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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)
BY A DIVISIONAL COURT

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Donnelly's Application [2015] NIQB 56

IN MATTER OF AN APPLICATION BY BRIDGIN DONNELLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE PUBLIC PROSECUTION SERVICE DATED 5 DECEMBER 2013

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Girvan LJ, Gillen LJ and Weatherup J

GIRVAN L J (delivering the judgment of the court)

Introduction

[1] In this application the applicant, Bridgin Donnelly, challenges:

(a) the decision of the Public Prosecution Service ("the PPS") to withdraw criminal charges against two alleged assailants, L and A, notice parties to the application, who she alleged assaulted her;

(b) the decision of the District Judge granting leave to the PPS to withdraw the charges; and

(c) the decision of the District Judge to bind over the notice parties to keep the peace.

The applicant claims that the PPS withdrew the charges against her express wishes and that the prosecutor misled her into believing that the notice parties had pleaded

guilty and had been sentenced to a suspended sentence for the offences, the subject of the original charges.

[2] This matter has been a difficult and troubling one necessitating the filing of copious affidavits containing disputed evidence; amendments to the original Order 53 statement; the submission of amended skeleton arguments; and the making of reformulated submissions. Mr Scoffield QC and Ms Tierney appeared for the applicant. Mr Coll QC appeared for the respondent. Mr Ronan Lavery QC appeared with Mr Mullan on behalf of the notice party Lyndsay McCourt ("L"). Mr Sayers appeared for the notice party Aine McCourt ("A"). The court is grateful to all counsel for their helpful and well-focused arguments.

The Evidential Context

[3] The applicant alleges that she was assaulted by L and A the notice parties on 22 February 2013 in connection with a family dispute. A summons was issued requiring L and A to appear at Lisburn Magistrate's Court on 30 May 2013 on foot of a complaint charging them with assault contrary to Section 42 of the Offences against the Person Act 1861. They pleaded not guilty. The matter was adjourned for a contested hearing to take place on 30 July 2013. A prosecution witness, who was an eye witness to the relevant events, failed to attend and the investigating officer was on leave. The case was adjourned until 5 December 2013.

[4] On 5 December 2013 the eye witness again failed to attend. The PPS withdrew the charges with their consent. L and A were bound over to keep the peace for 12 months on their recognisance of £400 pursuant to Article 127 of the Magistrates' Court (Northern Ireland) Order 1981 ("the 1981 Order"). The circumstances surrounding the withdrawal of the charges and the making of the binding over orders are disputed and lie at the heart of the application.

[5] In her affidavits the applicant asserts that the withdrawal of the criminal proceedings was against her express wish. She claims that she understood that the prosecutor on 5 December told her on several occasions that L and A were pleading guilty. She says that both the prosecutor and the investigating officer told her that L and A had both received 12 months' suspended sentences further to their guilty pleas and £400 if they were breached. It is her case that she discovered the truth when L and A taunted her on social media after the outcome. The applicant, who is partially deaf and wears a hearing aid, in her affidavit evidence made a number of key averments:

(a) She described how the assault resulted in her sustaining bruising to the eyes and body, bleeding, swelling and stiffness. She stated that she sustained a broken nose which was diagnosed as such in early December.

(b) On 30 July when S did not attend the PPS female prosecutor in attendance on that occasion indicated that there was an option for the PPS to withdraw the

prosecution and have the defendants bound over but the applicant refused to agree to that course.

(c) The applicant's version of what happened on 5 December was that the witness was again not in attendance. She informed the prosecutor (Terence O'Connor) of the diagnosis of a broken nose but she claimed that he said it was a bit late mentioning that. She understood the prosecutor to say that if the case went into court it was a 50-50 case.

(d) She alleged that the prosecutor said something along the lines that if the case did not go into court the defendants would still be guilty and she would have won. She was unsure what he meant.

(e) The prosecutor and the investigating officer withdrew briefly and then the applicant and her mother who was in attendance were taken to a different room. The investigating officer said that if the case went into court and the defendants won it would be "all over Facebook" (something which the investigating officer Constable Green denies). He said that if she did it in the way suggested by the prosecutor she could hold her head high and that she would have won the case. The applicant said that this would be ok provided the defendants were pleading guilty. She and her mother returned to the original witness room.

(f) The applicant felt confused about what was being said. She was asked if she wanted to go into court while the matter was mentioned. The applicant asked to see the prosecutor again to be sure that the defendants were indeed pleading guilty.

(g) When the prosecutor came back the applicant asked if the defendants were definitely pleading guilty and he replied that they were. She felt satisfied as a result and did not go into court.

(h) After the prosecutor and the investigating officer returned the prosecutor said "that's it – they have pleaded guilty." He said that each had received 12 months' suspended sentences and £400 fines if the orders were breached.

(i) The applicant then discovered from offensive Facebook comments posted by one of the notice parties that the defendants had not pleaded guilty at all.

(j) The applicant refuted the prosecutor's claim that he had explained the nature of a binding over order at length.

[6] In a letter of 24 January 2014 the Regional Prosecutor (Eastern Region) replied to the applicant's complaint about the handling of the matter by the PPS. The letter recorded, and the applicant accepts, that at the hearing on 30 July 2013 when the eye witness did not attend the prosecutor then present said that there were four options

(to proceed with the available evidence; to apply to adjourn; to direct a caution if admissions were made; to withdraw the charge and seek to bind over the defendants). The letter recorded that the application was adjourned. The letter went on to state that on 5 December the prosecutor then present clearly took the view that in the absence of the eye witness's evidence the contest would be based on two different versions set against each other with the possible consequence that the defendants would be acquitted. (It should be pointed out that there are many cases, including for example serious sexual offences, in which at the end of the day the court has to resolve two conflicting versions of events unsupported by any third party witness. The fact that an eyewitness is unwilling to attend would not itself be a justification for not prosecuting). The letter asserted that it was extremely difficult to ascertain the injured parties wishes and that her mother persistently intervened instructing the injured party what to say. The letter stated it was conceded by the injured party that certain texts had been sent to the defendants which it was alleged could have inflamed the situation. It was also the case that part of the defendant's evidence was that the injured party had started to make racist comments. The letter asserted that, according to the prosecutor's note, he explained at length what a binding over order would mean. He also advised the injured party and her mother of the maximum sentence and/or fine available if conviction was secured, noting that it would be highly unlikely that the highest tariff would be imposed. The note recorded that the injured party wanted to accept the binding over route as she felt this would have the dual effect of not having to face the parties in court and would have a deterrent effect on the defendants (although it does appear that the applicant already had the benefit of a non-molestation order and did not need something hanging over the head of the notice parties). Although the mother initially objected to that course forcefully on a final return to the witness room, while the investigating officer was still speaking to the injured party and her mother, the injured party said that she wished to accept the binding over order and her mother was in agreement.

[7] Some support for the applicant's case is to be found in the record of Mr Kevin Barr who was a Witness Service volunteer present in the court on 5 December 2013 and who interacted with the applicant and her mother on that day. He had filled in a case information sheet after court that day and in the note section on the document he recorded that the "defendants pleaded guilty". The note also recorded that a pre-sentence report was to be obtained. This was clearly wrong and may have been based on an assumption on the part of Mr Barr or he may have confused this case with another one.

[8] In her third affidavit the applicant rejected the version of events set out in the PPS letter. She denied that her mother interfered or had to be calmed down as alleged. She strongly denied that she wanted to go for a binding over order to avoid having to go into court or to have something to hold over the defendants. The applicant's mother in her affidavit said that the prosecutor did not make any kind of effort to speak slowly to the applicant who had a hearing problem. In any event the applicant understood what was said. She refuted the prosecution claim that the applicant was "looking to make the matter go away." (In fact in Constable Green's

affidavit he makes clear that it was the eye witness who wanted to make the case go away.) If the prosecutor picked that up incorrectly then he clearly misunderstood the applicant's frame of mind. She supported the applicant's evidence that the Mr Barr went to fetch the prosecutor again when the applicant wished to be absolutely sure that the defendants were pleading guilty. She asserted that the prosecution did not mention withdrawal or binding over at that stage.

[9] A very lengthy affidavit of 63 paragraphs was sworn by Terence O'Connor, the prosecutor in attendance on 5 December. He denied the applicant's version of events and asserted that the disposal of the case was entirely in accordance with the wishes of the applicant. He exhibited his typed notes of the events of 5 December 2013 which he claimed were typed up on the following day from contemporaneous notes which were "shredded" prior to leaving the PPS. Mr O'Connor asserted that this had been done because he had signed the Official Secrets Act. This was a spurious assertion since there is nothing in the Official Secrets Act which requires the destruction of contemporaneous handwritten notes. His typed version of his notes is dated 6 December and is a version of events drafted in a carefully self-protective form. If the date is correct the notes were made before any intimation of any complaint by the applicant so he must have been aware of a potential problem arising. His deliberate destruction of the handwritten notes for a spurious reason calls into serious question the reliability of his typed notes. Mr O'Connor did accept that he portrayed a binding over order as a "win" but he insisted that he accurately and fully discussed the reasons why the prosecution were going for a binding over order.

[10] Subsequently on 12 January 2015, Stephen Burnside, an Assistant Director in the PPS swore an affidavit following application to cross-examine Mr O'Connor on his affidavit. Mr Burnside averred that Mr O'Connor was not prepared to co-operate with the respondent in the provision of any further evidence. According to an e-mail sent to the PPS by Mr O'Connor he "reiterated" that at the time of drafting up his affidavit he was under considerable disability and swore the affidavit in response to repeated urgings from the PPS. He claimed that he signed "against his better judgment" and in the midst of bad health brought on primarily by his experience of working with the PPS. Mr Burnside stated that the respondent did not accept any implied criticism that Mr O'Connor was placed under pressure to provide an affidavit or to provide any particular evidence in the light of the context of the e-mail of 29 September 2014 from Mr O'Connor. The respondent considered that it was not appropriate for the respondent to continue to rely on Mr O'Connor's affidavit.

[11] The respondent does, however, seek to rely on the affidavit of Constable Green, the officer in charge of the investigation. He had no relevant notebook entry detailing the events in question and his affidavit was based on recollection. When the eye witness did not turn up he told the prosecutor that it was the eye witness who wanted the case to go away. Thus it was not the applicant as wrongly noted by the prosecutor in his note. The police officer did not speak to the applicant or her mother until the prosecutor later told him that he had spoken to

them. His recollection was that the prosecutor put the matter in the hands of the applicant as to whether to run the case or adopt the binding over order route. He recalled the applicant's mother asking him to explain what a binding over order meant but he could not recall his exact wording. He said that he personally commented to the applicant that a binding over order was a win and that the applicant could hold her head high as it was definite and she would not have lost in court. The applicant and her mother each agreed to the binding over order route being taken. The witness had no recollection of any comment being made to the effect that the defendants were pleading guilty. The witness averred that the prosecutor was clear with the applicant and her mother that it was open to them to decide to run the case. In effect he left the decision as to whether to run the case or take the binding over order to the applicant and he was clear that the applicant agreed to the binding over order.

The District Judge's affidavit

[12] The District Judge could not remember exactly the events in court due to the passage of time and the limited note that she had made. Her affidavit was based on her normal and usual practice. In cases where she had not already heard evidence it was likely that she would have received a brief outline of the background from the prosecution. She could not rule out having read the papers prior to the application removing the need to hear any facts. She had no note of evidence indicating that the case was ever commenced. The terms of such orders are generally based on the court's assessment of the circumstances and relationship between the parties, the seriousness of the situation and what may be necessary to keep the peace between the parties. Defence legal representatives never make contrary submissions. Once a binding over order is made the ICOS system generates a new charge against which the binding over order is recorded. The prosecution do not amend the summons before the court or introduce a new summons or complaint.

[13] The entry on the Order Book indicated "5 December 2013 Cracked trial (defendant dealt with) Reason (insufficient evidence: withdrawn)". She did not believe that the defendants made any admission or that any inquiry was made regarding the same. She stated that no findings would have been made in relation to the factual events underpinning the summons served on the defendants. She considered from her experience as a DJ (Magistrates' Court) that normally prosecutors do not withdraw a case unless the victim of the crime has agreed with the application.

[14] The DJ stated that as reflected in the Order Book sheet from ICOS she was satisfied the defendants were persons before the court who were likely to be guilty of future breaches of the peace and not having shown cause why an order binding them over should not be made pursuant to Article 127(1)(c) of the 1981 Order. She had considered the factual background underpinning the summonses.

The relevant PPS Code and Policy

[15] The PPS Code gives guidance on the general principles to be applied in determining whether criminal proceedings should be instituted, continued or discontinued and what charges should be preferred. It provides general guidance for the conduct for prosecutors and defines standards for prosecutors (see Clause 1.2.1). Decisions to prosecute include the specific offences to be prosecuted and they are to be taken in accordance with the test for prosecution. The general principle is that the decision to prosecute and the offences to be prosecuted should not be altered unless there is a proper reason once the decisions have been taken and formally issued by the Prosecution Service (see Clause 5.3.2).

[16] Under Clause 2.2.1 all actions are to be taken with complete impartiality to the highest ethical standards. All victims and witnesses will be treated with respect and sensitivity.

[17] Under Clause 4.12.1 the giving of reasons for not prosecuting is described as a complex one. A balance needs to be struck between the proper interests of victims and witnesses and other concerns including but not limited to damage to the reputation of others, injustice to an individual, the danger of infringing the presumption of innocence and other human rights and the risk of jeopardising the safety of individuals.

[18] Under Clause 6.11 the proper interests of the victim and witnesses will be taken into account along with the relevant factors to determine whether or not prosecution is required.

[19] Under Clause 6.21 it is stated that the prosecution is committed to delivering a comprehensive set of services to victims and witnesses. The range of services include delivery of information at key milestones in the progress of a case, for example, prosecutorial disposal decisions, notification of any major changes in the case etc.

[20] Under Clause 7.3.5 there is a need to ensure the fairness and effectiveness of prosecutions. Prosecutors shall fulfil their responsibilities to victims and witnesses. Under Clause 7.3.7 prosecutors shall in accordance with a fair trial consider the views, legitimate interests, privacy and concerns of victims and witnesses when their personal rights are or might be affected and seek to ensure that victims and witnesses are informed of their rights.

The Victims and Witness Policy

[21] Under Clause 2 of the Policy the proper interests of the victim and witnesses will be taken into account along with other relevant factors to determine whether or

not prosecution is required. Clause 4 requires decisions as to prosecution or diversion to take into account the interests of victims in weighing the public interest.

[22] Clause 4.3 provides:

> "In some cases a decision may be taken not to proceed with the original charge directed or to accept a plea to a lesser offence. This may arise, for example, if there is a change in the evidence available or a significant public interest consideration has arisen. When considering whether this should be done, PPS will, whenever possible, and where the victim wishes explain to the victim why this is being considered and listen to anything the victim wishes to say. However, sometimes these issues have to be dealt with relatively quickly at court in circumstances where it is not always possible to speak to the victim."

[23] Clause 5.2 under the heading "Services at Court" states:

> "If the trial does not proceed for the offence originally directed this will be explained to the victim and anything the victim says will be considered."

It further says:

> "If the victim or witness has any questions after the contest or trial the prosecutor will attempt to answer these queries and also explain the verdict or the sentence imposed."

[24] Under Clause 5.1 while the law does not require victims to be informed about the proceedings the PPS is committed to ensuring that victims are kept informed of the progress of the case in which they are involved. They are kept informed of the progress of the case at key milestones in the prosecution process.

[25] In Section 8 the PPS states it is committed to continually improving services provided to victims and witnesses and it wants victims and witnesses to have confidence in the way in which decisions are taken and cases progressed.

The Council Framework Decision (2001-220-JHA)

[26] The Framework Decision deals with the standing of victims in criminal proceedings as set out therein. This will influence the court's interpretation and application of the applicant's rights under Article 8 of the Convention. The PPS Victims and Witness policy if properly applied would satisfy the requirements of the

Framework Decision. Member states are enjoined to make every effort to ensure that victims are treated with due respect for the dignity of the individual and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings. Under Article 4 member states are required to ensure that victims receive appropriate information of relevance for the protection of their interests. Victims should be informed of the outcome of the complaint, relevant factors enabling them to know the conduct of the criminal proceedings regarding the persons charged and the court's sentence. Article 5 sets out communication safeguards. Each member state shall in respect of victims having the status of witnesses take the necessary measures to minimise communication difficulties as regards their understanding of and involvement in the relevant steps of the criminal proceedings to an extent comparable with the steps it takes in respect of defendants.

The parties' submissions

The applicant's case

[27] Mr Scoffield contended that if the applicant's version of events was substantially correct, the decision to withdraw the charges could not stand. Since Mr O'Connor's evidence had collapsed the respondent could only rely on Constable Green's evidence. The withdrawal of Mr O'Connor's evidence meant that the respondent could not rebut the applicant's evidence. No adequate explanation existed as to how Mr O'Connor came to provide an affidavit against his "better judgment". The fact that he did so in itself is a reason to doubt his judgment during the disputed exchanges. Mr Barr's record was very significant support of the applicant's case. There was plainly enough evidence to permit the court to conclude that there was so much misunderstanding about the position on the part of the applicant that her views were not properly taken into account as required by the PPS policy. Mr Scoffield relied on the relevant provisions of the Code for Prosecutors and of the PPS Victims and Witnesses Policy. Counsel contended that the applicant had a legitimate expectation that the relevant policies would be applied in her case. The applicant was not properly informed as to what was proposed or what was happening. The respondent's conduct was a breach of Article 8 of the Convention (Botta v Italy [1998] 26 EHRR 241). Counsel further contended that the decision was a breach of Articles 2, 4, 5 and 6 of the Counsel Framework decision 2001-220-JHA on the standing of victims in criminal proceedings. Even if, which the applicant denied, she was happy to proceed with the binding over route, on the respondent's own case the prosecutor had fettered his discretion in the case because he had abdicated his decision to what he understood to be the applicant's viewpoint.

[28] Mr Scoffield argued that a binding over order cannot be made under Article 127(1) of the 1981 Order unless there is a finding on evidence giving rise to a concern about potential breaches of the peace in the future (Blackstone E13.4, Banks on Sentencing Section 15.32). Material relied upon in seeking to bind over must be strictly proved (Brooks v Nottinghamshire Police [1984] Crim LR 677). Counsel referred to the English Practice Direction which makes clear that the court should be

satisfied beyond reasonable doubt of the matters complained of before a binding over order may be imposed. A binding over order can only be imposed where the court makes findings based on evidence or admissions which provide the necessary factual foundations for the exercise of the jurisdiction. The notice parties' affidavits point to the conclusion that the binding over orders were made simply upon their agreement. If it were suggested that the Order Book sheet from ICOS shows that the judge made the necessary findings of fact that was inconsistent with paragraph 10 of her affidavit and was unsustainable in light of the fact that the ICOS record appeared to be generated independently without direct input from the judge and was unsupported by the terms of the ICOS Order Book.

The PPS Case

[29] In reliance on the affidavit of Constable Green, Mr Coll argued that the applicant was not misled as to the disposal of the case and should have been under no misapprehension that charges were being withdrawn on the basis of agreement to being bound over on the part of the defendants as opposed to their pleading guilty to the charges. In making that submission Mr Coll had to recognise that the respondent could not rely on the affidavit of Mr O'Connor who as prosecutor was the key person on the PPS side who could speak to what was actually said to the applicant. He painstakingly compared the affidavit evidence of the applicant and her mother with the affidavits sworn by Constable Green and he also sought to rely on the prosecutor's contemporaneous note of 6 December.

[30] Mr Coll stressed that it was unlikely that the prosecutor would have given such misleading information as alleged by the applicant. It was difficult to conceive of a situation in which the prosecutor would have told the applicant that a 12 month suspended sentence had been imposed where the maximum sentence was in fact 6 months. The prosecutor would not know the terms the District Judge would impose in the event of a binding over order being made. It did not make sense for a victim to be asked for approval to defendants pleading guilty. Mr Coll took issue with the reliability of Mr Barr's note in respect of a plea of guilty. Mr Barr could not recall whether the information came from the prosecution or the applicant. Mr Coll relied on the proposition that in judicial review proceedings where there is a conflict of evidence and that conflict of evidence cannot be resolved on the papers the applicant's version of events must be preferred (Re TP (A Minor's) Application [2006] NIJB 171).

[31] Both Mr Coll for the respondent and Mr Ronan Lavery and Mr Sayers for L and A contended that the binding over orders as made by the District Judge were duly and properly made. There was ample material on the papers before the District Judge on which to find a reasonable apprehension that there might be a breach of the peace in the future by the notice parties. The notice parties had gone to the applicant's home and were involved in an altercation in the context of a family background type dispute between the parties during which offensive social media comments had been made. It was not a case of the District Judge simply making a

binding over Order on consent in the absence of underlying material. Mr Coll accepted that there had to be material before the judge to cause a reasonable apprehension that there might be a breach of the peace. If the binding over orders were valid, as counsel contended, then any attempt to reinstate the prosecution of the notice parties would inevitably lead to a successful abuse of process application.

[32] Mr Coll rejected the argument that the respondent had fettered its discretion by effectively leaving to the applicant the decision as to whether or not the prosecution should proceed to the applicant. The prosecution was content to proceed to a contest. The prosecutor was prepared to proceed with the summons or to go for a binding over order depending on the preference of the applicant. He rejected Mr Scoffield's argument that the PPS had not provided any or adequate reasons for its decision to withdraw the charges.

The PPS decision to withdraw the charges

[33] The evidential context of this dispute is, to say the least, highly unusual. On the one hand the applicant has sworn affidavits setting out a version of events which we are not satisfied on a balance of probabilities can have occurred in the way or in the sequence described. On the other hand, the evidence of the respondent is in a state of disarray with the sworn evidence of Terence O'Connor being withdrawn and no longer relied on. By necessary implication Mr O'Connor felt unable to stand over the evidence. He was unwilling to subject himself to cross-examination. The respondent is forced to rely entirely on the affidavit of Constable Green whose evidence does not tally with Mr O'Connor's version of events set out in the document of 6 December. We have already noted that these notes were drafted in very defensive terms and seem to recognise that he felt vulnerable to serious criticism. They were purportedly made at a time before any formal communication had come from the applicant alleging that she had been misled. We have already noted the destruction for spurious reasons of the original handwritten note which would have been the contemporaneous notes of what happened.

[34] We recognise that the onus of proof lies on the applicant and we recognise that the normal principle is that if there is conflict of evidence which cannot be decided on the papers the applicant's version of events will not have been established (Re TP [2006] NIJB 171). In Re Cranston's Application [2002] NI 1 this court pointed out that it is for the applicant to establish on a balance of probabilities the version of facts that is necessary to sustain his or her judicial review challenge. As the case proceeded it became clear that the central factual questions are whether (a) the applicant misunderstood what was happening and what she was being told; (b) there had been a proper explanation given to her as to what was happening in relation to the prosecution of the case; and (c) the prosecutor properly ascertained the applicant's views.

[35] While Mr Coll sought to persuade us that we should put no reliance on the applicant's evidence and that her version of events was wrong, he did not go so far

as to say that she was presenting deliberately dishonest evidence. In the absence of deliberate dishonesty we are satisfied that the affidavit should be read as a genuine attempt by the applicant to record what she understood to have happened. We are satisfied that she did misunderstand the position. The first question is whether her misunderstanding arose from a failure on the part of the prosecution to explain the situation to the applicant in accordance with the PPS Code and the Victim's Policy. The second question is whether the prosecutor properly ascertained her true views as a victim. Those views he was bound to take into account even if ultimately it was for the prosecutor to decide whether, in the light of all the circumstances including those views, the state of the evidence and the public interest, the prosecution should continue.

[36] We can place no reliance on the prosecutor's self-serving note of 6 December. Constable Green was on his own evidence not present at every occasion when the prosecutor was speaking to the applicant. His evidence is described as a recollection as best he can remember it. It is unsupported by any notebook entry. He does explain that he told Mr O'Connor that it was the eyewitness who wanted the matter to go away while Mr O'Connor misinterpreted that to mean that the applicant wanted the matter to go away. The prosecutor, therefore, misunderstood the applicant's state of mind in relation to the matter. Constable Green could not recall the exact wording of Mr O'Connor's explanation and he saw the future progress of the case as primarily a matter for the prosecutor. Constable Green did lead the applicant to believe that because of the eyewitness' non-attendance the case was a "50-50 thing." He commented that a binding over order was "a win" and the applicant could hold her head high as it was definite and she would not have lost in court. This description of the effect of a binding over order was inaccurate. What the comment does show is that he felt a need to persuade the applicant to allow the prosecution to be withdrawn. The constable said that the prosecution was clear with the applicant and her mother that it was open to the prosecution to run the case and that he had in effect left to the applicant the decision as to whether to run the case or take the binding over orders.

[37] We are satisfied that the applicant formed the impression that there was going to be some acknowledgement or finding of guilt on the part of L and A. The constable's reference to a "win" probably contributed to that belief. The explanation of a binding over order may have used the word "guilty" in the context of the court finding a degree of misconduct leading to the imposition of a court order. What does appear clear is that Mr Barr made a note recording "pleaded guilty". The full note reads:

> "Spoke to PPS (Connor) Sean Kearns withdrawing statement.
>
> Defendants pleaded guilty. Pre-sentence Report."

It is thus clear that Mr Barr did speak to Mr O'Connor at some stage. It is not clear whether he was told about the guilty plea by the prosecutor or the victim. If he was told about it by the prosecutor then clearly the prosecutor was giving the impression that there was a plea of guilty. If, as seems more likely, he was so told by the victim that would be clear evidence that the applicant did genuinely misunderstand what had happened and this confirms that whatever explanation had been given to her she had interpreted it as showing there had been a recognition of guilt.

[38] While normally a presumption can be made that the prosecutor has followed its Policy and Code correctly, in the circumstances of this case we conclude that the terms of the Policy and the Code were not properly applied. The applicant has established a prima facie case that the respondent had not complied with them. The PPS has adduced no evidence from the relevant prosecutor to show that the Code and the Policy had been properly complied with and in the absence of contradictory evidence (which is not provided by Constable Green's affidavit) we conclude that there had been a breach of the Policy and Code. We are satisfied that there was poor communication between the prosecutor and the victim and a failure by the prosecutor to explain what was happening in terms that she could understand. As a result there was a failure to ascertain and understand the true views of the applicant.

[39] As a consequence the applicant is entitled to a declaration that the respondent breached the terms of its Code of Practice and the PPS Victims and Witness Policy.

The binding over orders

[40] The decisions of the District Judge to grant leave to the respondent to withdraw the summonses and to proceed with what was in effect an application for binding over orders are inextricably linked. If the binding over orders stand then L and A were the subject of court orders with the potential penal consequence of estreatment of the recognisances imposed on foot of the orders. The imposition of such an order on the notice parties brought about by the prosecution withdrawing the proceedings and inviting the court to make such orders would present a formidable potential block to any new attempt by the respondent to prosecute the notice parties for the original offences charged. It is inevitable that an abuse of process application would be mounted. In such cases the question is not so much whether the defendant can be fairly tried but whether for some reason connected with the prosecution's conduct it would be unfair to the notice parties if the court were to permit the respondent to proceed against them at all (see R (Ebrahim) v Feltham Magistrates Court [2001] EWHC Admin 130). There is a strong public interest in ensuring the finality of litigation, both civil and criminal. When proceedings had been apparently terminated as a result of the imposition of what was intended to be a final court order disposing of criminal proceedings the public interest favours a presumption of finality.

[41] That is not to say that it would not be open to the court to quash a binding over order if it were established that such order was unlawfully made in the absence

of any underlying material or evidence to justify the court making such an order. We bear in mind and see force in Mr Ronan Lavery's argument on the dangers of granting a victim legal standing to, for example, challenge sentences imposed by the court on defendants. This could open the door to many applications for judicial review of sentences imposed by Magistrates' Courts. No judicial review would be possible in respect of Crown Court sentences. However, the present case presents a very unusual and, hopefully, wholly exceptional set of circumstances. We have not been persuaded by the argument that the applicant does not have legal standing to bring the challenge to the binding over orders in the present case. As Mr Scoffield argued, the modern principle of legal standing focuses on whether there has been a legal wrong affecting the interests of the applicant which requires correction. In this case the applicant was intimately involved in the proceedings and there was a close interconnection between the respondent's decision to withdraw the proceedings and to go down the route of seeking a binding over order against each of the notice parties.

[42] The power to make a binding over order in this instance derives from the provisions of Article 127(1) of the 1981 Order which provides so far as material:

> "(1) Subject to this Article, a magistrates' court may order a person to enter into a recognisance to keep the peace …….. :-
>
> (a) upon a complaint that such person should be called upon to show cause why he should not be ordered to be so bound; or
>
> (b) upon convicting a person of an offence and in lieu of or in addition to any sentence which the court may lawfully impose; or
>
> (c) in the case of a person present before such court without any formal application to the court to make such order."

The District Judge purported to act under Article 127(1)(c).

[43] The use of the power to bind over to keep the peace does not depend on a conviction. Generally a binding over order to keep the peace is typically only warranted where there is evidence of likely personal danger to others involving violence or the threat of violence (per Sweeny J in Emohare v Thames Magistrates' Court [2009] EWHC 689). Where a person has been acquitted it would be exceedingly rare that it would be appropriate to bind over the defendant who had been acquitted (per Collins J in R v Middlesex Crown Court ex parte Khan [1997] 161 JP 240). If a judge is going to require a person to be bound over in circumstances where (s)he has been acquitted it is important that he should be satisfied beyond a

reasonable doubt that the person poses a potential threat to other persons and that he is a man of violence. It would seem to us that approach should also apply to a person against whom proceedings have been withdrawn.

[44] In England and Wales proceedings relating to binding over orders are governed by the Criminal Justice Practice Direction (Sentencing) Section J. That Practice Direction is premised on the case law as developed in the light of decisions of the European Court of Human Rights. In Hashman and Harrup v UK 30 EHRR 241 the ECtHR recognised the criminal law nature of binding over orders and struck down orders to be of good behaviour as being too imprecise. The English Code does not apply in Northern Ireland. However, its contents are clearly intended to be both declaratory of the existing law read in the light of the Strasbourg case law and directory in the recommendations it makes in respect of the procedures to be followed.

[45] Before making a binding over order the Practice Direction states that the court must be satisfied so that it is sure that a breach of the peace involving violence or an imminent threat of violence has occurred or that there is a real risk of violence in the future. Such violence may be perpetrated by the individual who will be subject to the order or by a third party as a natural consequence of the individual's conduct. Rather than binding an individual over to keep the peace in general terms the court should identify this specific conduct or activity from which the individual must refrain.

[46] In relation to evidence the Practice Direction states:

> "The court should give the individual who would be subject to the order and a prosecutor the opportunity to make representations, both as to the making of the order and as to its terms. The court should also hear any admissible evidence the parties wish to call and which has not already been heard in the proceedings. Particularly careful consideration may be required where the individual who would be the subject of the order is a witness in the proceedings."

The Practice Direction goes on to state that if there is an admission which is sufficient to found the making of a binding over order the court should nevertheless hear sufficient representations and, if appropriate, evidence to satisfy itself that an order is appropriate in all the circumstances and to be clear about the terms of the order. The court should be satisfied so that it is sure of the matters complained of before a binding over order may be imposed. The burden of proof rests upon the prosecution (or the complainant in the case of a complaint).

[47] In relation to future applications for binding over orders in this jurisdiction we commend the statement of legal principles and the procedural guidance set out

in the English Practice Direction. The requirement therein to hear evidence, if appropriate, does not preclude reliance on other probative material provided that at the end of the day the court is satisfied to the requisite standard that the case has been properly made out before the making of a binding over order. Thus, for example, admissions and concessions made by a defendant in police interviews or in a witness statement or in open court by his or her representative would be relevant material from which conclusions can properly be drawn. It would be important to ensure that key findings made in the course of the case are properly noted to prevent the kind of problem which has arisen in the present case.

[48] The District Judge's affidavit does not show the kind of structured analysis adumbrated in the Practice Direction. It also appears that the hearing before the District Judge was of short duration and there was not an adequate or proper note kept of the events. We have, however, concluded that for the following reasons we should not interfere with the binding over order as made:

> (a) There is a presumption of regularity in relation to an order imposed by the court. There is also a public interest in securing finality in the judicial process.
>
> (b) There was material in the defendant's police interviews from which the conclusion could be drawn that a breach of the peace involving violence occurred and there was evidence from which it was possible to infer a real risk of violence in the future. L and A went to the applicant's house clearly intent on having a confrontation with the applicant. Violence ensued in which one of the parties by her own admission became involved in physical violence against the applicant. The other notice party A was there in circumstances from in which it was proper to draw an inference that she was encouraging and supporting L. Both were involved in shouting; there was a history of offensive communication between the notice parties and the applicant prior to the confrontation; and there was sufficient evidence from which to infer the real risk of future violence and breach of the peace.
>
> (c) L and A consented to the order being made. While mere consent to an order does not of itself constitute an admission of given facts, nothing was said on behalf of L and A to say that what was admitted by them in the police interviews was wrong.
>
> (d) Neither L nor A sought to challenge the binding over orders. The orders represented an adverse finding made by the court that they were involved in conduct from which it could be inferred that they presented a risk of future violence. They were subjected to an order with penal consequences.
>
> (e) The orders remained valid and enforceable court orders during the period of their enforceability. Those orders are no longer in force.

We thus conclude that it has not been established that the binding over orders were unlawfully made and should be set aside or declared invalid.

[49] We have already stated that the applicant is entitled to a declaration that the respondent breached its Code and the Victims Policy in withdrawing the charges. It is open to the respondent to reconsider the question whether in the light of that finding fresh charges should be brought. In reviewing the position it would have to take account of the conclusions we have reached in relation to the validity of the binding over orders. We do not consider it necessary or appropriate in the circumstances to remit the matter to the respondent to reconsider its decision. The declaration which we make is a sufficient vindication of the applicant's rights.

[51] As a result of this judgment both the applicant and the notice parties should fully appreciate that the effect of the binding over orders was that there was a finding against L and A that, on their own admission, they were guilty of a breach of the peace from which it could be inferred that there was a real risk of future violence. The District Judge had, on their admission, concluded that they presented a real risk of violence in the future. While this was not a finding of guilt on the assault charges it was an adverse finding against L and A. After the imposition of the binding over orders to which they consented, L and A, in making the Facebook entries which they did in respect of the matter, behaved in a disgraceful and unwarranted manner. That behaviour, which does not appear to have been adequately investigated as a potential breach of the binding over orders, undoubtedly led to the institution of this lengthy and very costly litigation in which all parties were publicly funded.