

# Judicial Communications Office

14 December 2018

## COURT DISMISSES APPLICATIONS BY PADDY JACKSON AND STUART OLDING FOR COSTS OF RAPE TRIAL

### Summary of Judgment

Her Honour Judge Patricia Smyth, sitting today in the Crown Court in Belfast, dismissed applications by Paddy Jackson and Stuart Olding for costs orders against the Public Prosecution Service following their acquittals by a jury on 28 March 2018 on counts of rape.

Section 3 of the Costs in Criminal Cases Act (Northern Ireland) 1968 (“the 1968 Act”) provides for a court to order the Director of Public Prosecutions (“DPP”) or the prosecutor to pay to the accused the whole or any parts of the costs of his/her legal defence if he/she is acquitted. The legislation provides no guidance on the factors that the court should consider, nor is there any reported case law in Northern Ireland. The prosecution and defence both agreed that the court could therefore take into account the statutory provisions and case law in England and Wales and the Republic of Ireland (set out in paragraphs [7]-[29] of the judgment). These were distilled into a number of questions which the court should consider when exercising its discretion whether to make an order for costs.

Judge Smyth said that in determining the applications she would apply the following principles:

- The judge has an unfettered discretion which must be exercised upon the special facts and circumstances of the case and no hard and fast rules should be applied;
- The acquittal of Paddy Jackson and Stuart Olding (“the applicants”) is more than a purely neutral factor and is the starting point for consideration;
- There is no presumption that an award of costs should or should not be made;
- In order to make an order for costs it is not necessary that there should be fault or impropriety on the part of the DPP either in initiating or continuing the proceedings; and
- Whether or not the judge agrees with the jury’s verdict is irrelevant to the exercise of the discretion.

It was submitted on behalf of Jackson and Olding (“the applicants”) that the judge should take into account the personal and financial consequences of the trial upon each of them including the damage to their reputations, the termination of their contracts by the Irish Rugby Football Union (“IRFU”), the fact that each of them has been obliged to accept offers of employment overseas and that they have lost the opportunity to play rugby for Ulster or Ireland. Judge Smyth said it was important to make clear that the power to award defence costs under s.3 of the 1968 Act does not include the power to award compensation for loss of reputation or other damage consequent on the trial. She did, however, accept that there may be exceptional situations where although a defendant is ineligible for legal aid, his financial situation after acquittal is so irrevocably changed as a consequence of the prosecution that it would be unjust not to take that factor into account.

The court was provided with affidavits from Paddy Jackson and his father setting out the sums of money expended in legal costs. Paddy Jackson had paid off his mortgage and had savings but in order to pay his fees he said he had to draw on his mortgage and accept money from his father from

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his retirement money. Before the applications to the court were concluded, both applicants' employment situations had improved and, for that reason, the court invited them both to provide evidence of their current financial situation and the terms of their new contracts of employment along with information regarding any financial terms associated with the termination of their contracts by IRFU. They were invited in particular to provide confirmation of the reasons given for the termination of their contracts as it had been implied to the court that this was as a consequence of the prosecution. Counsel for Stuart Olding explained that there may be issues of confidentiality which would have to be considered before such information could be disclosed. The court indicated that if necessary, an application to hear the evidence in closed court would be granted. No application, however, was made and the court was informed that the applicants intended to rely only on the affidavits already lodged with the court but which did not deal with the terms upon which the contracts of employment were subsequently terminated or the current financial situations of either applicant.

Judge Smyth commented:

"In those circumstances, there is simply no evidence upon which this court could conclude that the financial circumstances of either Mr Jackson or Mr Olding have been irrevocably changed as a consequence of the prosecution for rape and that this is a relevant factor to take into account in determining the applications. Furthermore, Mr Olding made an application for legal aid on the basis that his available funds were such that legal aid ought to be granted in the interests of justice. If Mr Jackson had found himself in similar circumstances he also could have made a legal aid application. Whilst the willingness of family or friends to assist with legal costs is relevant to such an application, Mr Jackson's father was not required to contribute his retirement monies which, no doubt were much needed for future living expenses. Indeed, Mr Peter Jackson explains in his affidavit that he provided those funds because it was unclear whether his son would be able to raise the money rather than because attempts to do so had been unsuccessful. In any event, Mr Jackson has declined the opportunity to provide evidence regarding his current financial situation including the extent to which he has repaid the debt to his father."

Counsel for the prosecution submitted that the judge should take into account the fact that the Public Prosecution Service ("PPS") has never been resourced to pay awards of costs to an acquitted defendant. An order for costs would affect the PPS's ability to properly discharge its functions which would not be in the public interest. It was also submitted that the fear of an order for costs would deter prosecutors from bringing prosecutions in cases involving wealthy individuals. Judge Smyth, however, said she was unpersuaded that either of these factors should weigh upon the exercise of the court's discretion:

"In choosing to enact section 3, Parliament has expressly decided that if an acquitted person should be paid his costs, it is the Director of Public Prosecutions who should pay. Since it would clearly not be in the public interest that the Public Prosecution Service should be unable to properly discharge its responsibilities because of the impact of an award of costs, particularly where there has been no impropriety on its part, those who hold the public purse strings would be required to make the necessary budgetary adjustments. With regard to the second factor, the public is entitled to expect that the Public Prosecution Service will make decisions about prosecutions based on the prosecution test without having regard to irrelevant considerations such

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as the possibility of an award of costs. I do not accept that a decision whether to award defence costs should in any way be influenced by the risk that a public body might act improperly in future.”

## CONSIDERATION OF ISSUES

Judge Smyth then turned to consider the questions suggested by the case law. She added that it should be clearly understood that this exercise is quite separate from the task entrusted to the jury, which was to decide whether the prosecution had proved beyond reasonable doubt that the defendants were guilty, and nothing should be inferred as undermining the decisions of the jury in this case.

### ***WAS THE PROSECUTION JUSTIFIED IN TAKING THE CASE THROUGH, IT BEING FOUNDED ON APPARENTLY CREDIBLE EVIDENCE?***

This required a consideration of whether the prosecution acted reasonably in starting or continuing the proceedings in light of the evidence available at that time. Counsel on behalf of Mr Jackson made a number of submissions:

- **Warning to the Jury**

Counsel submitted that this was a highly unusual case in which a warning was given to the jury in the course of the summing up that they should be cautious before relying on the evidence of a witness if he or she has been shown to be unreliable or in a more extreme case, if the witness is shown to have lied or there is some other reason to urge caution. It was contended that this warning supported the submission that a proper investigation would have revealed the complainant’s unreliability.

Judge Smyth rejected this submission. She said it failed to take account of the context in which the warning was given. The jury was not told to exercise caution before accepting the complainant’s evidence but was told that they should consider inconsistencies in her accounts and *possible reasons* and if they concluded that the *reason* for the inconsistencies was that she had or may have told lies, then certain consequences would follow. It was explained to the jury that a person who has been raped will have suffered trauma and that trauma may affect that person’s ability to take in, register and recall the event. It was also explained that they should consider the possibility that a person who has made a false complaint may also have difficulty being consistent and that the inconsistencies may expose the possibility that the details do not represent a true recall of events but are part of a manufactured account which is difficult to remember consistently. The jury was expressly told that the purpose of suggesting a number of possible explanations for inconsistencies was so that they could think about it and it was entirely for the jury to decide the significance, if at all, of any inconsistencies in the complainant’s evidence.

- **The Investigation**

Counsel criticised the investigation and submitted that the decision not to adduce the complainant’s evidence in chief by way of an achieving best evidence interview (“ABE”) and the decision not to provide a statement of evidence led to unnecessary complication and delay. Judge Smyth did not accept that submission. She said that notwithstanding the fact

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that the complainant did not rely on her ABE interviews, the lengthy recordings were played to the jury by the defence in their entirety. The judge accepted that whilst the defence was properly entitled to bring to the jury's attention any inconsistencies in the two accounts, whether it was necessary to play the entire ABE interviews to achieve this purpose was not entirely clear.

- **Delay before Charge**

Counsel criticised the delay of 13 months before a decision to charge the applicants was taken and suggested that the delay was another feature of why Paddy Jackson had to incur costs to the level at which he did. On the other hand, Counsel for Stuart Olding criticised the prosecution for taking what he described as a "premature" decision to charge him. Counsel for the prosecution submitted that the decision to prosecute Mr Olding was no greater or smaller than any other decision to prosecute for rape and rejected the suggestion that a different standard ought to have been applied by the PPS in view of his public profile. Judge Smyth also rejected any suggestion that there should be a separate set of rules for the rich and famous: "There is no evidence to suggest that the prosecution was either dilatory or premature in making decisions in this case or that the public profile of any of the applicants influenced the decision-making process. This was a complex investigation involving, amount other things, the examination of a number of electronic devices and the need to obtain expert reports."

- **Decision to try all Defendants on same Indictment**

Counsel submitted that the decision to try all defendants together had added to the complexity of the trial and elongated it. Judge Smyth said this issue had been considered when an application was made on behalf of Mr Jackson to sever Mr McIlroy from the indictment. The application was opposed on behalf of Mr McIlroy. Applying the relevant legal principles, the court had concluded that the counts were properly joined on the indictment. The judge noted that no submissions had been made on behalf of any other defendant that the indictment should be severed and commented that "In any event, there is no doubt that the cases were so intertwined that they could not be tried separately".

- **Issues which impacted on the length of the trial**

Finally, Counsel for Paddy Jackson relied on issues that arose in the course of the trial which were not the fault of either the prosecution or the defence, but which impacted on the length of the trial. In particular, he relied on the inappropriate behaviour of some members of the public on social media and on Twitter in particular, the unexpected illness of jurors and also incidents that occurred which required specific case management in order to ensure a fair trial. Judge Smyth said that whilst that cannot be laid at the door of the prosecution, she accepted that the effect of all of those matters had been an increased financial burden on the part of Mr Jackson in particular but added that issues such as juror illness and other unexpected issues often arise in a serious criminal trial.

Counsel on behalf of Stuart Olding also made a number of submissions:

- **The Police Investigation**

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Counsel for Stuart Olding “made no bones about his submission that the prosecution was at fault in the bringing of the prosecution against [him]”. He submitted that the police ought to have carried out a third ABE interview with the complainant to clarify her evidence in light of answers given by Mr Olding to the police, inconsistencies in her accounts and the evidence of Dara Florence in particular. Judge Smyth said such a course maybe problematic in sexual offence cases as drawing a complainant’s attention to inconsistencies in her account as a result of further investigations may give rise to accusations of coaching. Furthermore, the unique considerations that arise in sexual offences cases because of the impact of trauma on memory mean that a further ABE may not assist the investigation.

- **Decision to Prosecute**

Counsel submitted that the decision to prosecute was taken without securing any objective expert evidence that could have explained any medical reason for the inconsistent accounts given by the complainant and why the final account was to be preferred. Judge Smyth found no merit in this submission as it failed to recognise the clear authority that the prosecution may not call expert evidence which tends to convey to the jury the expert’s opinion of the truth or otherwise of the complaint.

Counsel also submitted that the decision to prosecute Mr Olding for vaginal rape was based on incomplete forensic evidence. He submitted that Mr Olding had always denied having vaginal intercourse with the complainant and had always insisted that he had consensual oral sex only. He described the failure to send the complainant’s top for forensic testing at an earlier stage as a “*glaring and obvious omission*”. Counsel for the prosecution, however, submitted that the charge of vaginal rape against Mr Olding was based on forensic tests and the decision not to continue the prosecution in relation to this charge was based entirely on additional forensic evidence and had no bearing on the complainant’s credibility. Counsel for the prosecution also explained the rationale for submitting only certain items of clothing for evidential analysis on the basis that, primarily, consideration is given to the accounts that are put forward by both the complainant and a suspect. Because the complainant made no reference to her top in her ABE, and because she said that she did not know whether or not Mr Olding had ejaculated, the top was not considered to be relevant.

In dismissing the suggestion that the failure to initially test the complainant’s top and pants was a “*glaring and obvious deficiency*”, Counsel for the prosecution pointed out that if this had been the case, the deficiency would have been identified at an earlier stage by the expert and conscientious defence team. Judge Smyth commented:

“Whilst in hindsight, all of the complainant’s clothes ought to have been forensically examined, there was a clear rationale based on the evidence for the decision taken and when the matter was raised, the prosecution responded promptly and made prosecutorial decisions expeditiously.”

- **Impact of the Decision not to pursue the Vaginal Rape Charge**

Counsel submitted that the prosecution ought to have carried out a full review of the decision to prosecute Mr Olding in respect of any offence, and that if it had done so, it would have concluded that there was no reasonable prospect of conviction on the oral rape charge. The prosecution submitted that if there was any merit in that argument, Mr Olding would

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have made an application of no case to answer at the conclusion of the prosecution case. Neither Mr Olding nor Mr Jackson did so.

Counsel for Mr Olding appeared to submit that notwithstanding the implicit defence assessment at the conclusion of the prosecution case that the prosecution evidence was such that its strength or weakness depended on the view to be taken of a witnesses reliability, or other matters which are generally within the province of the jury and that on one possible review of the facts there was evidence upon which a jury could properly come to the conclusion that the defendant is guilty, a fuller review of the evidence before the trial started should have resulted in that charge being withdrawn. There was a dispute between the parties as to whether the evidential test for the prosecution (reasonable prospect of conviction) is different from the test for a submission of “no case to answer”. Judge Smyth said she was unable to accept the logic of the submission that there may be sufficient evidence upon which a jury could convict and yet the test for prosecution, based on the same evidence, was not met: “In any event, a consideration of all of the evidence in this case clearly justified the prosecution”.

- **Flawed Understanding of the Facts of the Case**

Counsel submitted that the decision to prosecute Mr Olding was based on a flawed understanding of the facts of the case. In so doing, Counsel relied on an issue with the prosecution opening statement to the jury which outlined the circumstances in which Mr Olding entered the bedroom and which Counsel submitted was inconsistent with the complainant’s oral evidence. Judge Smyth commented that it was clear from the ABE interviews that the complainant was extremely distressed and that her evidence was difficult to follow: “In the context of a complex, multi-faceted investigation, there is no merit in the submission that the decision to prosecute was based on a flawed understanding of the facts of the case”.

Judge Smyth concluded her consideration of this issue by commenting:

“Having considered all of the submissions I am satisfied that the prosecution was justified in taking the case through it being founded on apparently credible evidence. Matters such as inconsistencies were wholly for the jury’s consideration in the context of what is now generally understood regarding the impact of trauma on memory. In addition, the prosecution had to consider a number of strands of evidence including the independent evidence of the taxi driver of the complainant’s highly distressed state, medical evidence which confirmed intimate injury, the contents of messages sent the following day and the different conclusions that a jury may have drawn from all of the evidence.”

***DID ANYTHING WITHIN THE INVESTIGATION BY THE POLICE GIVE RISE, OF ITSELF, TO THE EXISTENCE OF A SERIOUS INHERENT DOUBT AS TO THE GUILT OF THE ACCUSED?***

Counsel on behalf of both Mr Jackson and Mr Olding submitted that Dara Florence’s assessment that the sexual event she had witnessed was consensual “*created a serious inherent doubt as to the guilt of the accused.*” In making the submission on behalf of Mr Jackson, it was said that if he was not engaged in consensual activity with the complainant why would he have invited the witness [Dara Florence] to join in? If the witness had accepted the offer, the complainant (on the prosecution account) would have been a victim of rape while the other would have been a willing participant. Furthermore, it

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was submitted that the manner in which Ms Florence's evidence was investigated by the police was defective and the effect of her evidence was misunderstood.

On behalf of Stuart Olding, Counsel described Ms Florence's evidence as "*single most compelling piece of evidence in the case*", and pointed out that her account of what she witnessed supported Mr Olding's account of how the oral sex occurred. However, Counsel for the prosecution submitted that the evidential picture available to the prosecution included the fact that the complainant had contemporaneously reported that she had been the subject of serious sexual assaults, medical examination demonstrated an intimate tear that was still bleeding some 24 hours later and they had evidence from a taxi driver who described the complainant's distress and the content of a conversation he had overheard which involved the fourth defendant. Dara Florence's evidence was also to the effect that she was "100%" certain that sexual intercourse was taking place, whereas both applicants denied any form of penile penetration on Mr Jackson's part. The prosecution also submitted that the text messages were a key part of the investigation.

Judge Smyth said the question of whether Dara Florence's evidence gave rise to the existence of a serious inherent doubt as to the guilt of the applicants required careful consideration. In respect of Mr Olding, the issue for the jury was whether the prosecution had proved beyond reasonable doubt that the complainant did not consent to oral sex and that Mr Olding did not reasonably believe that she was consenting. The judge said that the two concepts are quite different and although a jury has to be sure of both elements in order to convict, it is possible for a jury to reach a conclusion that the complainant did not consent, but that the defendant reasonably believed that she did so: "Ms Florence observed the scene for a very short time and whilst she did not think she was witnessing a rape, she did not see anything which positively indicated consent either".

In respect of Mr Jackson, the prosecution had to prove beyond reasonable doubt that sexual intercourse occurred, as well as the elements relating to consent. He denied that he had had sexual intercourse, whereas Dara Florence said that she was 100% certain that she witnessed it taking place.

Judge Smyth noted that the complainant said that she did not fight back, that she froze and allowed sex to happen, but that she did not consent. Counsel for the applicants submitted that the complainant must have interrupted the oral sex on a number of occasions, such as when she was removing her top at the request of Mr Olding, and that these interruptions and recommencing of oral sex were inconsistent with someone who was frozen. The judge said the jury was carefully directed about the legal meaning of consent, the difference between submission and consent and that it was for the jury to decide the question of consent, not the prosecution.

The judge concluded: "Taking account of the complexities of Dara Florence's evidence in particular, I am not satisfied that there was anything within the investigation which gave rise, of itself, to the existence of a serious inherent doubt as to the guilt of the accused."

***WAS THERE ANY INDICATION THAT THE CASE HAD BEEN TAKEN AGAINST THE ACCUSED THROUGH BEING BASED ON AN ABUSE OF HIS RIGHTS THROUGH OPPRESSIVE QUESTIONING, WHICH CONTRIBUTED TO A CONFESSION THAT WAS UNRELIABLE IN LAW?***

It was not suggested that this was a relevant consideration in this case.

***WHETHER THE ACCUSED WAS ACQUITTED BY DIRECTION OF THE TRIAL JUDGE OR ACQUITTED UPON CONSIDERATION BY THE JURY?***

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The applicants were acquitted by a jury and no application was made at the end of the prosecution case. Counsel for Paddy Jackson touched on whether the length of jury deliberations may be a relevant factor. Judge Smyth said that little weight, if any, could be attached to the length of the jury deliberations in this case. In light of the fact that the acquittal was by a jury, it was not necessary to consider this question.

## **WHAT ANSWER HAD THE ACCUSED GIVEN TO THE CHARGE WHEN PRESENTED WITH AN OPPORTUNITY TO ANSWER IT?**

Judge Smyth said it was relevant to consider what answer the accused gave to the charge when presented with an opportunity to answer it. She noted that the *“purpose of any fair investigation is to seek out the truth, sometimes according with an initial police view as to who is guilty, and oftentimes contradicting it. A fair interview upon arrest would naturally bring an accused person to the point that he or she is expected to deal with the preliminary outline of the case, inculcating the suspect and allowing him or her an opportunity, if he or she wishes, the chance to say what the answer to it is, or might be, in a case based on circumstantial evidence.”*

Counsel for Mr Jackson submitted that his response to the police was absolute and immediate. He said that although this was his first time in a police station, or interviewed under caution, and although the contents of the complainant’s first ABE were not disclosed and the results of forensic testing had not been completed he gave a full account. Subsequently, he completed a detailed defence statement and gave consistent oral evidence. Although Counsel accepted that Mr Jackson did not answer police questions in later interviews he submitted that since the jury was told not to draw adverse inferences, this was not a relevant consideration. In response, the prosecution submitted that Dara Florence’s evidence that she was sure that Mr Jackson was having sexual intercourse with the complainant, thus confirming the complainant’s evidence, was an important subject of police questioning, and in those circumstances his failure to answer questions about this in later interviews was a relevant consideration.

On behalf of Mr Olding, Counsel submitted that he gave a full account when he was first interviewed on 30 June 2016, submitted to forensic testing in the police station and gave a consistent account throughout the duration of the investigation and the trial. In response, the prosecution submitted that whilst Mr Olding gave a “relatively” detailed account in his first interviews on 30 June 2016 and answered all questions, his failure to answer questions in later interviews arising out of Dara Florence’s account as well as specific questions about the WhatsApp messages he had sent was a relevant consideration for the costs application.

Judge Smyth commented that there was an important distinction in the task entrusted to the jury and the task of the judge in determining the applications for costs. Her task was to distance herself from the evidence and assess whether the prosecution was warranted in terms of the available evidence, including what actually transpired at the trial and what responses were made by or on behalf of the applicants prior to the trial:

“A person who attends a police station is not compelled to answer questions or to co-operate in any way. However, where he chooses not to fully co-operate, and where that may have a bearing on the police assessment of the evidence, that will be a relevant factor in an application for defence costs. Whilst it is correct that both applicants answered a large number of police questions, agreed voluntarily to provide samples and maintained their innocence throughout, the evidence of Dara Florence was key to both prosecution and defence and in fact was described by [Mr Olding’s QC] as

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*“the single most compelling piece of evidence”*. Whilst the refusal to answer questions in later interviews was based on legal advice, it was unhelpful in the context of this complex police investigation and is a relevant consideration in these applications.”

***WHAT WAS THE CONDUCT OF THE ACCUSED IN THE CONTEXT OF THE CHARGE THAT WAS BROUGHT, SPECIFICALLY IN TERMS OF WHO WAS HE ASSOCIATING WITH, AND ON WHAT OSTENSIBLE BASIS?***

It was submitted on behalf of both Mr Jackson and Mr Olding that whilst the text messages were distasteful, they were not the only persons to engage in such behaviour and it should not be concluded that anything in the messages brought suspicion on either defendant. The prosecution, however, submitted that the messages that were exchanged the following day were a key part of the prosecution case and highly relevant.

Judge Smyth said Mr Olding’s description of himself the following day as a “top shagger”, as well as the description of the events as being like a “merry-go-round at a carnival” and the reference to “spit roasting”, particularly in the absence of an explanation to the police, tended to draw suspicion upon him, albeit he apologised in court for his immature talk and was ultimately found not guilty of rape. The judge also commented that whilst Mr Jackson also expressed remorse for the content of the messages, particularly his response to the “spit roast” text, and was found not guilty of rape, his failure to explain his conduct to the police or to answer questions about Dara Florence’s evidence tended to draw suspicion upon him.

***WHAT WAS THE CONDUCT OF THE ACCUSED IN MEETING THE CASE AT TRIAL? WAS A POSITIVE CASE MADE BY THE ACCUSED SUCH AS MIGHT REASONABLY BE CONSISTENT WITH INNOCENCE, AND WHETHER ANY RIGHT WAS EXERCISED TO TESTIFY AS TO THAT CASE, OR WHETHER AN OPPORTUNITY WAS USED UNDER THE PROSECUTION OF OFFENCES ACT 1974 TO COMMUNICATE WITH THE DIRECTOR OF PUBLIC PROSECUTIONS AS TO THE NATURE OF THAT DEFENCE?***

In terms of the conduct of the trial, it was not suggested that either defendant did anything to disrupt the running of the trial or breached their bail conditions. Judge Smyth said this was a complex trial which required careful consideration of voluminous material by all those involved in either bringing or defending the charges and the length of the trial reflected that complexity: “In respect of both applicants, a positive case of innocence was put throughout the process and they exercised their right to testify, maintaining the account they had given to the police”.

***HAS THE PROSECUTION OR DEFENCE MADE ANY SERIOUS ERROR OF LAW OR FACT, WHEREBY THE CASE BECAME PRESENTED ON A WRONG PREMISE?***

No further submissions were made on behalf of either applicant or the prosecution.

## **CONCLUSION**

Judge Smyth said it was apparent from the authorities that an individual discretion is vested in every trial judge to order defence costs of an acquitted defendant where it is just to do so, taking into account the special facts and circumstances of every case:

“This was a highly complex police investigation and the prosecution was warranted albeit the jury did not consider that the charges had been proved beyond reasonable

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doubt. The evidence bore the characteristics of a Rubik cube, capable of bearing myriad conclusions, depending on the jury's view of the evidence. But those were conclusions for the jury to reach, not for the prosecution. Having considered all of the relevant factors, I am satisfied that there is no basis for exercising my discretion in the applicants favour. The applications are therefore dismissed."

## NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston  
Judicial Communications Officer  
Lord Chief Justice's Office  
Royal Courts of Justice  
Chichester Street  
BELFAST  
BT1 3JF

Telephone: 028 9072 5921

E-mail: [Alison.Houston@courtsni.gov.uk](mailto:Alison.Houston@courtsni.gov.uk)