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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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Mooney's (Christopher) Application [2014] NIQB 48

IN THE MATTER OF AN APPLICATION BY CHRISTOPHER MOONEY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE PUBLIC PROSECUTION SERVICE

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Before: MORGAN LCJ, GIRVAN LJ and COGHLIN LJ

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COGHLIN LJ (delivering the judgment of the court)

Introduction

[1] This is an application by Christopher Mooney ("the applicant") for judicial review of a decision taken by the Public Prosecution Service ("the PPS") on 23 April 2013 to withdraw a summons issued against Craig Doak alleging that on 5 October 2008 Craig Doak assaulted the applicant thereby occasioning him actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861 ("the 1861 Act"). Mr O'Donoghue QC and Mr Sean Devine appeared on behalf of the applicant while the respondent was represented by Mr Peter Coll. The notice party, Craig Doak, was represented by Mr Barry Macdonald QC SC and Mr Jebb. The court wishes to acknowledge the assistance that it derived from the industry and professionalism of all three sets of counsel in the preparation and presentation of their written and oral submissions.

The Background Facts

[2] On 5 October 2008 it appears that a disturbance broke out at a house party at Belgravia Avenue, Belfast. As a consequence, a number of persons, including the applicant, were ejected by the householder. That group of persons then engaged in

further disturbances. An individual who left the house in order to try to calm the situation was attacked by a member of the ejected party thereby receiving severe facial injuries. It was alleged that the applicant also punched that person causing a cut to his face. Other people from the house came to his aid and chased the alleged assailants.

[3] A confrontation then took place between the applicant and the notice party and other persons. The police were summoned and when they arrived they found the applicant on the ground being assaulted by other members of the group, including the notice party. The police intervened and restrained the notice party. While the applicant was being spoken to by other officers the notice party broke free, ran at the applicant and struck him in the face breaking his jaw and causing damage to his teeth.

[4] In due course the applicant, together with two other individuals, was prosecuted on indictment for offences including affray and criminal damage. The notice party was the subject of a separate summary prosecution by summons, issued on 20 October 2009, alleging an assault upon the applicant, contrary to section 47 of the 1861 Act. Following unsuccessful applications for 'No Bills' the applicant and his co-accused were arraigned on 9 October 2012. The applicant entered a not guilty plea in respect of each of the charges that he faced. Upon the second occasion on which it was listed the Crown Court trial of the applicant and his two co-accused on indictment was due to commence on 18 April 2013 but there were difficulties with witnesses. A co-accused pleaded guilty to an offence contrary to section 18 of the 1861 Act but, as a consequence of evidential problems, the remaining counts on the indictment, including all those against the applicant, were not further proceeded with but "left on the books".

[5] The police experienced difficulties in serving the summons on the notice party and it had to be re-issued upon four occasions. The notice party was eventually successfully served on 18 March 2013 and first appeared before the Magistrates' Court on 3 April 2013. The notice party pleaded not guilty and the matter was adjourned to fix a date for contest on 24 April 2013.

[6] On 11 April 2013 the Magistrates' Court prosecutor with responsibility for conducting the prosecution of the notice party referred the case to a Regional Prosecutor for review. The relevant part of her reference note reads as follows:

> "It is an old matter s.47 dated 5 October 2008. It does not appear to have been reviewed by an SPP prior to re-issue of summons. Can you please review the same and provide indication if it should proceed given the time delay? From the system, I can see that the IP in this matter (who now appears to reside in England) was also prosecuted on indictment for affray – all arising out of the

> same incident. It is not clear from the system, however, what the status of that is."

[7] The Regional PPS prosecutor subsequently reviewed the case and, on 12 April 2013, appended the following manuscript note:

> "I have reviewed this case. The prosecution should continue. However, if the IP cannot be contacted or will not come for the contested hearing then we should withdraw."

On 23 April, some 11 days later, he added a further written note to the following effect:

> "The public interest in prosecuting this case is not strong. Doak committed the offence when responding to aggression carried out by Mooney. Given that factor and the length of time since the incident I consider that the public interest no longer requires a prosecution. Please withdraw."

The summons against the notice party was duly withdrawn on 24 April 2013.

[8] The applicant was not notified of the decision to withdraw the summons against the notice party and, on 17 June 2013, when the applicant's solicitor enquired about the progress of the summons against the notice party, he was informed that the summons had been withdrawn. On the same date the solicitor wrote to the PPS seeking confirmation that the summons had been withdrawn and the reasons therefore. By letter dated 19 June 2013 the PPS responded in the following terms:

> "In view of the delay in serving the summons and bringing the matter before the Court the Court Prosecutor requested that the Regional Prosecutor review the case. The Regional Prosecutor was also advised that your above named client now resided in England.
>
> It was noted by the Regional Prosecutor in making his decision to discontinue proceedings that the actions of Mr Doak were a response to alleged aggression by your above named client and others who were being prosecuted in the Crown Court many of the others having already been dealt with by that Court. Given these factors and the delay in bringing this case before the Court he decided that it was no longer appropriate to proceed with the prosecution as a result of which the summons was withdrawn at Court."

[9] The relevant PPS Regional Prosecutor has sworn an affidavit for the purpose of these proceedings in which he has averred that he has no memory of giving the direction to continue with the prosecution after receiving the reference from the Magistrates' Court Prosecutor and cannot recall the factors that led to his decision. He is unable to explain why he felt that it was necessary to carry out a further review on 23 April 2013 although he believes that, in the interim, he had been informed that the prosecution of the applicant at the Crown Court had been discontinued. However, he accepts that he cannot be sure that he had received this information and notes that no reference to it was contained in his handwritten note. The Regional Prosecutor confirms that he is familiar with the Code for Prosecutors (Revised 2008) but he does not recall specifically referring to that document in the context of his decisions relating to the Craig Doak prosecution.

The Relevant Codes

[10] The Code for Prosecutors Revised 2008 ("the Code") was issued pursuant to the statutory duty placed upon the PPS by section 37 of the Justice (Northern Ireland) Act 2002. Section 37 requires the published Code, *inter alia*, to give guidance on the general principles to be applied when determining whether criminal proceedings should be instituted or, where such proceedings have been instituted, whether they should be discontinued. The Code defines the 'Test for Prosecution' at section 4 in the following terms:

> "**4.1 The Test for Prosecution**
>
> 4.1.1 Prosecutions are initiated or continued by the Prosecution Service only where it is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
>
> (i) The evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
>
> (ii) Prosecution is required in the public interest – the Public Interest Test.
>
> 4.1.2 Each aspect of the Test must be separately considered and passed before a decision to prosecute can be taken. The Evidential Test must be passed before the Public Interest Test is considered. The Public Prosecutor must analyse and evaluate all of the evidence and information submitted in a thorough and critical manner."

[11] The Public Interest Test is dealt with at paragraph 4.3 of the Code and 4.3.3 provides as follows:

> "4.3.3 Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, there are circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, prosecution is not required in the public interest."

Paragraph 4.3.4 contains a non-exclusive, illustrative list of public interest considerations both in favour of and against prosecution.

[12] Section 6 of the Code deals with Victims and Witnesses and paragraph 6.1 provides as follows:

> "**6.1 Prosecution Decisions**
>
> 6.1.1 Although the evidence in respect of a particular criminal offence may be sufficient to provide a reasonable prospect of conviction, the Prosecution Service has also to decide whether prosecution is required in the public interest. In this regard, the proper interests of the victim or witnesses will be taken into account along with other relevant factors to determine whether or not prosecution is required."

[13] In 2007 the PPS published a Victims and Witnesses Policy. The Foreword to that document included the following passages:

> "The Public Prosecution Service (PPS) is very much aware of the importance of victims and witnesses in ensuring the criminal justice system operates effectively. Victims and witnesses play a vital role in co-operating with an investigation and in giving evidence at court. Without this assistance many cases would not be detected or prosecuted …
>
> This policy document sets out the services victims and witnesses can expect to receive from the PPS. These

> services are the PPS's commitment to giving victims and witnesses the type of assistance and information they require to ensure their effective participation in the criminal justice system."

[14] Section 4 of the Victims and Witnesses Policy explains how the views of victims are taken into account and paragraph 4.1 confirms that decisions as to prosecution or diversion take into account the interests of victims in weighing the public interest. Paragraph 4.3 provides:

> "**4.3 Proceeding with a lesser charge**:
>
> In some cases a decision may be taken not to proceed with the original charge directed or to accept a plea to a lesser offence. This may arise, for example, if there is a change in the evidence available or a significant public interest consideration has arisen. When considering whether this should be done, PPS will, whenever possible, and where the victim wishes, explain to the victim why this is being considered and listen to anything the victim wishes to say. However, sometimes these issues have to be dealt with relatively quickly at court in circumstances where it is not always possible to speak to the victim."

The Parties' Submissions

[15] The primary submission advanced by Mr O'Donoghue on behalf of the applicant was that the decision to discontinue the prosecution against the notice party taken by the Regional Prosecutor on 23 April 2013 was contrary to paragraphs 6.1 of the Code and 4.3 of the Victims and Witness Policy insofar as absolutely no attempt was made to contact the applicant, listen to what he might have to say and explain the decision to him. He submitted that the decision was also contrary to paragraph 2.3 of the same Policy in that the PPS had not taken into account any views of the applicant or the consequences for the applicant when deciding to discontinue the prosecution against the notice party in the public interest. Mr O'Donoghue conceded that the threshold faced by the applicant was high and he referred to the observation by Lord Bingham at paragraph 30 of his judgment in R (on the application of Corner House Research and others) v Director of the Serious Fraud Office [2008] UKHL 60 when he said:

> "It is accepted that the decisions of the Director (the Director of Public Prosecutions) are not immune from review by the courts, but authority makes plain that only

> in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator."

In Mr O'Donoghue's submission this was such an "exceptional case". Apart from the alleged breaches of the PPS Code and Policies, Mr O'Donoghue also maintained that the decision taken on 23 April 2013 was in breach of the applicant's Convention rights in accordance with Article 8 of the ECHR and irrational. He submitted that it was quite clear that the evidential test had been met for a prosecution of the notice party and that nothing had occurred in terms of the Public Interest Test to explain why the Regional Prosecutor had changed his mind some 11 days after directing that the prosecution should continue.

[16] On behalf of the respondent PPS Mr Coll conceded that it was difficult to reconcile the basis for the review carried out by the Regional Prosecutor on 23 April 2013 with paragraph 4.11 of the Code. Paragraph 4.11.3 sets out the procedure to be observed where a review is to be conducted of a prosecution decision. Sub-paragraph 1 requires the case to be considered by a prosecutor other than the prosecutor who initially took the decision under review if no additional evidence or information is provided. In accordance with sub-paragraph 2 the prosecutor who took the initial decision may reconsider the case if there is additional evidence and information provided in connection with a request to review the original decision. In such circumstances the prosecutor must consider the evidence and information reported in the original investigation file, the decision that was reached and the additional evidence and information. Having done so, the prosecutor must apply the Test for Prosecution and either reach a fresh decision or conclude there is no sufficient basis for changing the original decision. In the latter case the matter will be referred to another prosecutor to conduct a review. Mr Coll agreed that it was necessary to infer that some additional information had become available to the Regional Prosecutor, which could only have been the decision to discontinue the proceedings against the applicant and his co-defendants on 18 April 2013, since, if no such additional information had become available, it would have been necessary to refer the question of a review to an alternative prosecutor in accordance with paragraph 4.11.3. sub-paragraph 1. However, he also conceded that if such additional information was the reason for the review, it was difficult to explain why there was no reference to it in the decision to discontinue taken on 23 April 2013. In the circumstances, Mr Coll confirmed that the respondent PPS accepted that the decision to discontinue the prosecution against the notice party taken on 23 April 2013 should be quashed upon the ground that the respondent failed to follow and comply with its own policy with regard to Victims and Witnesses. In such circumstances, he submitted that the matter should be remitted by this court to the respondent for further consideration.

[17] On behalf of the notice party Mr Macdonald identified the central issue in the litigation as being the alleged failure on the part of the respondent PPS to take account of the interests of the applicant in accordance with its own policy when assessing what was required by the public interest. Despite the omission to

specifically articulate it as a reason, Mr Macdonald argued that it was simply a matter of common sense that the Regional Prosecutor must have taken into account the decision to terminate the proceedings against the applicant and his co-accused which had occurred on 18 April 2013. He emphasised that, according to authority, it was well established that judicial review of a prosecutorial decision, although available in principle, was a highly exceptional remedy that was, in practice, very rarely utilised and he referred the court to the statement of principle set out in the judgment of Lord Bingham in Sharma v Antonine and others [2006] UKPC 57 at paragraph [14(5)]. He argued that there had been no successful application for judicial review of a prosecutorial decision grounded upon alleged breaches of public interest policy to date in the UK and that, therefore, the concession made by the respondent in this case had been mistaken. In terms, breaches of PPS policies were not enough. He drew the attention of the court to the purpose of the Code for Prosecutors set out at paragraph 1.2 and, in particular, to the fact that paragraph 1.2.3 confirmed that the Code was not intended to be a detailed manual of instructions, or a comprehensive guide and did not lay down any rule of law. He pointed out that the Victims and Witnesses Policy, unlike the Code which was made under statute, was merely an internal guide for the PPS. He submitted that the Foreword to the Policy confirmed that it was essentially "aspirational". Mr McDonald also relied upon an alleged lack of candour on behalf of the applicant insofar as he had not set out in full detail his own participation in the disturbances on the relevant occasion.

The Relevant Authorities

[18] In Corner House the House of Lords had to consider whether a decision made by the Director of the Serious Fraud Office to discontinue a criminal investigation was unlawful. In dealing with the main issue Lord Bingham said at paragraphs 30-32 of his judgment:

> "[30] It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of the independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: R v Director of Public Prosecutions ex parte C [1995] 1 Cr App R 136, 141;

R v Director of Public Prosecutions ex parte Manning [2001] QB 330, paragraph [23]; R (Bermingham and others) v Director of Serious Fraud Office [2006] EWHC 200 (Admin) [2007] QB 727, paragraphs 63-64; Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20, [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fijii in Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 735-736; Sharma v Brown-Antoine and others [2006] UKPC 57, [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

[31] The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no-one else. No other authority may exercise these powers or make the judgment on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of Matalulu):

> "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits".

Thirdly, the powers are conferred in very broad and unprescriptive terms.

[32] Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

[19] However, it is also important to bear in mind the factual background to the decision in Corner House which related to a decision by the Director not to continue

with an investigation into the circumstances of a very substantial and valuable arms contract between the UK government and the Kingdom of Saudi Arabia for which BAE was the main contractor. After representations made by the Prime Minister and a series of meetings with the Attorney General, the Solicitor General and the Legal Secretary to the Law Officers, the Director of the Serious Fraud Squad confirmed his view that continuing the investigation would "risk serious harm to the UK's national and international security". Such a decision would seem to have been a classic example of the 'polycentric' type of decision making envisaged.

[20] In Re McCabe [2010] NIQB 58 the Divisional Court considered the principles applicable to the power of the court to review decisions of the Director of Public Prosecutions at paragraphs [19]-[21] noting, in particular, that the threshold for review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute. In that context the court referred to the observations of Lord Bingham CJ in R v Director of Public Prosecutions ex parte Manning [2001] QB 330 at paragraph 23 when he said:

> "So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

Discussion

[21] It will be apparent from even a brief review of the relevant jurisprudence that, absent dishonesty and/or bad faith, the courts will only intervene to review decisions by the PPS to prosecute or not to prosecute in exceptional circumstances. In R v Director of Public Prosecutions [1995] 1 Cr. App. R. 136 Kennedy LJ delivering the judgment of the court said that the court could be persuaded to act if, and only if the decision not to prosecute had been arrived at:

> "(1) because of some unlawful policy……
>
> (2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or
>
> (3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.

[22] The reason for reluctance on the part of the court to intervene is not difficult to ascertain flowing, as it does, from the unique nature of the office of PPS. The PPS does not discharge a judicial function, adjudicating between parties. By the same token, this court does not take decisions as to which cases should or should not be prosecuted. The constitutional position is absolutely clear. It is not the function of this court to substitute its own view for that of the Crown about whether there should be a prosecution. The function of the PPS is extremely complex and, as noted above, has been described as "polycentric". The PPS must consider and weigh a number of disparate and, at times, even competing interests including, for example, the general public interest at any particular time, the interests of the accused, the victim, a supplier of information, such as an informant, and various witnesses both interested and disinterested. As Lord Bingham observed in the passage from his judgment in Corner House quoted above the discretionary powers given by Parliament to the prosecuting authority are exclusive to that office. The powers conferred are very broad and unprescriptive and no other authority may exercise those powers or make judgments upon which such exercise must depend.

[23] However, as the authorities confirm, the breadth and exclusivity of the powers conferred upon the PPS by Parliament do not mean that there are no circumstances under which the court may intervene. The "polycentric character" of decision making by the PPS cannot operate so as to deprive a member of the public of a remedy in appropriate cases.

[24] In determining the correct approach to be taken with regard to the decision not to prosecute in the present case, bearing in mind the relevant authorities, a number of factors fall to be considered:

(i) Essentially, this falls to be regarded as a "public interest" decision since there was general agreement that the evidential test had been met i.e. that the general disturbance had come to an end and that the notice party, who had been restrained by the police, broke away from the officers in order to inflict a serious assault upon the applicant. While it was not specifically recorded, the court is prepared to accept that it is likely that the Regional Prosecutor was informed of the decision to terminate the proceedings against the applicant prior to his decision of 23 April. However, assuming that is correct, he has not given any indication as to the extent to which, if at all, he took into account the circumstances of the separate assault on the applicant after the notice party had been restrained. In that context it is important to bear in mind that paragraph 4.3.3. of the Code provides that:

> "Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case."

(ii) It seems clear that the decision of 23 April 2012 was taken in breach of paragraph 6.1.1 of the Code which provides that, even if the evidential test is met, the PPS *will take into account* (our emphasis) the proper interests of a victim along with other factors in order to determine whether a prosecution is required in the public interest. The importance of taking into account the consequences for victims and any views expressed by a victim in the course of applying the Public Interest Test is also provided for at paragraph 2.3 of the Victims and Witness Policy. In the course of his manuscript written note of 12 April 2013 the Regional Prosecutor expressly recognised the need to contact the victim before a decision was taken to withdraw the prosecution. Unfortunately, no attempt appears to have been made to contact the applicant or to ascertain his views. Such an omission would appear to be quite contrary to paragraph 4.3 of the Victims and Witnesses Policy which provides that, when considering whether a decision should be taken not to prosecute, the PPS will, whenever possible, and where the victim wishes, explain to the victim why this is being considered and listen to anything the victim wishes to say.

(iii) The Introduction to the Code specifically provides that the Code does not lay down any rule of law nor is it intended to be a detailed manual of instructions for prosecutors and the Victims and Witnesses Policy is, as its title suggests, a policy. However, both are public documents published by the PPS, the former under a statutory duty, for the purpose of ensuring, as far as possible, the effective participation of victims in the criminal process. In terms of transparency they also serve to ensure that members of the public have as much information as possible about how the decision making process is intended to work.

(iv) In this case the PPS, after careful consideration in the context of a documented and reasoned judicial review application, has accepted that the decision of 23 April 2013 should be quashed upon the ground that there was a failure to comply with the Victims and Witnesses Policy.

[25] This is not a case in which the PPS, after giving the matter close scrutiny, reached a balanced decision not to comply with the Code and Policy in the particular circumstances and recorded detailed reasons for not doing so. It is a case of the reversal of a decision to prosecute taken over a relatively short period in which there appears to have been an unexplained failure to take into account and comply with the relevant requirements as contained in public documents. In our view this is an exceptional case and there is no reason why this court cannot assess the consequences of such a failure.

[26] Given the content of the affidavits, the agreed factual background and the detailed submissions by the parties, we do not consider that there is any substance in the submission that there has been a sufficient lack of candour on the part of the applicant to warrant the refusal of a remedy.

[27] Having carefully considered the matter we are satisfied that it has been demonstrated that the decision of 23 April 2013 was reached without regard to important provisions of the statutory Code and settled Policy of the PPS concerning the public interest, namely, the requirement to take into account the proper interests and the views of a victim with regard to reconsideration of a decision to prosecute. Accordingly, we propose to quash the decision of 23 April 2013 and remit the matter to the PPS for further consideration. We emphasise that nothing in this ruling should be taken as indicating any view upon our part as to the likely or proper outcome of such reconsideration which will be carried out in accordance with the PPS's usual high standard of independent professionalism.