The applicant contended that little weight should be given to this affidavit as it came after the challenge was initiated and effectively constituted an amendment of the basis of the decision (see Re Hinton's Application [2003] NIQB 7).

[36] Thirdly, the prosecutor considered the prospects of a successful application. She gave weight to whether or not the sentence would be altered. It was submitted that she erred because she should have been considering whether it was in the interests of justice that the court should look at the sentence having regard to the change of circumstances. A determination by the court that the sentence should not be altered is not a failure. It should provide reassurance to the public. Alternatively, she conflated her task as specified prosecutor, which was the decision whether or not to refer, with that of the court which, on a referral, could review the original sentencing decision.

[37] Fourthly, in both cases the prosecutor took into account the nature and extent of the assistance actually provided by the offenders. It was submitted that this amounted to double counting because the offenders had already been given credit for this in the sentence and should not be entitled to use it again for the purpose of preventing referral back.

[38] Next, it was submitted that by virtue of section 74(2)(a) of the 2005 Act a person became liable to be considered for referral if there was a failure to any extent to give assistance in accordance with the Agreement. There was no materiality threshold. It was submitted, therefore, that the prosecutor could not under section 74(3) of the said Act introduce an analysis of materiality in determining whether or not to refer back. In any event Gillen J had stated at paragraph 292 of his judgment that the lies of the Stewarts had created an insuperable impediment in assessing their credibility on all the charges. In those circumstances a materiality threshold was in any event crossed. At paragraphs 33 and 243 of her decision the prosecutor appeared to suggest that it was only where there was an attribution of criminal conduct to others that materiality arose.

[39] In respect of both offenders the prosecutor concluded that weight should be given to the passage of time since the date of the original sentence and the fact that both Stewarts had been released from custody on licence for approximately 18 months at the time of the decision. It was submitted that this was not a relevant consideration. By virtue of section 74(3)(a) of the 2005 Act a case could not be referred back unless the person was still serving his sentence. It was accepted that since both Stewarts were given life sentences that condition was fulfilled. The fact that they had been released on licence was not material.

[40] We allowed the applicant to amend the Order 53 Statement to add a ground contending that the prosecutor erred in only reviewing the findings of the learned trial judge. It was submitted that it was for the PPS to ensure compliance with the Agreements. This involved a wider consideration than simply looking at the judgment which was an impermissible shortcut. The proper exercise of the statutory powers required the prosecutor to properly inform herself and that required a wider analysis of the debriefing notes and other intelligence to ascertain the full extent of the breaches.

[41] Mr McGleenan submitted that the discretion available to the prosecutor under section 74(3)(b) was wide and unconstrained by any specific factors. It would have been open to her to examine the decision in the context of whether referral was required in the interests of justice. The reason the prosecutor was allocated this task by the statute was because she would have knowledge of the scoping interviews and the terms of the Agreement. The trial judge was not looking at the case against that factual matrix. In particular, the prosecutor had access to intelligence material and evidence excluded for one reason or another from the trial.

[42] The respondent submitted that the duty of enquiry applied only in relation to common law duties and did not apply in relation to this statutory scheme. Even if it did apply it was for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken, subject to Wednesbury review (see R(Khatun) v Newham LBC [2004] EWCA Civ 55). The use of the judgment as a key reference point was a reasonable approach which was well within the area of discretionary judgment available under the statutory scheme.

[43] This was a prosecutorial decision which required consideration of matters of policy and public interest. As with other prosecutorial decisions it was polycentric in character. The statute did not impose any constraint on the width of the specified prosecutor's discretion. It is well established that the decision to prosecute will only be susceptible to judicial review where dishonesty, *mala fides* or other exceptional circumstance is alleged (see ex p Kebilene [2000] 2 AC 326). This decision is of the same character and should attract the same approach. It was submitted that there was substantial compliance with the Agreements here. If any deviation were to lead to a referral, that would affect the likelihood of assistance from offenders.

[44] In his analysis when dealing with the direction application the learned trial judge identified difficulties of memory in relation to the evidence which he did not accept. If the failure was one of memory it could not be established beyond reasonable doubt that it was a lie. In relation to her conclusion about the presence or otherwise of Bond the prosecutor had additional information in the form of Webster's excluded statement and intelligence material. The prosecutor was entitled to conclude that there was nothing in the direction application which required examination of the Stewarts' compliance with the Agreements.

[45] In his decision the learned trial judge recognised the difficulties arising from faulty memory and the potential confusion of similar incidents. He relied upon certain lies in evidence, as identified by the prosecutor, and others which for the reasons given she rejected. He also, of course, was entitled to look at the credibility of the Stewarts taking into account lies told prior to their entering into the Agreements. His conclusions about the credibility of the Stewarts and the impact of lies on the outcome necessarily required him to take into account many matters beyond the breaches of the Agreements.

[46] The respondent submitted that the thrust of the analysis carried out by the prosecutor was that any breaches were not material. There were a very small number of definite post agreement lies which contributed to the undermining of the credibility of the Stewarts. There was no challenge by the applicant to the analysis of the evidence carried out by the prosecutor and the court should not engage in intense scrutiny of her decisions in the absence of such a challenge.

[47] For the Stewarts Mr Lyttle adopted the argument of the respondent but raised two further issues. The first was the issue of delay. This had not been referred to in

the skeleton argument and was raised for the first time on the last day of hearing. The press release containing the decision was issued 11 June 2013. The pre-action protocol letter to the PPS was sent on 9 August 2013. There was a holding reply on 13 August 2013. A response to the pre-action protocol letter was received on 12 September 2013 which was a day after the three-month period referred to in Order 53 Rule 4 of the RCJ had expired.

[48] In the absence of a response the applicant applied for legal aid funding on 6 September 2013 and that was determined on 20 September 2013. The application was drafted and lodged on 27 September 2013. The notice party complained that there was no explanation of the delay during the period 11 June 2013 to 9 August 2013 but in fairness to the applicant no issue about delay had been taken by anyone prior to the last day of hearing. Mr Scoffield indicated from the Bar that instructions had been received by the solicitor on 28 June 2013 but, with the intervention of the holiday period and the time taken to prepare the pre-action protocol letter, it was not possible to send it earlier than 9 August 2013. In those circumstances we consider that the applicant had taken all reasonable steps to initiate these proceedings at an early stage and that there is, therefore, good reason for extending the period within which the application was made.

[49] The second additional issue raised by the notice party was the question of standing. Section 18 (4) of the Judicature (Northern Ireland) Act 1978 provides that an applicant for judicial review must have a sufficient interest in the matter to which the application relates. This requirement is then carried through into Order 53 Rule 3(5) of the RCJ. In his grounding affidavit the applicant indicated that he was acquitted by Gillen J of a number of alleged offences, including murder, having been prosecuted in reliance on the evidence of the Stewarts. At paragraph 8 of his grounding affidavit he indicated that he considered it wrong that they received exceptionally discounted sentences on a basis that had now been undermined because they had been found to be liars.

[50] The notice party submitted that although those who have been victims of the crimes committed by the Stewarts or their personal representatives were clearly persons who had a sufficient interest to challenge the decision not to refer the sentences, the interest of the applicant was no different from that of any other member of the general public.

[51] The leading decision on the approach to standing in this jurisdiction is Re D's Application [2003] NICA 14. Carswell LCJ suggested that standing is a relative concept to be deployed according to the potency of the public interest content of the case so that the greater the amount of public importance involved the more ready the court may be to hold that the applicant had the necessary standing. That is the approach also advocated by Lord Reed in Axa General Insurance Ltd and others v The Lord Advocate and Others [2011] UKSC 46 where he said that the type of

interest which is relevant and therefore required in order to have standing will depend upon the particular context.

[52] The context of this case is the issue of whether the significant discount in sentence received by the Stewarts should be referred back to the court for review. The discount was given because of the Stewarts' agreement to give evidence in a prosecution against, *inter alia*, the applicant. One of the allegations against the applicant was that he along with others was involved in the murder of Mr English and was wearing a balaclava in preparation for his participation in it. The learned trial judge suggested that the account about the balaclava was the product of imagination.

[53] We accept that the interest of the applicant is different from that of people who have been victims of the crimes committed by the Stewarts but, having regard to the context of this case and the direct involvement of the applicant as a defendant, we consider that he has demonstrated an interest sufficient to entitle him to pursue this application.

Consideration

[54] The leading authority on the interpretation of the 2005 Act is R v P and Blackburn [2007] EWCA Crim 2290. The court recognised at paragraph 22 that there was a long-standing and entirely pragmatic convention by which criminals received lower sentences than they otherwise deserved because they had informed on or given evidence against those who had participated in the same or other crimes. The review arrangements in the 2005 Act replaced the post sentence assistance which was formerly left to the Home Office or Parole Board. The arrangements under section 74 of the 2005 Act provided an important safeguard against dishonest manipulation of the process by the defendant.

[55] At paragraph 30 the court considered the approach that should be taken where the review arose from the defendant's failure or refusal to provide assistance in accordance with the agreement and concluded that, save exceptionally, it doubted that it would be right for the sentence indicated but for the assistance given or offered to be subject to any reduction. We agree that this is appropriate in cases where a defendant has reneged in relation to the offer of future co-operation or where there is dishonest manipulation of the process by the defendant. We recognise, however, that a defendant falls within section 74 (2) (a) of the 2005 Act where he knowingly fails to any extent to give assistance in accordance with the agreement. We accept, therefore, that there can be cases where the extent to which the defendant failed to assist can be taken into account in determining the appropriate sentence although in those cases the court will need to carefully assess the issue of dishonest manipulation.

[56] At paragraph 33 the court indicated that a review under section 74 is a fresh process which takes place in new circumstances. We consider that this analysis is helpful in understanding how the prosecutor should approach the interests of justice test in section 74 (3) (b) of the 2005 Act. If the prosecutor concludes that the failure to give assistance is such that the court could not conclude that the circumstances had altered as a result, the interests of justice would rarely require referral. If, as is generally likely to be the case where there has been a failure or refusal to provide assistance, the court could take the view that the circumstances had changed, the interests of justice would point towards a referral unless there were countervailing considerations. It is with those principles in mind that we examine the approach of the prosecutor in this case.

[57] The starting point, therefore, is to establish the circumstances as identified by the learned trial judge when he passed sentence on the Stewarts on 5 March 2010. At paragraph 19 of his judgment Hart J noted that the Stewarts had admitted their part in a very large number of offences, many of a very serious nature. He noted the investigations continuing into the murder of Thomas English and the attacks on Caskey and Webster. He stated that the prosecution regarded the assistance provided by the Stewarts as evidence which would greatly assist in those investigations and any prosecutions flowing from them. At paragraph 20 of his judgment he considered that the extent of the assistance which they had given to the police and had at that time undertaken to give by way of evidence was such that there should be a very substantial reduction in the sentence which they would otherwise have received. He accordingly reduced the minimum term by 75% to represent that assistance. It is common case that this represents a discount at the very top end of the range. It is relevant to note that in this case the assistance comprised past co-operation by way of debriefing and pleas of guilty to offences, including offences where the police had no reason to suspect the involvement of the Stewarts, and an undertaking to provide future assistance comprising, principally, truthful evidence.

[58] The applicant submitted that the task facing the prosecutor in light of the outcome of the Haddock trial was the conduct of an investigation which was sufficiently rigorous to ensure that it would ascertain any breaches by the Stewarts of the Agreements. In particular, it was submitted that it was insufficient to review the judgment for the purpose of analysing those lies found by the learned trial judge and determining whether each constituted a breach of the Agreements. In support of that submission it was pointed out that the learned trial judge indicated at paragraph 45 of the Haddock judgment that he could not hope to rehearse every piece of evidence which was given during the many weeks of the trial. He did, however, indicate that he must attempt to deal with the salient themes and submissions.

[59] All of the debriefing material was made available to those involved in the trial through disclosure. It is clear from the judgment that it was extensively used in

cross-examination of the Stewarts. It is common case that the judge had many criticisms of their evidence as a result of memory lapses, drug and alcohol abuse and bad character. He did, however, engage in a careful review of those matters which he concluded were lies by the Stewarts between paragraphs 292 and 333 of his judgment. He then carried out a detailed assessment of the circumstances in which the Stewarts became prosecution witnesses between paragraphs 334 and 378, focusing in particular on their motivation.

[60] We accept that the task of the prosecutor was to identify from the available material any breaches of the Agreements. We consider, however, that there was a degree of discretionary judgment available to the prosecutor as to how she should approach that task. If authority is needed for the proposition it can be found in R(Khatun) v Newham LBC [2004] EWCA Civ 55. The judgments in Haddock were a careful analysis of the manner in which the Stewarts had given their evidence by reference to, among other things, the debriefing material. Any false statements to police which impinged on their credibility were likely to have been exposed in the trial process. The extent and range of the judgment showed the detailed analysis carried out by the trial judge. In those circumstances the decision by the prosecutor to conduct an investigation by reference to the terms of the judgments in the Haddock case was well within the boundary of the range of approaches that she could have adopted.

[61] Mr McGleenan submitted that section 74(3)(b) of the 2005 Act gave the prosecutor a wide discretion as to the course she should take. He characterised the decision as a prosecutorial judgment which should be only open to review on the basis of dishonesty, *mala fides* or other exceptional circumstance. Although the prosecutor specifically denied that she had applied a test of necessity, he submitted that she would in any event have been entitled to do so.

[62] We do not accept those submissions. We recognise that determining whether or not to institute a criminal prosecution is often polycentric, engaging different aspects of the public interest. Where, however, a decision has been made to prosecute and a conviction obtained, the prosecutor's role is to fairly present the circumstances so as to enable the court to come to a conclusion as to the correct sentence. The determination of the appropriate sentence by the court is an important constitutional principle and secures the confidence of the public in the administration of the criminal justice system. In our view it could not be undermined by statute other than by the clearest words.

[63] We do not consider that the discretion available under section 74(3)(b) undermines that principle. As we have indicated at paragraph 55 above, the first task of the prosecutor is to determine whether the court could conclude that the circumstances had changed. That is a decision which is plainly reviewable on a traditional basis by the court. There was no challenge to the assessment by the prosecutor of the issues raised in the judgment. The material relied upon by the

prosecutor is, therefore, also available to the court which accordingly is well placed to make a judgment on the validity of her conclusion.

[64] The prosecutor did not ask whether the court could conclude that the circumstances had changed. She noted that the breaches of the Agreement did not in either case attribute criminal conduct to an innocent person. She concluded that each of the brothers had lied about his motivation in coming forward to police and recognised that the learned trial judge found that to be an important matter affecting their credibility. She concluded that the breaches of the Agreements were not determinative of the outcome of the trial and represented a small proportion of the many difficulties with the evidence.

[65] As a result of this analysis she concluded that any substitution of the discounted sentence in either case was not likely to be significant. She further concluded that the prospects of what she called a "successful application" were low. In support of that view she relied upon the nature and extent of the assistance actually provided by both Stewarts. We accept that this can be a relevant consideration in determining whether a court could conclude that circumstances had changed but, if the court could so conclude, then where it did so the extent of assistance actually provided would only be relevant to the court's determination of sentence on the review.

[66] The prosecutor also considered that the time which had elapsed since the date the original sentence was passed was a relevant consideration. We doubt whether that was a matter which should have carried any weight. The fact that the prosecutor becomes aware that an assisting offender has breached his agreement sometime after he has been released from custody, but during the currency of the sentence, generally should not of itself diminish the public interest in ensuring that the changed circumstances are recognised by an appropriate sentence.

[67] A further consideration taken into account by the prosecutor was that any failed attempt to have the discounted sentences substituted was unlikely to improve public confidence in the SOCPA regime of the criminal justice system as a whole. We consider that this proposition is inconsistent with the statutory purpose of the scheme. Where a court could conclude that there was a change of circumstances, it is for the court and not the prosecutor to assess the impact upon the sentence, unless there is some countervailing factor. It is the transparency of the reviewing court delivering open justice that provides the necessary public confidence. Any decision to interfere or not to interfere with the sentence once referred would be the subject of reasoned decision.

[68] Finally, we accept that the prosecutor was entitled to take into account the medical circumstances in relation to each of the Stewarts in determining whether it would be oppressive to refer the sentences. It is apparent, however, that those circumstances were not decisive in either of these cases.

Conclusion

[69] We have concluded that the prosecutor did not ask the right question when considering whether it was in the interests of justice to refer the sentences to the court. We further consider that she took into account irrelevant considerations in her determination of that issue. Accordingly we quash the decision and will hear the parties on any further Order.