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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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Wilson's (Jason) Application [2012] NIQB 102

IN THE MATTER OF AN APPLICATION BY JASON WILSON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PUBLIC PROSECUION SERVICE ON 4 APRIL 2012

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Before Morgan LCJ, Higgins LJ and Treacy J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an application for judicial review of a decision by the Public Prosecution Service (PPS) whereby it reviewed and reversed a decision not to prosecute the applicant for assault occasioning actual bodily harm arising out of a confrontation with Lyndsey Clarke on 28 August 2011. The impugned review was the third time the original no prosecution decision was reviewed. On the two previous occasions the PPS had concluded that the decision not to prosecute should stand. The applicant sought judicial review on the grounds that the PPS's decision was irrational, the PPS failed to apply the Code for Prosecutors correctly, the PPS took into consideration irrelevant factors, namely, a letter from Ms Arlene Foster MLA and legal advice from independent Counsel, and the decision was in breach of the applicant's legitimate procedural expectation as he should have been given an opportunity to make representations during the review process.

Background

[2] On 28 August 2011 the applicant was returning home in the early hours of the morning from a night out with friends in Fivemiletown when an altercation with the

injured party occurred. The applicant was arrested nearby and interviewed by police later that day. On 12 October 2011 police conducted a second interview with the applicant and on 25 November 2011 PPS issued a no prosecution decision to the police. On 5 December 2011 the PPS issued a letter to the applicant advising him of that decision.

[3] On 7 December 2011 the police requested a review of the no prosecution decision. On 20 December 2011 PPS advised the police that a review of the decision was carried out by the regional prosecutor and the decision not to prosecute had not been changed. On 21 December 2011 the injured party's solicitors sent a letter to the PPS requesting a review of the decision. On 20 January 2012 PPS advised the injured party's solicitor that a second review had been conducted by the regional prosecutor but there had been no change in the decision not to prosecute.

[4] On 6 February 2012 Ms Arlene Foster MLA sent a letter to the PPS stating, "I understand that Ms Clarke's solicitor has asked for a review of the decision not to prosecute and I would certainly support his call for a review of the case". On 29 February 2012 the regional prosecutor was concerned that the original decision not to prosecute and her review of the decisions not to change that decision may have been wrong and, therefore, directed that the opinion of independent counsel be obtained as to whether the test for prosecution was met. On 16 March 2012 counsel provided his opinion advising that there was sufficient evidence to afford a reasonable prospect of conviction. He indicated that the comments made to Constable McCarroll by a witness, Thomas Johnston, could be adduced as hearsay evidence.

[5] On 4 April 2012 PPS wrote to the applicant advising him that a review had been carried out and that the PPS had decided to prosecute. On 19 April 2012 a summons was issued requiring the applicant to appear before Dungannon Magistrate's Court on 8 June 2012 on a charge of assaulting Lyndsey Clarke thereby occasioning her actual bodily harm. On 16 May 2012 the applicant's solicitor wrote to the PPS challenging the decision to prosecute. On 31 May 2012 PPS replied stating that the original decision not to prosecute was not one that a reasonable prosecutor should have taken. On 25 June 2012 the applicant lodged an application to judicially review the decision to prosecute and on 19 September 2012 the applicant was committed for trial by Dungannon Magistrates' Court on the charge of assault occasioning actual bodily harm.

[6] The applicant contends that the decision of 4 April 2012 to institute the prosecution was unlawful for a number of reasons. The Code for Prosecutors provides for the manner in which prosecution decisions may be reconsidered. The introduction states that the Code is issued pursuant to the statutory duty placed on the PPS by section 37 of the Justice (Northern Ireland) Act 2002. The Code provides that a prosecutor reviewing a decision not to prosecute should first consider whether the original decision was within the range of decisions that a reasonable prosecutor could take in the circumstances. If so the original decision should stand. The

applicant submits that the decision to prosecute was irrational because the original decision was clearly within the range of reasonable decisions open to the original prosecutor.

[7] Secondly, it is submitted that the decision to prosecute was unlawful because there was a failure to comply with the procedural steps set out in the Code. In particular it is submitted that the decision to obtain counsel's opinion was not in accordance with the procedure set out in the Code. Thirdly, the applicant submits that the PPS did not give adequate reasons for the decision to prosecute in all the circumstances. In particular it is contended that it is not sufficient simply to assert that the decision was not one which a reasonable prosecutor should have taken.

[8] Fourthly, the applicant submits that the third review was prompted by the letter from a local MLA and that the prosecutor consequently had been improperly influenced by the fact that she had received a letter from a local politician. The last point made on behalf of the applicant is that in any event the letter of 5 December 2011 gave rise to a legitimate expectation that the applicant would not be prosecuted.

Consideration

[9] There are a number of decisions which touch on whether as a matter of discretion the court should entertain a judicial review of a decision to prosecute. The issue was addressed by Lord Steyn in Ex Parte Kebilene [1999] UKHL 43.

> "I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the applicants' application."

He recognised that a distinction arose in the opposite case where there was a decision not to prosecute because the applicant would there be left with no other effective remedy.

[10] The issue was again addressed in Sharma v Antoine [2006] UKPC 57. The Chief Justice of Trinidad and Tobago was being prosecuted for allegedly attempting to pervert the course of justice. He claimed this was a politically motivated prosecution and sought judicial review of the decision to prosecute. In the Privy Council Baroness Hale, Lord Carswell and Lord Mance gave a joint speech saying the following:

> "[31] The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court: cf *R v Horseferry Road Magistrates' Court, ex p Bennett* [1993] 3 LRC 94 at 108 where Lord Griffiths explained the rationale in the following passage:
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> 'If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law.'
>
> [32] In our opinion, the same responsibility extends to the oversight of executive action in the form of a police or other prosecutorial decision to prosecute. The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review of proper

> prosecutorial considerations (such as, in England, those set out in the Code for Crown Prosecutors issued under the Prosecution of Offences Act 1985)."

[11] The question for us is whether the proper interests which the applicant seeks to protect in these proceedings can effectively be raised within the on-going criminal proceedings before the Crown Court. The two categories of abuse of process are described in the decision of Carswell LCJ in Re DPP's Application [1999] NI 106 where he stated:

> "Our conclusion from our examination of these authorities is that there are only two main strands or categories of cases of abuse of process:
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> (a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected (we regard these words, which were used in *Re Molloy's Application*, as the appropriate formulation of the criterion);
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> (b) those, like *Ex parte Bennett*, where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all.
>
> We do not consider that there is a third category of generalised unfairness such as that accepted in *R v McLaughlin* …"

[12] A particular example of this second category of abuse of process is where a person who has received a promise, undertaking or representation from the police or prosecuting authorities that he will not be prosecuted is then subsequently prosecuted and has similarities to the public law principle of legitimate expectation. The English Court of Appeal reviewed the authorities on the issue in R v Abu Hamza [2007] QB 659 and concluded (at [54]):

> "… it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may

> justify proceeding with the prosecution despite the representation."

[13] The applicant accepts that certain of his complaints can be dealt with within the trial process, particularly that in relation to improper political motivation. He contends, however, that his complaint in relation to the change in the initial decision not to prosecute will not be capable of being challenged by him because he will not be able to demonstrate that he has acted on the representation to his detriment as required in Abu Hamza. In those circumstances any unlawfulness on the part of the PPS in departing from the Code would not lead to a remedy for the applicant.

[14] Even if that turns out to be correct it does not in our view avail the applicant. The underlying rule of legal policy revealed in Abu Hamza is that where the complaint relates solely to an unequivocal representation that a prosecution will not be pursued but the applicant has not acted to his detriment on that representation it will not then be necessary to prevent the prosecution proceeding in order to protect the integrity of the criminal justice system. That was the test adopted by the Supreme Court in Warren v Attorney General for Jersey [2010] 1 AC 22 for the second category of cases described in Re DPP's Application. The reason is that there is a countervailing public interest in ensuring that those in respect of whom a fair trial is possible should be prosecuted. Abu Hamza strikes the balance between the public interest and the interest of the applicant.

[15] In our view this is not a case with any exceptional circumstances justifying a departure from the general rule that the applicant should pursue his remedy in the criminal trial. We consider that there is considerable force in the observations of the Divisional Court in England and Wales in R (on the application of Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin):

> "49. In view of the frequency of applications seeking to challenge decisions to prosecute, we wish to make it clear and, in particular, clear to the Legal Services Commission (which funds applications of this kind which seek to challenge the bringing of criminal proceedings), that, save in wholly exceptional circumstances, applications in respect of pending prosecutions that seek to challenge the decision to prosecute should not be made to this court. The proper course to follow, as should have been followed in this case, is to take the point in accordance with the procedures of the Criminal Courts. In the Crown Court that would ordinarily be by way of defence in the Crown Court and if necessary on appeal to the Court of Appeal Criminal Division. The circumstances in which a challenge is made to the bringing of a prosecution

should be very rare indeed as the speeches in *Kebilene* make clear.

50. We stress that the Legal Services Commission and those advising prospective applicants for judicial review should always realise that judicial review is very rarely appropriate where an alternative remedy is available. If such a remedy is available, a judicial review application should not be pursued."

[16] We dismiss the application.