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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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Public Prosecution Services' Application [2014] NIQB 29

IN THE MATTER OF AN APPLICATION BY THE PUBLIC PROSECUTION SERVICE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY A DISTRICT JUDGE MADE ON 5 JULY 2013

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application for judicial review of a decision made on 5 July 2013 whereby a District Judge stayed the committal proceedings before him as an abuse of process. The basis of the decision was the concern of the District Judge about the credibility of the main prosecution witness. It has become very common in criminal cases for repeated applications to be made to stay proceedings as an abuse of the process of the court. This application suggests that this practice may now have become a virus. This judgment may isolate the virus in this case and act as a firewall in other cases but where the virus is as deeply embedded as this the need for vigilance is heightened.

Background

[2] In the early hours of 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

Hanvey, were subsequently withdrawn due to insufficient evidence to prosecute and the sixth person was acquitted following trial.

[3] 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 to the home of Allister Hanvey. It is alleged that Reserve Constable Atkinson advised Allister Hanvey to destroy the clothing he was wearing at the time of the incident. It was further alleged that he also kept Hanvey updated as the police investigation into the murder progressed.

[4] Reserve Constable Atkinson was interviewed by police on 9 September 1997 about these allegations. Atkinson denied making the telephone call. When the telephone records were later put to him, he claimed that the telephone call had been made by Mr Michael McKee, who had stayed at his house that night, and who was the uncle of Hanvey's girlfriend. The police investigated the matter further and Michael McKee, his wife Andrea McKee and Atkinson's wife Eleanor Atkinson all provided statements to police which supported Atkinson's version of events.

[5] Three years later in June 2000, following the breakdown of her marriage to Michael McKee, Andrea McKee approached police and provided them with a further statement in which she admitted that neither she nor her husband stayed at the Atkinsons' house on the night in question and that she had been asked by her husband to make the false statement to police 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 McKee 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 McKee was sentenced to 6 months imprisonment suspended for 2 years.

[6] 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 McKee 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 McKee's no 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 McKee's 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.

[7] 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 McKee, Reserve Constable Atkinson, Eleanor Atkinson and Kenneth Hanvey. 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.

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

[9] The prosecution requested the Magistrates' Court to conduct a preliminary inquiry. The defendants required the attendance of Andrea McKee and other witnesses pursuant to Article 34 of the Magistrates' Courts (NI) Order 1981. On 9 May 2012 the 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 McKee 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.

[10] Andrea McKee attended and gave evidence on 11 June 2012. 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.

[11] 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.

[12] The solicitor for Kenneth Hanvey produced a marriage certificate indicating that Andrea McKee 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 McKee. However, she again refused to answer questions relating to her son's birth certificate which had also been obtained by the solicitor.

[13] 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.

[14] On 2 November 2012, during the course of this police investigation, Andrea McKee 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 McKee lives. This gave rise to concerns that she had posted the letter to herself.

[15] When the case was adjourned on 26 October 2012 the District Judge advised Andrea McKee 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.

[16] In April 2013 the PPS made a decision not to prosecute Andrea McKee 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 McKee 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.

[17] On 16 April 2013 the Magistrates' Court was informed of the PPS's decision not to prosecute Andrea McKee 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 McKee's credibility raised during the anonymity application. It was this decision by the PPS which grounded a second abuse of process application by the defendants.

The District Judge's decision

[18] The District Judge acceded to the application on 28 June 2013 and handed down written reasons on 5 July 2013. He stated that the only category of abuse of process applicable to committal proceedings was whether it was fair to try the defendant at all and not whether a fair trial could be held. He had a continuing duty to consider the fairness of the proceedings. A person charged with a criminal offence should usually be tried and the proceedings should not normally be concluded by other means. A witness's credibility can be divisible (see R v Cairns [2003] 1 WLR 796). He found that there had been no breach of the Prosecutor's Code by Mr

Hedworth consulting with Andrea McKee even though she had not concluded her evidence before the court. He accepted the explanation that Mr Hedworth believed that his entitlement to consult continued from the previously given permission. Having read the notes of that consultation it is apparent that there was no discussion of the detail of the witness's evidence nor any suggestion of impropriety. In those circumstances any argument on abuse of process on that issue was doomed to failure.

[19] He took the view, however, that there was a deep seated problem in the case, namely the propensity of the sole relevant witness of fact to tell lies to the court. He said he was satisfied Andrea McKee had lied or obfuscated about numerous matters. She misled the court in relation to whether or when she was divorced, about her marriage and her current husband, possibly lied about receiving a threatening letter, giving an incredible story about believing her first marriage was annulled, and the obvious conclusion that she was not free to marry on 9 February 2001. The District Judge noted that Andrea McKee's evidence was the only evidence on which the court could rely and he concluded that, even though it is normally for a jury to assess credibility rather than the committal proceedings, Andrea McKee was so unreliable that no jury properly directed could ever convict on her evidence. He, therefore, stayed the proceedings as an abuse of process on the basis that there could never be a fair trial of the issues based on the evidence of this witness.

[20] The District Judge then elucidated his thinking on the decision in an affidavit sworn in these proceedings. He explained that he regarded the decision in Re Nolan's Application for Judicial Review [2011] NIQB 128 as authority for the proposition that the Magistrates' Court should only exercise the power to refuse committal as an abuse of process in circumstances where it was found that it was unfair to try the defendant at all rather than on the ground that the defendant could not receive a fair trial. He therefore stayed the proceedings on the basis that it would be contrary to the integrity of the justice system to permit the case to continue. It is now accepted that the District Judge misunderstood the decision in Nolan which held that the power to stay committal proceedings was available where the issues were concerned with the fairness of the trial but not in that smaller band of cases where the issue was the integrity of the justice system. In light of this misunderstanding the District Judge properly conceded that the application for judicial review should succeed and that his decision should be quashed.

[21] In his affidavit the District Judge stated that he found the witness's evidence tainted beyond redemption and there was nothing that she would not lie about. He stated that he did not consider her capable of belief in relation to the evidence that she would give in relation to the three defendants. That conclusion was reached in advance of supporting evidence which the prosecution sought to adduce in relation to the central issue in the prosecution and before any cross-examination of the witness had occurred in relation to that issue.

[22] Despite the assertion in the affidavit evidence that the District Judge considered that the witness's evidence was so tainted by untruthfulness that the case should be stayed the written submissions advanced on behalf of the District Judge indicated that he considered that credibility could be divisible. The submissions then went on to indicate that the District Judge had accepted that Mrs McKee's evidence surmounted the requirement to demonstrate sufficiency of evidence "with such ease that there was no requirement to dwell on that fact".

The statutory scheme

[23] Article 31 of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") provides that the prosecution may request a Magistrate's Court to conduct a preliminary inquiry into committal proceedings provided the accused does not object. Article 32 of the 1981 Order describes the documents which must be furnished to the court and served on the accused by the prosecution. By virtue of Article 34 (2) the court, the prosecution and the accused may each require any person to attend and give evidence on oath and any such person may be cross examined and re-examined. In this case the defendants required Mrs McKee to be produced for cross-examination on foot of that provision.

[24] The statutory test to be applied at committal is found in Article 37 (1) of the 1981 Order.

> "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."

[25] The issue of the sufficiency of evidence was considered by the Privy Council in Brooks v Director of Public Prosecutions [1994] 1 AC 568. In that case the applicant was charged with carnal abuse of a girl under the age of 12. The child alleged that the applicant had taken her to an apartment where he had sexual intercourse with her. Her credibility was in issue because she was suffering from a venereal disease and there was evidence that she was having a relationship with another man. The resident magistrate decided that the evidence was not sufficient and declined to return the applicant. The principal issue in the case concerned the subsequent presentation of a voluntary bill on behalf of the prosecution.

[26] The Committee considered the contribution that credibility can make to the sufficiency of evidence at 581A.

> "The resident magistrate came to her decision after a long hearing during which she had ample time to form an assessment as to the credibility of the witnesses. Her decision is therefore entitled to be treated with considerable respect. There was however ample evidence on which she would have been entitled to find that there was a prima facie case which justified the applicant being committed for trial. The resident magistrate's decision must therefore have been based on the lack of credibility of the prosecution witnesses and in particular of the girl who is alleged to have been raped.
>
> 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. Nevertheless there are features of the evidence of the complainant which make her decision understandable and their Lordships accept Lord Gifford's submission that an application for certiorari to quash the resident magistrate's decision would have failed."

It is apparent therefore that in certain cases credibility can be material to the issue of whether the evidence was sufficient to put the accused on trial.

Conclusion

[27] In our view this was not a case of abuse of process. It was a case in which the District Judge should have considered whether the credibility of the chief prosecution witness was so undermined that the evidence was not sufficient to put the accused on trial. The determination of that issue was the statutory task imposed upon the District Judge by Article 37 (1) of the 1981 Order. In his skeleton argument it is specifically submitted on behalf of the District Judge that he did not conduct that assessment. It was neither necessary nor appropriate to transpose that straightforward statutory task into the guise of an abuse of process. The failure to carry out the statutory assessment is in this case sufficient to justify the quashing of the decision.

[28] The District Judge conceded that his decision should be quashed because of his misunderstanding of the decision of this court in Re Nolan's Application [2011] NIQB 128. The essence of that decision is to be found at paragraph 26 where

Girvan LJ said that it was undesirable for magistrates to be drawn into reaching determinations on abuse of process allegations in cases other than those strictly related to the procedural fairness of exposing an accused to trial. That decision must now be read in the light of the decision of this court in Re McManus's Application [2013] NIQB 104 and the decision of the Privy Council in Panday v Virgil [2008] UKPC 24 on the issue of entrapment. Where the issue concerns the integrity of the criminal justice system the District Judge should generally return the accused for trial so that the issue can be dealt with in the Crown Court or alternatively adjourn the proceedings to facilitate an application to the Divisional Court if there is some good reason to follow that course.

[29] We wish to emphasise again that the leading authority in this jurisdiction on the general principles applicable when considering any application to stay for abuse of process remains Re DPP's Application [1999] NI 106.

> "The jurisdiction to stay proceedings should be exercised carefully and sparingly and only for very compelling reasons. It was not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct."

[30] Having decided to remit this case we realised that many days of hearing had already taken place before the District Judge who was obviously familiar with the background papers and the evidence. We consider, however, that in light of the contradictions in the evidential materials put forward in this judicial review application as to the position of the District Judge we are bound to direct 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.