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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

(DIVISIONAL COURT - CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY GARY DEVLIN
(A PERSON UNDER DISABILITY) BY HIS MOTHER AND NEXT FRIEND
AINE McMAHON FOR JUDICIAL REVIEW

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

Mr Paddy Lyttle KC and Nick Jones (instructed by Archer, Solicitors) for the Applicant
Mr Philip Henry (instructed by the PPS) for the Respondent

Before: Horner LJ and Kinney J

HORNER LJ

Introduction

[1] The applicant, Gary Devlin, a 31 year old man, who is under a disability, seeks a judicial review of the decision of the Public Prosecution Service ("PPS") not to prosecute Sean McLean ("SMcL") a member of the security staff at McDonald's fast food restaurant, Donegall Place for assaulting him arising out of an incident, captured on CCTV and a mobile phone ("the footage") which occurred on 23 November 2020 at around 5:30pm.

[2] The applicant makes the case that the decision not to prosecute SMcL, which was confirmed on review, was unlawful in that :

- (i) It breached the PPS's own policy and the Code for Prosecutors (2018) ("the Code") and in particular 4.1 of the Code;

- (ii) It breached its own policy set out in 4.8 of the Code;
- (iii) It breached its own policy addressing the public interest test, set out at 4.11 and 4.12 of the Code;
- (iv) Was contrary to its own policies and in particular a published policy document entitled "Victims of crime requesting a review of a decision not to prosecute";
- (v) Placed too much weight on the recommendation made by the original investigating officer;
- (vi) Erred in law by concluding the notice party was acting in self-defence as his act of alleged self-defence was not proportionate;
- (vii) Breached the notice party's rights under article 3 and article 8 of the European Convention on Human Rights ("ECHR");
- (viii) The decision not to prosecute SMcL was both unlawful and irrational.

[3] A divisional court comprising Kinney J and myself had the opportunity to view in full the footage showing the whole incident from beginning to end.

Facts

[4] At around 5.30pm on 23 November 2020 the McDonald's fast food restaurant in Belfast city centre at Castle Place was very busy. The applicant was a customer. He purchased food at the payment counter and was given a receipt with his order number while his food was being prepared.

[5] The food arrived at the collection area and the applicant began consuming it there. This area is for collection of food only and not for consumption. When the applicant was asked to move on he was abusive to the staff and demanded an apple pie. His misconduct was visible to other customers in this busy restaurant. At that time customers were still following the rules in respect of social distancing (as instructed) and some were wearing masks.

[6] The applicant, who gave the impression of having been intoxicated, became very angry. He abused staff and when asked to take his food and eat it either at a table or outside, his manner became overtly hostile.

[7] After several minutes a security staff member, SMcL, approached him and asked him to leave. He asked that member of staff if he knew "who he was" and became very aggressive. He then started squaring up to SMcL and behaving in an aggressive and confrontational manner. He pushed SMcL a few times and SMcL then forcibly removed him while at the same time trying to avoid being physically attacked by the applicant. At this time the applicant was throwing punches and this was

followed by him restraining SMcL in a headlock and trying to choke him. It would have been obvious to bystanders that the applicant was intent on hurting SMcL. It certainly appeared to be his aim as observed from the footage

[8] SMcL was then seen on the footage picking the applicant up and dropping him/throwing him onto the floor. The applicant was subsequently arrested. He was discovered to have sustained a serious injury when he hit the floor.

[9] The police supplied the PPS with five pieces of footage which covered the incident:

- (i) CCTV footage from inside McDonald's;
- (ii) CCTV footage from the camera on the wall outside McDonald's;
- (iii) PSNI city centre CCTV;
- (iv) mobile phone footage recorded by a member of the public obtained by the PSNI and referred to by the applicant;
- (v) body camera footage from the police officers who attended the scene after the incident first arose.

[10] The PPS looked at all the footage which ended in the applicant being arrested. He was interviewed on 8 March 2021. He made the case that he was the victim. Contrary to the case made in the judicial review at para 6 of his affidavit which claimed he had no memory of what happened, he gave his version of events on the night in question.

[11] SMcL was interviewed by the police, and he made the case that the applicant was the aggressor and that he had been attacked by the applicant repeatedly and continuously and that the actions he had taken were in self-defence. Accordingly for any prosecution to succeed it would have to prove beyond reasonable doubt that the accused was not acting in self-defence when the applicant was injured, if it was to secure a conviction.

[12] The matter was referred to the PPS and the prosecution lawyer there concluded that the evidential test for prosecution was not met. In a letter of 19 July 2021 the PPS set out its reasons which included:

- (i) The evidence available was insufficient to provide a reasonable prospect of conviction;
- (ii) The individual strands of evidence, taken as a whole, were not sufficiently strong enough to provide a reasonable prospect of conviction.

[13] In those circumstances the applicant was advised that the test for prosecution was not met and advised that he could ask for a review. Approximately a year later the applicant's present solicitor wrote inquiring about the decision and asking for reasons. These were provided. A request was then made for review and although the PPS Code for Prosecutors provides that such requests should be made within three months of the relevant prosecution decision, it agreed to carry out a review which was to be undertaken by a senior prosecutor.

[14] The applicant's solicitor provided a medical report from a Consultant Clinical Neurologist dated 29 August 2022 which referred to various injuries suffered by the applicant, including a number of head injuries. It also identified significant substance abuse, involving alcohol and drugs, throughout his teenage and adult life.

[15] The reviewing lawyer looked at all the relevant evidence, including the footage relied upon by the applicant, and decided the evidential test was not met. She did not consider that there was a reasonable prospect of proving beyond reasonable doubt that SMcL was not acting in self-defence.

[16] It is accepted that the PPS originally did not respond to the applicant's pre-action protocol letter due to an administrative error. The response was contained in a letter of 17 October 2022. This delay on the part of the PPS is unfortunate given that the incident occurred on 23 November 2020. It is also important to note the actual Order 53 Statement is dated 30 September 2022.

[17] The Order 53 Statement raised a number of different grounds. These were:

- (i) The PPS had acted unlawfully and in breach of its own policy and in particular in respect of 4.1 of the Code in that it acted contrary to its own policies in applying this test;
- (ii) The respondent acted unlawfully in breach of its own policy as set out in 4.8 of the Code in that there was an identifiable suspect, credible evidence that the prosecution could present to a court and evidence upon which an impartial jury properly directed could be reasonably expected to find and prove beyond reasonable doubt that that suspect had committed a criminal offence;
- (iii) The PPS had acted unlawfully and in breach of its own policy addressing the public interest test as set out in 4.11 and 4.12 of the Code in that there was serious injury, strong evidence and it was clearly in the public interest to prosecute;
- (iv) The PPS had acted contrary to its own policies and had failed to provide detailed reasons for the decision on review;
- (v) The PPS placed too much or excessive weight on the recommendations made by the investigating officer;

- (vi) The respondent erred in law by concluding that SMcL was acting in self-defence;
- (vii) A decision not to prosecute SMcL was incompatible with the applicant's rights pursuant to article 3 of ECHR because it failed to provide protection through the legal system for a serious rights violation and was also incompatible with the applicant's article 8 rights because it had materially departed from the Code and in doing so had failed to demonstrate respect for the applicant's private and family life.

Legal principles

[18] Section 76 of the Criminal Justice and Immigration Act 2008 provides that where in proceedings for an offence an issue arises as to whether the person charged with the offence is entitled to rely on a defence within sub-section (2), namely the common law defence of self-defence and the defence provided by section 3(1) of the Common Law Act 1967 and the question arises as to whether the degree of force used by the defendant against a person was reasonable in the circumstances.

[19] Article 76(3) states:

“The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be ...”

[20] Section 3 of the Human Rights Act 1998 provides:

“3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

[21] Article 3 of the ECHR provides:

“No one shall be subject to torture or to inhuman or degrading treatment or punishment.”

[22] Article 8 states:

- “(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

[23] In *R (on the application of Corner House Research) v The Director of Serious Fraud Office (BAE Systems plc, interested party)* [2008] 4 All ER 927 at [30]-[32] Lord Bingham said as follows:

“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 an 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 p C* [1995] 1 Cr App R ep 136 at 141; *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330 at 343-344; *R (on the application of Bermingham) v Director of the Serious Fraud Office, Bermingham v Government of the USA* [2006] EWHC 200 (Admin) at [63]-[64]; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20 at [17] and [21], citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 735-736; *Sharma v Antoine* [2006] UKPC 56 at [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.” (emphasis added)

[24] In *Re Mooney' Application* [2014] NIQB 48 Coghlin LJ giving the judgment of the Court of Appeal stated:

“[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 ...”

[25] Lord Bingham then goes on to look at the public interest after establishing there was general agreement that the evidential test had been met. The Court of Appeal went on to conclude “that this was in fact an exceptional case.”

Discussion

[26] On 9 March 2022 Michelle Neill, a Public Prosecutor with the PPS sent a reply to an email from the applicant’s solicitor of 9 March 2022. It said:

“A detailed letter setting out the reasons for no prosecution was sent out to the injured party on 19 July 2021, which included information on how to request review of the decision. No request for review was ever received. Before coming to the decision last June, I had watched all of the available footage of this incident. Mr McLean kept returning to his stance in the doorway of McDonald’s to prevent Mr Devlin from re-entering. Instead of walking away, Mr Devlin kept approaching Mr McLean on numerous occasions. Mr Devlin had Mr McLean in a headlock. Mr McLean had extricated himself from the headlock then carried out the manoeuvre that resulted in the head injury to Mr Devlin. Although Mr Devlin sustained injury from this incident the CCTV shows that he was the aggressor, and that Mr McLean was acting in self-defence.”

[27] We have watched the available footage at great length. We consider that the conclusion of Ms Neill is both unsurprising and reasonable. In any event it is well within the margin of appreciation afforded to the prosecutor.

[28] The applicant was fortunate not to be prosecuted given his behaviour. But the PPS took the decision not to prosecute because of the serious injury he had sustained during this incident. The PPS decided that in those circumstances it was not in the public interest to prosecute. Such a decision appears to us to be unimpeachable.

[29] There are two stages to be considered in the defence of self-defence.

(i) Was it necessary for the doorman to use force to defend himself?

[30] We have reviewed the footage on a number of different occasions. We share the view of the PPS that it was necessary for SMcL to use force because he was being viciously and continuously attacked. This was not a simple attack. The applicant attacked on a number of occasions over a 10 minute period. This assault ultimately culminated in the applicant punching SMcL on the head and then executing a choke hold on his neck. In those circumstances the PPS acted reasonably in concluding that SMcL was entitled to throw him off. This was not a situation for a fine judgment. The applicant was choking SMcL and SMcL was suffering at the hands of the applicant. His only option was to use force to defend himself.

(ii) Was the level of force used in self-defence reasonable?

[31] SMcL was at the mercy of the applicant. He had been punched and he was now being choked. This vicious attack had lasted some 10 minutes. SMcL had to escape from the applicant's headlock or risk asphyxiation. It seemed to us from the footage that the PPS was entitled to conclude that SMcL acted reasonably and proportionately in lifting the applicant off the ground and then throwing him onto the ground so as to release himself from the choke hold. We considered it highly unlikely that any jury in those circumstances would have considered the use of force by SMcL to be disproportionate. SMcL had to bring the attack to an end or risk being choked. Earlier efforts involving less force had been unsuccessful. It was not an option for SMcL to allow the applicant to strangle him.

[32] We have no hesitation in concluding that:

- (a) It was necessary for SMcL to use force to defend himself; and
- (b) The level of force used by SMcL in the circumstances was reasonable.

[33] In those circumstances the decisions of two different prosecutors that the evidential limb for prosecution had not been met were unimpeachable. They were clearly within the wide margin of appreciation afforded to any prosecutor in such circumstances.

[34] The claim that there was a breach of article 3 and/or article 8 of the ECHR was also ill-founded. The PPS was quite correct to conclude on balance that the actions of SMcL were proportionate given the serious physical attacks made by the applicant on him. First of all there is force in the submission of the PPS that the minimum level of severity required for an article 3 case is not met as the applicant's case falls far short of that threshold.

[35] In *R(B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening)* [2009] 1 WLR 2072 the claimant suffered an assault in which part of his ear was bitten off. He identified R as being assailant. On the basis of a medical report which concluded that the claimant's medical condition might affect his perception and recollection of events, the Crown Prosecution Service decided that it could not put

the claimant before the jury as a reliable witness and there was no realistic prospect of success. The claimant sought judicial review by way of declaration that the decision to discontinue the prosecution was irrational under domestic public law and also that it was a violation of his rights under article 3 of the ECHR. Toulson LJ giving the judgment of the court noted that article 3 provided that “no one should be subject to torture or to inhuman or degrading treatment or punishment”. One aspect of the duty is the provision of a legal system for bringing to justice those who commit serious acts of violence against others. However in this case, we find, it was the applicant who viciously assaulted SMcL who, in return appears to have used reasonable force to defend himself. This does not begin to establish any claim under article 3 or article 8.

[36] In the instant case, we do not consider for the reasons we have set out that the evidential test for prosecution was met. Also we do not consider that there was or could have been a breach of 4.7 or 4.8 of the Code for Prosecutions.

[37] 4.11 and 4.12 are irrelevant because this is a sequential test and this court having determined that the evidential test is not satisfied, there is no need to go on to consider the public interest test.

[38] In any event, we pause to note that the original victim in this case was not the applicant but rather SMcL who was the subject of an unprovoked and vicious attack by the applicant. The PPS was entitled to conclude that in the circumstances SMcL responded proportionately.

[39] The final complaint is that it is the policy of the PPS to give detailed reasons for a decision not to prosecute to the victim of crime and to offer a meeting and that this policy was not followed.

[40] The first prosecutor provided reasons for the decision not to prosecute in a letter dated 21 July 2021. Apparently, these were not considered by the applicant, but they were subsequently re-sent. However the original decision was reviewed, and the reviewing prosecutor set out her reasons in a letter dated 5 July 2022. This letter made it clear that:

- (i) The matter had been carefully considered by an experienced lawyer who decided not to prosecute SMcL in respect of the allegations made by the applicant about the alleged assault; and
- (ii) This had been reviewed by Ms Drummond on behalf of the PPS and she agreed with the decision of the directing officer.

[41] Their view was that there was insufficient evidence to afford a reasonable prospect of obtaining a conviction for assault against SMcL. In any event if the reasons for not bringing the prosecution were not apparent to the applicant then, (and they should have been), they must be now. The evidential test was not met given the circumstances in which the applicant suffered his injuries and the likelihood of a jury

concluding having seen the footage, that such injuries were suffered as a direct consequence of SMcL defending himself and using proportionate force against the applicant's attack.

[42] It is important not to forget that in this case the evidence available indicates that the applicant was not a victim of a crime. He was in fact the perpetrator of a vicious assault and was injured as a consequence of his victim exercising his lawful right to self-defence.

Conclusion

[43] We have had the opportunity of viewing the footage of the incident which lies at the heart of this judicial review. We also recognise the wide margin of appreciation given to the prosecuting authority in deciding whether to prefer charges. The conclusion that the prosecution of SMcL failed the evidential test for prosecution was unimpeachable. This is emphatically not one of those cases in which the court should intervene. The applicant on the basis of the evidence before us was never the victim of any crime. He was the perpetrator of a vicious assault on SMcL. His injuries were suffered when SMcL took reasonable and proportionate steps to prevent the applicant from choking him. This was not a situation for fine judgment.

[44] The applicant should have been aware from the circumstances why the PPS did not prosecute. In any event this judgment should leave him in no doubt that the decision not to prosecute SMcL was because the facts of this case did not pass the evidential test for prosecution. There was no breach of the Prosecution Code. Nor did the applicant begin to persuade the court for the reasons given that there had been any breach of any of the articles of the ECHR.

[45] Context is everything. The applicant viciously attacked SMcL who defended himself and who used what might be considered reasonable force in so doing given the circumstances. The decision not to prosecute was unsurprising and comes within the wide margin of appreciation with which the PPS is invested in deciding whether to prosecute these types of case. Accordingly, we reject this application for judicial review of the decision of the PPS not to prosecute given all the circumstances.