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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **20/12/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Before: Treacy LJ and O'Hara J

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TREACY LJ ***(delivering the judgment of the Court)***

Introduction

[1] The Applicant is Mr Raymond McCord, the father of Raymond McCord Jnr who was murdered by Loyalists on 9 November 1997. The background to this application is set out in the grounding affidavit of Mr McCord. The present case arises out of developments which have occurred since 2013 when the Applicant was first advised as to the existence of an "Assisting Offender" in accordance with the Serious Organised Crime and Police Act 2005 ("the 2005 Act").

[2] Mr McCord was told that the Assisting Offender's criminal trial would have to conclude before any further investigative action could be undertaken by the PSNI. On 23 June 2017 Mr Haggarty was arraigned and pleaded guilty to over 200 crimes committed during a 16-year period from 1991 to 2007 when he was a member of the UVF. He was later sentenced on 29 January 2018 to six and a half years in custody.

[3] On 12 October 2017 the Director of Public Prosecutions informed the Applicant that following on from Mr Haggarty's agreement with the Public Prosecution Service in pursuance of section 73 of the 2005 Act, he had made a decision that Mr Haggarty's evidence did not pass the test for prosecution in relation to the activities of former police officers who had been implicated in having failed to prevent the murder of the Applicant's son.

[4] In the letter the Director advised that he had reached a decision based upon Mr Haggarty's credibility, which he expressed as a "clear view" that a judge hearing any case in which Mr Haggarty was a witness would warn himself of the dangers of

relying upon his evidence and would not return a conviction unless there was sufficient evidence capable of supporting his account.

[5] The Applicant sought a review of the decision not to prosecute. On 8 February 2018 the Applicant met with the Acting Deputy Director, Mr Agnew, to discuss his ongoing concerns about the decision not to prosecute, and in particular, the need then for a review of that decision. On 15 February 2018, a letter addressing the issues arising from the meeting was sent to the Applicant.

[6] Upon clarification that a review of the decision not to prosecute would be undertaken by the PPS the Applicant abandoned his earlier application for judicial review to compel such a result.

[7] On 3 May 2018, the PPS confirmed to the Applicant that the review would be assisted by the same senior counsel who advised in relation to the Convie and Fox case, this being a case where prosecutions were being considered in relation to the murders of Mr Gary Convie and Mr Eamon Fox on the basis of evidence provided by the assisting offender.

[8] In the Applicant's original Order 53 Statement in the current proceedings dated 23 July 2018 he seeks orders that the PPS should not conduct a review of the original decision not to prosecute that engages senior counsel who previously advised in relation to a case arising from the deaths of Gary Convie and Eamon Fox. In addition, the Applicant also sought an Order of Mandamus that the PPS provide a review by a sufficiently senior prosecutor "who has not previously sought to vindicate the original decision not to prosecute."

[9] The case has now been reviewed by the PPS. This review was informed by what the Respondent described in their skeleton argument as a detailed legal opinion by John McGuinness QC, a leading criminal law silk from outside the jurisdiction who had also advised in other cases relating to the assisting offender (Gary Haggarty). The Applicant was informed by letter dated 7 March 2019 wherein the PPS determined that there should be no prosecution of the two police officers.

[10] The issue of who should conduct the review was canvassed in the course of a contested leave hearing during which the Court was informed that Mr McGuinness QC had already completed written advices in relation to this prosecution but that they had not been transmitted to the PPS because these proceedings had intervened. The Court was also advised that the resignation of the previous Director gave rise to real practical difficulties in having a senior member of the PPS, other than Mr Agnew, conduct the review. The Court invited the Applicant to confirm whether he would object to the review being conducted by Mr Agnew, Deputy Director of Public Prosecutions. After consideration, Mr Lavery informed the Court that the Applicant would not object to Mr Agnew conducting the review. The Applicant did not however abandon his original objections.

[11] Following the receipt of advice from Mr McGuinness QC a review was conducted by Mr Agnew and, as previously noted, the Applicant was informed by letter on 7 March 2019 that the PPS had determined that no prosecution would commence.

[12] In support of the additional relief now sought amended grounds of challenge were added accompanied by a letter dated 21 May 2019 to the PPS raising a number of factual questions requesting information from the PPS in support of the new grounds of challenge. This correspondence was responded to in detail by the Deputy Director by letter dated 31 May 2019. It is convenient to turn to these additional grounds of challenge first.

Ground 3(viii) "The new evidence referred to in the letter of 7 March 2019 does not undermine the account of the assisting offender. The new evidence is actually corroborative of the assisting offender."

[13] The PPS assert that the evidence referred to is not new. It was evidence that was in the possession of PONI but which was not referred to PPS when PONI made the report to PPS in respect of the two officers. The evidence appears to show that one of the police officers did make a contemporaneous report of receiving a call from the assisting offender. The call was received on 13 November after the murder. To that extent the PPS insist that it does not "corroborate" the assisting offender's account for the purpose of the prosecution of the offence in question. If anything, in their view, it tends to undermine it. The Deputy Director has made this point. We agree with Mr McGleenan QC that the contention that this appraisal of evidence, that was not previously available to the PPS, amounts to bias, actual or perceived, is not tenable. In our assessment the fair-minded observer in possession of all of the relevant information could not reach the conclusion that this was evidence of bias.

Ground 3(ix) "Any failure by the Public Prosecution Service to provide the new information about a call having been made by the assisting offender to police on 13 November 1997 to the senior counsel instructed ... vitiates the decision not to prosecute."

[14] In his letter of 31 May 2019 the Deputy Director stated as follows:

> "I can confirm that Mr McGuinness QC was provided with all of the additional information in advance of providing his written advice. I can further confirm that both Mr McGuinness and I have considered detailed analyses in relation to the allegations that Mr Haggarty was making against the officers in respect of a series of incidents reported to this office by the Police Ombudsman for Northern Ireland. We have therefore had available and carefully considered a large volume of material relevant to the respective accounts of both

> Mr Haggarty and the officers against whom he has made various allegations. All relevant considerations have been taken into account by myself and Mr McGuinness." [emphasis added]

We agree with the Proposed Respondent that in light of the comprehensive response from the Deputy Director that this ground of challenge is not arguable.

Ground 3(x) Paragraph 4.62 of the Code for Prosecutors would ordinarily require that the instant case should have gone back to the original decision maker on the basis that new information was to hand after an initial decision not to prosecute was taken. .... It is clear from paragraph 4.62(ii)(b) of the Code for Prosecutors that the new decision maker making that decision in which he was taking new information into account was required to refer the case to another Public Prosecutor for review..."

[15] This ground of challenge was also responded to by the Deputy Director, Mr Agnew, in his letter of 31 May 2019 wherein he stated:

> "Paragraph 4.62(ii)(b) of the Code addresses the situation where 'new or additional evidence or information is ***provided in connection with*** a request for a review of a decision not to prosecute' [emphasis in original]. In these circumstances the original prosecutor will first look at the original decision in light of that new evidence so that they have an opportunity to change their mind *before* the case is passed to a second prosecutor. This part of the Code does not apply to the current situation. No new evidence or information was provided in connection with the request for review. The new information came to light in the course of the review as a result of a further line of enquiry being raised with the police. ..... The process which was adopted is in accordance with the Code."

We agree with the Proposed Respondent that in light of the comprehensive response from the Deputy Director that this ground of challenge is not arguable.

Ground 3 (xi) "The Public Prosecution Service has raised explicit concerns about Mr Haggarty's credibility as a prospective witness in this case. In circumstances where the Public Prosecution Service has a clear and obvious opportunity to have his credibility tested properly, the Public Prosecution Service has erred in reaching such a definite view about his credibility before the assisting offender has gone through the rigours of the trial process in the Convie and Fox murder prosecution."

[16] In his letter of 31 May 2019, the Deputy Director maintained that this ground of challenge amounted to a request to defer a prosecution decision. The Proposed Respondent contends that this ground of challenge is difficult to reconcile with

ground 2(b) of the amended Order 53 Statement which seeks Mandamus compelling the completion of a review.

[17] Moreover, as Mr Agnew noted in his letter of 31 May the Applicant places reliance on an affidavit sworn by a PSNI officer in separate proceedings which are not before this Court. The Deputy Director observes that the PSNI have an investigative remit which is conceptually different to the prosecutorial function vested in the PPS. Mr Agnew then states:

> "The extensive analysis undertaken at this stage has led me to form the prosecutorial judgment that the Test for Prosecution cannot be met without sufficient evidence supporting any particular criminal allegation made by Mr Haggarty. The prosecution in the Convie and Fox case is of one individual in respect of whom there **is** such supporting evidence. I have no reasonable expectation that the Convie and Fox trial will alter my general prosecutorial assessment as to the need for supporting evidence in order to prosecute on the basis of Mr Haggarty's evidence."

We agree with the Proposed Respondent that in light of the comprehensive response from the Deputy Director that this ground of challenge is not arguable.

[18] We have dealt with the new grounds of challenge identified by the Applicant in the final iteration of the amended Order 53 Statement and, as noted above, have determined that none of them are arguable. It is convenient to turn now to the original grounds of challenge.

[19] So far as the original grounds of challenge are concerned, there were two aspects. The first is the decision of the PPS to pursue a review of the original decision not to prosecute that engages the same senior counsel who previously advised in the related cases of Convie and Fox in which the Assisting Offender, Gary Haggarty, was also to be the key witness. The second aspect of challenge is predicated on the basis that the review was being carried out by a Prosecutor (the Deputy Director) who, it was asserted "has already sought to vindicate" the original decision not to prosecute.

[20] In respect of both limbs of the originally formulated challenge the essential contention is that the review process is therefore infected by apparent bias. The principal focus of Mr Lavery's oral submissions on these issues at the earlier adjourned leave hearing was directed towards the decision to entrust the Deputy Director with the task of review of the original decision not to prosecute taken by Mr McGrory QC, the then Director of the PPS. Mr Lavery QC did not pursue the first limb before us.

[21] Having reviewed the matter in some detail we do not consider that there is any substance to the originally formulated challenge. This is clear from our review of the relevant correspondence which we set out below.

[22] On 30 April 2018 the Deputy Director, Mr Agnew, wrote to the Applicant confirming again that a review would be undertaken into the decision not to prosecute two police officers for offences relating to the murder of the Applicant's son. The letter stated:

> "I can confirm that I am undertaking the review in this case. As explained in my letter dated 15 February 2018, Senior Counsel previously provided advice relating to the Test for Prosecution as it applied specifically to the Convie and Fox case. Whilst that advice included a general assessment of Haggarty's reliability and credibility and guided the approach that the former Director of Public Prosecutions, Mr Barra McGrory QC, applied to all of the Operation Stafford decisions, it did not specifically address the prospects of convicting the two officers for offences connected to Mr McCord's murder. To assist me with my review I am obtaining a further advice that does address that specific issue. I expect to receive that advice in early June 2018 and therefore the timescale for me to complete my review is presently the end of June 2018."

[23] On 1 May 2018 the Applicant's solicitors wrote to PPS seeking details as to who would be conducting the review. On 3 May 2018 the Deputy Director responded confirming that he would conduct the review and that it would be a fresh decision applying the test for prosecution afresh to the available evidence and information. The letter also advised that the review process had commenced and that the Applicant had been advised of the review on 12 March 2018.

[24] The Applicant replied on 14 May 2018. It is clear from this letter that the Applicant had wrongly gained the impression that the appointed senior counsel had previously advised on the specific issue of the prosecution of the two police officers. He had not.

[25] The Applicant sent further correspondence on 25 May 2018. This correspondence raised no issue about the identity of the prosecutor who should conduct the review. By this point the Applicant was fully aware that the review had commenced in March 2018 and that the review decision would be taken by the Deputy Director with the intention that it be completed by the end of June 2018.

[26] The Deputy Director responded to this letter on 5 June 2018 seeking to correct the Applicant's misunderstanding about the role of senior counsel. It was made

plain that he had not previously advised in respect of the no prosecution decision that was under review. He had advised on the Convie and Fox case which is the subject of prosecution. He was being instructed to advise on the prospects of prosecution in this case for the first time. The letter stressed that, while counsel was instructed to provide advice, the review decision would be taken by Mr Agnew.

[27] There was no further correspondence from the Applicant in this case and the Applicant lodged proceedings on 3 July 2018. We note the observation of the proposed Respondent that the Applicant was aware of the review from March 2018, was aware of the identity of the prosecutor who would make the decision from 30 April 2018, was aware that the timescale for decision was end of June 2018, but did not introduce to challenge the identity of the prosecutor until July 2018. The Respondent contends that this point was never foreshadowed in any properly constituted pre-action correspondence and that the time limits contained in Order 53 Rule 4 were not complied with and that leave, on that ground alone, should be refused.

[28] As noted above the PPS have now completed a review of this case having received advices from an English QC with detailed knowledge of the Assisting Offender's case. The review decision was taken by the Deputy Director. We agree that he was the appropriate decision-maker given that the previous decision was taken by the former Director. The Applicant was made fully aware that Mr Agnew was conducting the review and did not seek any relief to stop that process.

[29] None of the grounds relied upon has been established, leave is refused and the application for judicial review is accordingly dismissed.

Postscript

[30] The Applicant, pursuant to section 41 of the Judicature (NI) Act 1978 applied to the Court for a point of law of general public importance to be certified and for leave to appeal to the Supreme Court. Section 41, so far as material, provides:

> **"41 Appeals to Supreme Court in other criminal matters**
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> (1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court at the instance of the defendant or the prosecutor-
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> (a) from any decision of the High Court in a criminal cause or matter;
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> (b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.

> (2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court."

[31] The Applicant sought certification in respect of the following questions:

> "(i) Whether a Court can conclude that the Public Prosecution Service (PPS) review procedure was properly independent when, for the purposes of that review, the PPS placed reliance upon the opinion of the same senior counsel whose advice was already relied upon in respect of an original decision not to prosecute;
>
> (ii) Whether the Code for Prosecutors has created a scheme which is designed to guarantee to the victim or person interested on behalf of a victim a meaningful assessment of all of the relevant evidence followed, in the event of a decision not to prosecute, by a meaningful review and second consideration of all of the relevant evidence, which did not happen in this instance."

[32] Having carefully considered the written and oral submissions we were not persuaded that any point of law of general public importance is involved in the decision of this Court and accordingly leave was refused.