

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN

CA (A MINOR)

Appellant

and

PUBLIC PROSECUTION SERVICE

Respondent

MORGAN LCJ

Application

[1] The applicant is aged 17 and is the subject of an allegation of having inflicted grievous bodily harm contrary to Section 20 of the Offences against the Person Act 1861. By the present application she challenges the Public Prosecution Service conclusion that the allegation is not suitable for diversionary disposal as an alternative to prosecution as provided for by the Criminal Justice Children (Northern Ireland) Order 1998.

[2] This application concerns the approach of the PPS to the availability of a diversionary disposal in a case considered by the PPS to involve only partial or limited admissions from the applicant. The applicant seeks an order quashing the decision by which it concluded that the applicant's case was not suitable for diversionary disposal, a declaration that the decision was unlawful, ultra vires and had no force of effect and an order that the matter be reconsidered and determined according to law.

[3] The background is that the applicant is a school pupil who plays for a ladies' football club in her free time. Her date of birth is 11 October 1995 and she has no previous convictions. The circumstances of the allegation were that on 16 May 2012 the football match in which she was playing was abandoned following an incident in which she struck a player from the opposing team. During police interview on

18 May 2012 the applicant admitted punching the victim but denied kicking her in the face while she was on the ground. She showed remorse and stated that she did not mean to inflict the level of injury that she did. The injured party has alleged that the applicant did kick her and there are other witnesses who support the injured party's account. The Public Prosecution Service prosecuted the case on the basis that they will seek to establish that she did inflict a kick on the applicant. The test for interference by the court with a prosecution decision is contained in remarks made by Lord Steyn approved by the Privy Council in *Sharma v Antoine*. The first question that arises is whether or not this is a prosecution decision. Despite the submissions of Mr Sayers we are satisfied that this was a decision as to whether or not to divert as an alternative to prosecution that it is therefore a decision about whether to proceed with a prosecution and that the test to be applied is whether or not the decision is flawed by reason of dishonesty, mala fides or exceptional circumstances and for the reasons that we go on to give we consider that this is a case in which there are exceptional circumstances.

[4] The issue between the parties really depends upon the proper interpretation of paragraph 2.3 of the Guidelines for Diversion issued by the Public Prosecution Service and there is assistance as to how the court should approach the influence of such guidelines to be found in Lord Judge's remarks in the *R v A* where he has indicated that the court expected that such guidelines would be conscientiously applied. What does conscientious application mean in a case of this kind? It seems to us that it involves not just good faith but also properly taking into account the requirements of the guidelines. Turning then to the Guidelines which deal with the question of diversion one sees that the starting point is that they are engaged once the evidential test for prosecution is met. They are not therefore concerned with that aspect of the prosecutorial function.

[5] Paragraph 1.4 indicates that where sufficient evidence to provide a reasonable prospect of conviction is available, the next consideration is whether the public interest requires prosecution. So the guidelines tell us that the public interest lies at the heart of what is to be considered in applying these guidelines. Again at 1.4 public prosecutors must exercise their discretion as to whether a prosecution is required in the public interest. In paragraph 1.6 the last sentence reads "public prosecutors should positively consider the appropriateness of a diversionary option particularly if a defendant is a youth when considering where the public interest lies" and that again is a clear indication that the public interest is at the heart of this. Paragraph 2.1 says that when considering the appropriateness of diversion "each case should be assessed on its individual merits based on the general factors for consideration below" which seems to be a wide test. Whether diversion is appropriate will depend on the seriousness of the offence and the circumstances of the offence and the offender in each case which again appears to indicate a wide approach. That takes us therefore to paragraph 2.3 which deals with the question of the nature of the admissions. The first portion of paragraph 2.3 is concerned with the admissions that the offender must make but the relevant portion for the purposes of this application is the second substantial part of 2.3 which reads:

“In exceptional circumstances it may be appropriate to direct a diversionary option where the offender has made limited or partial admissions and where there are cogent public interest considerations in favour of diversion.”

We are satisfied that having looked at the document as a whole and at the sentence in particular that the consideration of whether or not exceptional circumstances are established requires consideration both of the nature of the limited or partial admissions and whether there are cogent public interest considerations in favour of diversion thereby leading to a balanced decision in the public interest as to whether or not diversion is appropriate.

[6] It seems to us that what has occurred in this case has not satisfied paragraph 2.3 because it is clear from the express terms of the letter of 19 March 2013 that the decision maker did not take into account the public interest considerations in determining that diversion should not arise in this case. He specifically said within the letter “for the reasons set out above and in previous correspondence I am unable to consider the public interest considerations that surround the decision whether to divert this case whilst such a central and important part of the prosecution remains in dispute”. It seems to us procedurally that that flies in the face of what the guidelines require him to do.

[7] So for those reasons we consider that this is an exceptional case falling within *Sharma v Antione* which entitles us to intervene and we do so by quashing the decision of the prosecutor and remit the matter to the PPS for the decision to be made according to law.