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*(subject to editorial corrections)**

2017 No.32501

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
DIVISIONAL COURT (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARIA FIONDA (A MINOR) BY HER MOTHER AND NEXT FRIEND RONA McDAID FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF A DISTRICT JUDGE (MAGISTRATES' COURTS) MADE ON 30 JUNE 2016

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Before: Treacy LJ, Horner J and Sir Anthony Hart

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TREACY LJ (delivering the judgment of the court)

Introduction

[1] The applicant seeks judicial review of the decision of District Judge McCourt sitting at Downpatrick Magistrates' Court dated 30 June 2016 to decline the prosecution adjournment application in respect of the prosecution against Paul Bell and to dismiss the prosecution against Paul Bell.

[2] The District Judge has taken no active part in the proceedings. The Public Prosecution Service ("PPS") appeared as a notice party. Although it was the PPS application to adjourn which was refused, leading to the dismissal of the prosecution without any hearing, they sought to uphold the impugned decision. The defendant Paul Bell has not taken any active part in these proceedings.

Background

[3] On 3 September 2014 the applicant, who was then an 11 year old girl was walking with her mother in Crossgar when it is alleged Paul Bell, who was driving a

Range Rover Sport Jeep, mounted the pavement striking the applicant's arm. Her arm was not bruised but it was sore when it happened and for a while after. The Range Rover also struck her mother's shoulder bag. A witness statement was recorded from the mother on 4 September 2014 and from Maria on 30 October 2014. At the end of the mother's statement she stated that Bell's driving was very poor and not acceptable. She states that she used to work for Bell and had known him for 7 years or so. She says in her statement that there is history between herself and Paul Bell's family which is being dealt with by solicitors.

[4] The summons to the defendant records that a complaint was made to a Lay Magistrate on 2 March 2015 that on 3 September 2014 he drove a vehicle without reasonable consideration for other persons, contrary to Article 12 of The Road Traffic (Northern Ireland) Order 1995. The summons required him to appear at Dungannon Courthouse on 18 February 2016. That was the defendant's first appearance and at which a not guilty plea was indicated.

[5] In an undated police document entitled "R v Paul Anthony Bell, Summary" it is recorded:

> "Police have attempted to make arrangements with the defendant for an interview but this has not yet taken place with the defendant last agreeing at the start of February 2015 that he would have his solicitor contact the Investigating Officer to arrange a suitable date and time for interview. This to date has not happened."

[6] It is very important to note that in *late 2015* the applicant and her mother had arranged flights and accommodation for a holiday in July 2016. The Aer Lingus booking confirmation (13 September 2015) shows the flights which had been arranged for the applicant and her mother from Dublin to Verona departing on 5 July 2016 and returning on 19 July 2016. The booking confirmation from Casa Silvana (18 November 2015) Italy is for an apartment from 5 – 18 July 2016

[7] Following the defendant's first appearance the applicant's mother was in phone contact with the PPS on 24 February 2016 and 25 February 2016 about the case. As will be seen as I develop the chronology the applicant and her mother have been assiduous in their attention to the prosecution.

[8] On 3 March 2016 the defence failed to attend court and the prosecution was fixed for contest on 5 April 2016 [first contest date]. On 4 March 2016 the mother was in contact with the PPS about the case and with the PSNI the following day.

[9] On 10 March 2016 *at the request of the defence* the first contest date was moved from 5 April to 5 May 2016 due to "*defence difficulty*" with the April date. By letter dated 14 March 2016 the minor applicant and her mother were notified that they

were now required to give evidence at the hearing in Downpatrick Courthouse on 5 May.

[10] On an unknown date the minor applicant's mother contacted the PPS on the number contained within the letter of 14 March 2016 and someone from NSPCC visited her home and spoke to the applicant regarding what would take place in the courtroom.

[11] On 24 March 2016 there was a *second defence application* to adjourn the second and agreed contest date (5 May 2016). This application was made on the basis that the defendant was to be out of the jurisdiction as he was going on a two week "*trip*". The contest date was vacated and the matter was fixed for contest on 26 April 2016 (the third contest date). The case was also put in for review two weeks earlier on 7 April 2016.

[12] By letter of 5 April 2016 the applicant and her mother were notified that they were required to give evidence at a hearing at Newtownards Courthouse on 26 April. This was now the third contest date for which the applicant and her mother made themselves available.

[13] At the review on 7 April 2016 the PPS sought a further review in advance of the third trial date scheduled for 26 April. A further review was fixed for 21 April 2016. On that date the matter was put in for further review on 25 April due to "ongoing disclosure issues" raised by the defence. On that date the third contest date was again vacated in light of "ongoing disclosure issues" and relisted for mention on 12 May 2016. The minor applicant and her mother were not informed of this development.

[14] The applicant and her mother attended at Newtownards Court on 26 April. They waited in the waiting area for about 3 hours during which time no one approached them. The applicant's mother contacted the PPS to be told that the hearing was cancelled. Later on the same date she made a further call to the PPS to enquire as to when the case would be listed again for hearing. She was informed that she would be told of the new date sometime in May. She contacted the PPS about the case again on 3 May 2016.

[15] At the mention on 12 May the case was adjourned for one week to 19 May to fix a new date for the contest. In the meantime the applicant was in ongoing contact with the PPS about the case.

[16] On 19 May the fourth contest date was fixed for 7 July 2016 with a review date of 23 June 2016.

[17] On 31 May 2016 the applicant's mother rang the PPS to ascertain what had happened at the court mention on 19 May. She was informed that the matter had been fixed for hearing on 7 July. She explained that she had a pre-booked holiday on

that date. She was advised that there was no note of that on the file. She was also in contact with the PPS on 21 June 2016.

[18] At the review hearing on 23 June 2016 the PPS applied to vacate the hearing on 7 July 2016 due to the witness holiday conflicting with the contest date and the unavailability of the applicant and her mother. The District Judge refused to vacate the contest at that stage and relisted the adjournment application for 30 June. The District Judge wanted to know (i) why the holiday had not been notified by the witness to PPS VWCU *and* (ii) documentary proof as to when the holiday was booked. The District Judge "indicated that, if he is not satisfied with what is provided, a defence application to dismiss the case would be hard to resist".

[19] At the resumed adjournment application on 30 June in relation to (i) above the District Judge was referred to an email from VWCU which stated:

> "I have got speaking to [the applicant's mother] this afternoon. She has advised that the original availability (sought back in February) did not cover the date of her holiday. Any further contact made with her for availability was on the back of a cancellation due to issues within the court and unfortunately the holiday simply slipped her mind during these conversations as it had been booked almost 7-9 months previously."

To the extent that there is any material conflict about what precisely the applicant's mother did say about availability I am content to proceed on the basis of what the District Judge was told via this email.

[20] While the PPS contend that following the review hearing on 23 June the Investigating Officer (Stephen Flood) was e-mailed and asked to call with the applicant's mother and acquire proof showing when the holiday was booked, this did **not** happen despite the fact that the District Judge had specifically requested documentary proof. It is the un-contradicted evidence of the applicant's mother that no such contact or call was made with her by the police. Had the police called she would have furnished the documentary evidence to the police and the PPS and thus to the District Judge. The PPS do not contend that the police did in fact call with the applicant's mother. Nor is there any doubt that she had booked the foreign holiday for both her and her daughter and paid for the flights and the accommodation back in late 2015.

[21] The Affidavit of Conor Gannon filed on behalf of the PPS indicates at paragraph 9 that on 30 June when applying to adjourn the contest date he "confirmed that no documentary proofs had been provided for the Court". At paragraph 15 he states:

> "The court was advised that the police were requested to obtain the documents from the witness however, the PPS had not, as yet, been given them."

Mr Gannon did not however inform the court that the reason why no proofs had been provided was that the police had not called, as directed by the PPS, to obtain them.

[22] The decisions of the District Judge were based upon the false premise that the applicant's mother had been asked by the police to provide vouching documentation and that it had not been provided. I consider that the impugned decisions were therefore based upon a material error of fact which, on established principles, can vitiate the decisions. In *Gracey and Fitzimmons* [2014] NIQB 131 (Coghlin LJ, Gillen LJ and Weir J) the Divisional Court acknowledged at paragraph [19] that there is now well established authority for the proposition that the court has jurisdiction to quash a decision reached on the basis of a material error of fact. At paragraph 22 it is noted that the impact of the principle in judicial review proceedings to the correct approach by a District Judge in determining whether to grant or refuse adjournment applications has recently been considered by the Divisional Court in this jurisdiction in *Re Millar* [2014] NI 246 where Morgan LCJ referred to "the interests of the victim and the desirability of having prosecutions determined on their merits…". As Wade and Forsythe noted in the passage quoted by Lord Slynn and set out at paragraph [19] of *Gracey & Fitzsimmons* "…decisions based upon wrong fact are a cause of injustice which the court should be able to remedy". In quashing the District Judge's decision in *Gracey* the court referred to the familiar triangulation of interests and held, on the facts of that case, that the interests of the victim and the public had not been respected. In this respect the court was following the approach of Morgan LCJ in the case of *Millar* and *Morrison*[2013] NIQB 67 where he again referred to the importance of the emphasis being placed upon the public interest in effective prosecution and the place of the victim in the criminal justice system (both cases where District Judge decisions on adjournment and consequential dismissal of summary prosecutions were quashed). For my part I have little doubt that had the District Judge been made aware of the correct position that he would not have made the decision he did on 30 June. At the very least the application to vacate would then have been postponed for a short period to enable the police to do what they had been tasked by the PPS. Armed then with the vouching documentation that he had sought no fully informed District Judge acting reasonably could at that stage have dismissed the entire prosecution.

[23] Furthermore, the District Judge does not appear to have been appraised of the relevant background and assiduous participation of the applicant and her mother throughout the prosecution. For example the affidavit of Conor Gannon filed on behalf of the PPS indicates at paragraph 10 that he was *unaware* when making the adjournment application on 30 June 2016 that the Applicant had attended court on 26 April 2016.

[24] Accordingly, the District Judge, when considering the adjournment application, was not made aware of and was therefore unable to take into account a material matter, namely the fact that the applicant and her mother had attended court previously for a contest on 26 April 2016 and had not been advised that the contest had in fact been adjourned the previous day due to ongoing "disclosure issues" raised by the defence.

[25] The affidavit of Conor Gannon filed on behalf of the PPS states at paragraph 11:

> "I cannot recall if I went through the history of the previous contests or not, however I would be surprised if I hadn't referred to the fact that the Defence had adjourned a previous contest listing for essentially the same reason. This could be relevant to the court's consideration of whether or not to adjourn and is information that would be, in my experience and practice, provided to the court – either by defence or prosecution representatives when the "other side" had required an adjournment previously."

[26] Mr Gannon cannot positively aver that the relevant history was outlined to the Court. The chronology prepared by Mr Gannon and exhibited to his affidavit does not state that the relevant history was provided to the court. I am persuaded that the District Judge was probably not made aware of and therefore failed to take into account the following:

(a) the fact that the contest hearing date had previously been fixed on three dates (5 April 2016, 5 May 2016 and 26 April 2016) but each of those dates were vacated pre-hearing not due to any fault of the applicant or her mother but due to:

    (i) "defence difficulty" with the contest date of 5 April 2016; that the defendant was going to be <u>on holiday</u> on the contest date of 5 May 2016;

    (iii) "ongoing disclosure issues" (26th April contest date);

(b) the fact that in respect of the two contest dates of which the applicant and her daughter had been advised previously namely 5 May 2016 and 26 April 2016 (both of which were vacated pre-hearing) they were willing and able to attend on those dates and in fact attended on 26 April 2016;

(c) the fact that the applicant and her mother were only to be out of the jurisdiction for a short period and that any delay in the matter coming on for hearing would only be a short one; and

(d) the fact that the previous adjournment applications, like the impugned one, had all been made pre-hearing and the defendant had therefore not on any occasion been required to attend for a contest date to be then faced with an adjournment (in contrast to the applicant and her mother who had attended on the 26 April 2016 having not been informed that that contest had been adjourned the previous day (see amended Order 53 Statement)).

[27] In my view no District Judge properly appraised of the material facts in this case, dealing with an adjournment application made in advance of the hearing, could reasonably have refused to adjourn the hearing for a short period. No District Judge informed of the full facts could reasonably have dismissed the entire prosecution.

[28] The affidavit of Mr Gannon avers at paragraph 9 that the District Judge was not satisfied with the explanation given, was not prepared to delay the matter and stated "that ultimately this was a civil case". He then dismissed the prosecution. In my view this was irrelevant and erroneous. This was not a civil case, it was a criminal case. In so characterising it the District Judge paid insufficient regard to the triangulation of interests and the emphasis placed on the public interest in effective prosecutions and the place of the victim in the criminal justice system. Certainly the defendant did not trivialise the matter. He pursued disclosure issues and even made a non-defendant bad character application. Also no civil case has in fact been taken. The District Judge therefore erred by proceeding on a material error of fact.

[29] The notice party raised the issue of delay and Order 53 Rule 4(1) RSC. The District Judge refused the PPS adjournment application and dismissed the prosecution on 30 June. The applicant and her mother were not informed of the decision before they left on their holiday on 5 July. When they returned from their holiday on 19 July she was still not informed and made numerous contacts over several months to try to find out about the new court date, being completely oblivious to what had transpired. Many of her calls were never returned despite being told that someone would call her back. On 29 September 2016 her persistence paid off when she was eventually told by someone called "Orla" that the prosecution had been dismissed. Orla told her she would get someone to call her with more information. The applicant's mother contacted her solicitor the same day and was advised to obtain more information from the PPS and the police. The applicant made repeated efforts without success over a long period of time to find out why the prosecution was dismissed. She should never have had to engage in such a futile and time-wasting exercise. If the PPS had discharged its duties faithfully at the appropriate time the applicant would have been equipped to take this case sooner. She met again with her solicitor on 8 November 2016 and counsel advices were sought which he provided together with draft pre-action protocol

letters on 29 November 2016. The pre-action protocol letter was sent to the PPS on 5 December 2016, inter alia, requesting information about the circumstances of the dismissal of the prosecution. In the meantime the applicant's solicitor obtained counsel's opinion to support an application for legal aid, submitted the legal aid application and dealt with the legal aid department. Legal aid was refused by letter dated 25 January 2017 at a time when there was a paucity of information because the PPS had not replied to the pre-action protocol letter. Senior counsel's opinion was sought and a notice of appeal against the refusal of legal aid was lodged on 7 February 2017. Correspondence with the LSA confirmed and repeated the urgency of the matter. A full legal aid certificate was not received until the 15 March 2017. Proceedings were quickly drafted thereafter, the grounding affidavit was sworn on 28 March and the judicial review proceedings were lodged on 29 March 2017. By this date the PPS had still not responded to the pre-action protocol letter sent in December 2016. It was not until 15 May that an undated response was received by the applicant's solicitors. Until that time the applicant and her mother were to a large extent operating in the dark. The picture was unclear to them because they were not at court when the impugned decisions were made, they were not informed by the PPS of the outcome at the time that the decisions had been made or the reasons for them. Repeated efforts to find out what had happened proved unsuccessful and the response to the pre-action protocol letter was only served after the proceedings were lodged in May 2017 some 5 months after the initial letter had been sent. Leave was granted on 29 June 20017 and on the same date, following the information provided by the PPS to the applicant's solicitors after proceedings had been lodged, leave was given to file an amended Order 53 statement (Weatherup LJ and Keegan J). The amendments contained at paragraph 3(a)(iv)-(viii), (d), (e) and (f) constitute the principal grounds upon which this judicial review is allowed and the judicial review in respect of those grounds was brought promptly. In any event the court considers that there is good reason for extending the period within which to make the application in accordance with Order 53 Rule 4(1) for the reasons set out above.

[30] Accordingly, we grant the judicial review and will hear the parties as to the appropriate remedy.

HORNER J

Introduction

[31] I agree with the judgment of Treacy LJ namely that time should be extended, and that judicial review should be granted. I do so with considerable hesitation as there are strong arguments on both sides. In the circumstances, and given the division of this court, I think it is appropriate that I set out briefly why I have reached the conclusions I did.

Discussion

[32] As a general rule I consider that it is important that parties and legal practitioners act promptly in issuing judicial review proceedings and in any event act within the three month period. Order 53 Rule 4(1) of the Rules of the Supreme Court (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be **made promptly** and **in any event within three months** from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."(emphasis added)

[33] The obligation is on all applicants to act promptly. The word promptly has to be seen in a context. In this case there had already been serious delay before the decision was made. The challenge was to the District Judge's decision to dismiss a summons for careless driving against Paul Anthony Bell ("PAB"). The "careless driving" complained of occurred on 2 September 2014 that is some 2 years before the judge's decision which is under attack. This decision was made on 30 June 2016. However the application for emergency legal aid was not made until 13 January 2017 and the application for judicial review then followed on 29 March 2017. There is no doubt that there has been delay on behalf of the applicant although, the applicant did not find out about the decision despite making a number of enquiries to the authorities, until 29 September 2016, some three months after the District Judge made his decision. The applicant did not act promptly in sending a pre-action protocol letter on 5 December 2016, more than two months having passed from when the applicant had belatedly learnt of the decision to dismiss the charge against PAB. Proceedings were not issued until 29 March 2017 following the granting of legal aid on 10 March 2017. So there is no doubt that some criticism can be levelled against the applicant in respect of her delay. However, the applicant's delay has been compounded by the unexplained failure of the police and/or the PPS to inform the applicant that the summons for careless driving had been dismissed despite her making enquiries and again the unexplained failure of the PPS to reply promptly to the pre-action protocol letter. The applicant's solicitors received an undated reply some 5 months later, a state of affairs which I consider to be unacceptable. I consider that the behaviour of the PPS (and the police) in failing to carry out their public duty to inform the applicant within a reasonable period why the case against PAB had been dismissed was unacceptable especially in the light of the enquiries which the applicant had made. Further the delay on the part of the PPS in responding to the pre-action protocol letter further compounded the earlier egregious behaviour. The applicant had every right to be disappointed at the failing of the PPS (and the police) to carry out their public duties with due expedition.

[34] Further it is quite clear that the prosecution had also been delayed by PAB. I

do not have enough information to reach a conclusion as to whether or not the attempt to bring a bad character application, the engagement of an engineer or other adjournment applications were deliberately designed to delay proceedings. However there can be no doubt that PAB can be faulted because the contest dated 5 April 2006 was fixed following his failure to attend court on 3 March 2016. The case was then re-fixed for hearing for 5 May 2016 because PAB had difficulties on 5 April. On 24 March 2016 PAB's barrister advised the court that PAB could not attend on 5 May 2006 as he was away on a trip commencing on 29 April 2016 for two weeks. There is no explanation as to whether the trip was booked before the case was fixed for hearing, and, if so, why the court was not informed at that time.
Treacy LJ has set out a detailed chronology in his judgment and I not consider that it will serve any purpose for me to repeat it here. I do acknowledge that there is a dispute about whether Stephen Lavery of the PPS Victims Witness and Care Unit had been told that the holiday had "slipped her mind." I am unable to resolve this dispute on the papers. However it is clear that the District Judge was becoming increasingly exasperated by the delays in prosecuting this case and he had made it clear that absent a satisfactory application at 30 June adjourned hearing he would find it difficult not to accede to a defence application to dismiss the case. When the case resumed the PPS or the police had no documentary proof to vouch that the holiday had been booked at the beginning of the year because no effort had been made to obtain that proof from the applicant or her mother, although it was readily available.

[35] There is a useful summary of the approach the court should take to delay in judicial review applications in Dr Gordon Anthony's excellent book, Judicial Review in Northern Ireland (2nd Edition) where he says at 3.29:

> "… The time limit can be extended where there is **good reason** for doing so. **Good reason** is a context – driven criterion, and the courts sometimes prefer to decide whether there has been a good reason for delay at the substantive hearing rather than the preliminary leave stage. In determining the issue the court will enquire: whether there is a reasonable and objective justification for the late application; whether permission to proceed would be prejudicial to third party interests or the interests of good administration; and where the public interest requires that the application should be allowed to proceed. The corresponding examples of good reasons in the case law include: the fact that delay was caused by prior attempts to obtain legal aid; the fact that counsel for the applicant was hospitalised; the absence of an adverse impact and good administration or the interests of a third party; and the fact that the issue before the court on a delayed application was one that

could be brought before the court again and is substantially the same form in a subsequent application."

[36] The applicant could never have brought the application for judicial review within the three months of the decision because she did not have the necessary knowledge until just before the three months had expired. While there were what appear to be modest delays on the part of the applicant and her legal advisers it seems to me that in the overall context, there are good reasons for extending time in this case. They are:

(i) Delay in this case is largely down to the failure of the PPS and/or the police to fulfil their public duties as set out above.

(ii) Any delay on the part of the applicant and/or her legal advisers is modest and is primarily due to the not unreasonable desire to obtain legal aid before first embarking on litigation and to know the attitude of the PPS (and the police) to the complaints which were being made. It was also reasonable given all the circumstances to await a response to the pre-action protocol letter before commencing legal proceedings.

(iii) While I accept that the interests of the third party, PAB, are affected, there is no doubt that he has contributed to the overall delay and in particular to the prosecution of the case against him.

(iv) The public interest demands every person "charged with a criminal offence should **normally** be tried: a prosecution should **usually** result in an adjudication of guilt or innocence and should not **ordinarily** be concluded in any other way" per McCloskey J in *Re Quigley and Others* [2010] NIQB 132.

In this case I consider that the applicant could well feel that there had been a considerable injustice visited upon her if her attempt to take a judicial review was lost because of the modest delays on the part of her and her solicitors, viewed in the overall context of the facts of this case, the delays of others and the merits of the case advanced by her for judicial review.

[37] While I consider that the court should always be slow to interfere with the way in which a District Judge controls his or her lists, there may be circumstances where it is just to do so. In this case I consider it is just and proper to do so and in accordance with the overarching imperative of Order 1 Rule 1(1)(A) for the following reasons:

(i) The applicant and her mother had attended for a contest on 26 April 2016 and sat in court for hours without them being advised the case had already been adjourned the day before. The District Judge was not

aware of this when he dismissed the summons.

(ii) The applicant had booked the holiday which prevented her from attending well before the case against PAB was listed for hearing. She had vouching documents to prove this. The District Judge had asked to see these documents, but had been denied the opportunity to look at them because of the inaction of the police. No satisfactory explanation has been provided for this failure. He was not informed that this failure to provide proof of the holiday reservation lay exclusively with the police as a consequence of their failure to act on his instructions and seek vouching documents of the holiday reservation from the applicant and her mother.

(iii) The previous adjournments of the trial had nothing to do with the applicant, although it is likely they had a considerable influence on the District Judge in his decision to dismiss the summons.

(iv) It is true that the applicant accepts that she did say that she was free to attend court without giving any limitation back in February 2016. But she could not reasonably have expected matters to be delayed until July of that year. She denies any suggestion that she gave a further reassurance as to availability. That is a matter which cannot be resolved in a judicial review.

[38] In the premises, it is clear that the PPS and the police failed to bring matters to the District Judge's attention which he should and could reasonably have expected to have been aware of before he made his decision. It is my opinion that this resulted in the District Judge acting "upon an incorrect basis of fact" which resulted in an obvious unfairness to the applicant: see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1030 and 1047.

Conclusion

[39] For the reasons which I have set out above and the reasons which are set out in more detail in the judgment of Treacy LJ, I would extend time for leave to apply for judicial review and in the circumstances of this case, I would grant judicial review of the decision of the District Judge.

SIR ANTHONY HART

[40] This is an application brought by Rona McDaid on behalf of her 14 year old daughter Maria Fionda to quash the decision of District Judge (Magistrates' Court) McCourt on 30 June 2016 to dismiss a summons in respect of which they were the main prosecution witnesses following his refusal of an application by the prosecution to adjourn the summons. In view of the unusual history of this case it is necessary to set out the chronology of events in some detail.

[41] Their witness statements allege that on Wednesday 3 September 2014 Rona McDaid and her 11 year old daughter were walking along the pavement in Mary Street, Crossgar. They allege that a jeep type vehicle driven by Paul Bell drove towards them, crossed the road, drove along the pavement on their side and stopped. It appears that the pavement is sufficiently wide at this point to allow a vehicle to park completely on the pavement but still allow pedestrians to pass, perhaps with difficulty.

[42] Maria alleged that the front corner of the jeep brushed against her skirt and then hit her left arm knocking her arm backwards. She did not have a bruise but her arm was sore for a short time afterwards. She told her mother who said that the car had also hit her handbag.

[43] Her mother confirmed this version of events, identifying the driver of the vehicle because she had worked for him for seven years or so. She confirmed that her daughter had no injuries and was not hurt but was "slightly annoyed about this happening". Her mother also said "there is a history between myself and Paul Bell's family which is being dealt with by solicitors", although she did not explain what this "history" involved.

[44] The matter was reported to the police and statements taken by the PSNI from the applicant and her daughter who is now aged 14. Mr Bell said he would make himself available for interview, but did not do so. The PSNI file was sent to the PPS which directed that Paul Bell be proceeded against on summons on a single charge that he drove a vehicle without reasonable consideration for other persons using the said road, contrary to Article 12 of the Road Traffic (Northern Ireland) Order 1995. A complaint in those terms was made on 2 March 2015.

[45] For some reason that has not been explained it was not until 18 February 2016, 13½ months after the summons was issued and 18½ months after the alleged incident, that the defendant made his first appearance before the Magistrates' Court and indicated that he would plead not guilty.

[46] The next court hearing was on 3 March 2016. It seems that the defence did not appear. The case was reviewed and fixed for trial on 5 April.

[47] On 10 March the case was reviewed and because the defence had a difficulty with the trial date of 5 April that date was vacated with a new trial date being fixed on the defendant's application for 5 May 2016.

[48] The matter was listed again on 24 March 2016 for review when the defendant said that 5 May did not suit as he was on holiday at the time. The trial date of 5 May was therefore vacated and the District Judge brought the case forward as a contest to 26 April 2016. The applicant and her daughter were notified of the new trial date of 26 April.

[49] The case was listed again for review on 7 April 2016 when the court was told that there were issues regarding disclosure and that the defendant wished to raise issues in relation to bad character of the applicant and her daughter. The case was reviewed again on 21 April, by which time bad character applications had been lodged by the defence in relation to both the applicant and her mother. It appears that part at least of the bad character application related to some form of squabble between the defendant's child and the applicant's daughter in the school playground. I find it hard to understand how such matters could conceivably be regarded as relevant to a charge of this nature.

[50] The case was reviewed again on 25 April 2016, and because there were outstanding disclosure issues the trial date of 26 April was vacated and the case relisted on 12 May 2016 for mention and to fix a new date for the trial. Inexcusably the applicant and her daughter were not informed that the trial had been adjourned. They attended at the court on 26 April and waited all day until someone approached them and they discovered that the case had already been adjourned.

[51] The case was listed on 12 May before a Deputy District Judge in order for issues in relation to disclosure to be considered.

[52] It was again reviewed on 19 May 2016 and on this occasion it was fixed for contest on 7 July 2016. This was now the fourth contest date that had been allocated to this case.

[53] The PPS Victims Witness and Care Unit (VWCU) is responsible for ascertaining whether witnesses are available for intended court dates. Joanne Hunter, an administrative officer attached to the VWCU, has deposed that she spoke to the applicant on two occasions, one of which was 6 May 2016, in relation to her availability for later court dates. As it is PPS practice that availability is sought for four months from the date of listing she has deposed that in May the availability sought would have included July 2016.

[54] It appears that the applicant first learnt of the new contest date of 7 July 2016 towards the end of May from the NSPCC, and on 31 May 2016 the VWCU were aware of this. However, it appears that it was not until 22 June that the VWCU managed to establish contact with the applicant and Stephen Lavery's e-mail of that date is in the following terms:

> "I have got speaking (sic) to Rona this afternoon. She has advised that the original availability (sought back in February) did not cover the date of her holiday. Any further contact made with her for availability was on the back of a cancellation due to issues within the court and unfortunately the holiday simply slipped her mind during these conversations as it had

been booked almost 7-9 months previously."

The year before the applicant had booked a holiday in Italy between 5 and 12 July 2016.

[55] The applicant disputes that she said to Stephen Lavery that the holiday had "slipped her mind". However, his contemporary email supports his account, as does the note on the court record of 30 June that there was a "slip of mind". I consider that this court should proceed on the basis that the applicant did say that the holiday dates had slipped her mind.

[56] The case next came before the District Judge on 23 June when the PPS applied to adjourn the contest fixed for 7 July 2016 because the applicant and her daughter would be unavailable on that date. The District Judge adjourned the matter to 30 June to find out why the applicant and her daughter were unavailable and asked for documentary proof of the booking of the holiday.

[57] It appears that the applicant was not approached for this documentary evidence of the holiday as the District Justice had directed, and the matter came back before him on 30 June 2016.

[58] The application of 30 June to adjourn the case was moved by Conor Gannon of the PPS. At paragraph 9 of his affidavit of 18 September 2017 he made the following points:

- He confirmed that no documentary proofs had been provided for the court.

- The witness had said that her availability had been sought in February which did not cover the date of her holiday.

- The District Judge was told that any further contact in relation to obtaining further availability would have been in the context of a cancellation of a court hearing due to issues within the court, and that unfortunately the holiday date "just slipped her mind" as it had been booked 7/9 months previously.

- Mr Gannon said that he would also have told the court that there would be no reason to disbelieve the witness as to when she said she booked the holiday.

- Mr Gannon deposed that the District Judge was not satisfied with the explanation given and was not prepared to delay the case any further, stating that ultimately this was a civil case and dismissed the summons.

[59] Inexcusably the applicant was not told that the case had been dismissed. She telephoned the police on a number of occasions to ascertain what had happened, but it was not until 29 September 2016 that her efforts to find out what had happened were successful. On that day she rang the PPS and was told that the case had been dismissed on 30 June, and that someone would call her with more information but this did not happen.

[60] On 29 September she contacted her solicitor and was advised to make contact with him again when she had obtained more information from the PPS and the police. She therefore contacted her solicitors on 14 October 2016 and told them that the prosecution had been dismissed.

[61] Her solicitor sought counsel's advice, and on 5 December 2016 the applicant's solicitors wrote a lengthy pre-action protocol letter to the PPS setting out a very detailed chronology of events as known to the applicant and her advisers at that stage. The letter asked what the court was told on 30 June and what reasons it gave for refusing the adjournment application and dismissing the summons. Order 53 proceedings were threatened if a reply was not received within 14 days. The PPS did not respond to this letter, and Mr Kennedy on behalf of the PPS said that although the letter was received by the PPS it was not forwarded to the appropriate department within the PPS.

[62] The applicant's solicitors did not issue proceedings after the expiry of the 14 days, but submitted an emergency legal aid application on 13 January 2017. This was more than three and a half months after the applicant had learnt that the adjournment had been refused on 30 June and the case dismissed, and more than five weeks after the pre-action protocol letter had been sent.

[63] On 15 March 2017 legal aid was granted after an initial refusal. On 29 March 2017 the proceedings were issued. This was three and a half months after the expiry of the 14 days notice period contained in the letter of 5 December, six months after the applicant had learnt of the dismissal of the case, and more than nine months after the decision which she now seeks to impugn.

Extension of time

[64] This court has to decide whether to extend the three month period required by Order 53 for the applicant to bring this application. In *Laverty's Application* [2015] NICA 75 at [21] this court stated that:

> "The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantive hardship to, or substantial prejudice to the rights of, any person and detriment to good administration.

> Also included would be whether there was a public interest in the matter proceeding."

[65] It was clear from the submissions of Mr Ronan Lavery QC on behalf of the applicant that the reason why the matter did not proceed after 5 December 2016 was that the applicant was pursuing legal aid. However, I do not consider that this is something which can excuse the failure of the applicant to bring this application promptly. Because of the failure of the PPS to explain to the applicant why the summons had been dismissed, and the failure of the PPS to respond to the pre-action protocol letter, I am satisfied that the court should extend the time to bring these proceedings until the expiry of the 14 days after the pre-action protocol letter of 5 December 2016.

[66] However, I do not consider that the time should be extended beyond that date. Given the time that had already elapsed since the applicant learnt of the dismissal of the summons on 29 September, I consider the applicant's advisers were obliged to pursue the matter with the utmost expedition given the passage of time to that date. As this court pointed out at [26] in *Laverty's Application*:

> "There is no good reason for extending time based on the outstanding application for legal aid. Although an application for legal aid may be a factor contributing to good reason to extend time an applicant must make and pursue the legal aid application in a timely fashion."

[67] When a prospective applicant for judicial review is already well outside the three month period within which Order 53 proceedings are to be brought there is a heavy burden on the applicant's advisers to move as rapidly as possible to institute proceedings. As the Court of Appeal pointed out in *Davis v Northern Ireland Carriers* [1979] NIJB No. 3, and as has been repeatedly emphasised over the years, the rules of court are there to be observed. If legal aid is being sought in my opinion an applicant should issue the Order 53 summons and then ask the court not to proceed until the legal aid position is resolved.

[68] Mr Lavery QC argued that the applicant was justified in waiting until the information sought from the PPS was made available, but he accepted that the information was still not available when the proceedings were issued. I am satisfied that the reason for the delay in issuing the proceedings was solely because the applicant wished to have the benefit of legal aid granted to her as her daughter's next friend to enable the application to be brought.

[69] I do not consider that the legal aid application was pursued in a timely fashion. It should have been lodged immediately upon the expiry of the 14 days from the pre-action protocol letter of 5 December, and not left until 13 January 2017. The applicant should therefore have lodged the Order 53 proceedings on or about 20

December 2016, and asked the court not to list the matter or deal with it any further until the legal aid application had been resolved. The applicant did not do that in this case and I consider that there was no reasonable excuse for delaying until legal aid was granted on 15 March. Even when legal aid was granted another two weeks elapsed before the Order 53 summons was issued.

The merits

[70] An additional factor in deciding whether time should be extended is whether or not there is a public interest in this matter proceeding. As Lord Steyn pointed out in *Attorney General's Reference (No. 3 of 1999*) [2001] 2 AC 91:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear or harm to person or property. And it is in the interests of everyone that *serious crime* should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public." (Emphasis added)

[71] It is important to bear in mind that Lord Steyn's principle in relation to a consideration of a triangulation of interests was predicated on the need to investigate and prosecute "serious crime". The allegations in this case relate to a minor incident which did not involve any significant physical injury to the applicant and her daughter, although it was no doubt an unpleasant episode. The charge brought in this instance against Mr Bell was of driving without reasonable consideration for others.

[72] When considering the triangulation of interests, as the Divisional Court pointed out in *Morrison* [2013] NIQB 67 at [14]:

> "It is undoubtedly right that the history of the progress of the case including any adjournment history is relevant in exercising the discretion but a case listed on the first occasion should proceed unless the court is persuaded by other relevant factors that it should be adjourned."

[73] During the application attention was directed at the failure of the prosecution to obtain documentary proof of the applicant's holiday as directed by the District Judge. Mr Lavery sought to argue from this that this meant that the District Judge's decision was vitiated by an erroneous view of the facts. I do not consider that the failure of the police to obtain a copy of the applicant's holiday booking documents as

directed by the District Judge on 23 June is relevant. The evidence before the court is that Mr Gannon on behalf of the PPS made it clear to the District Judge on 30 June that there was no reason to disbelieve the applicant's account that she had purchased this holiday the previous year, and there is no reason for this court to infer that the absence of the documents was considered relevant by the District Judge when he made his decision.

[74] There were undoubtedly a number of failings by the prosecution in relation to the way in which this matter was dealt with throughout its history. First of all, the investigation of this case and the decision to issue proceedings appears to have taken an extraordinarily long time, particularly given the very minor nature of these events and that there were only two prosecution witnesses. The failure of the PPS and/or the police to notify the applicant that she and her daughter were no longer required to attend on the hearing date which had been vacated on 26 April and which resulted in their spending all day at court to no purpose was inexcusable. Equally inexcusable was the failure to notify the applicant that the case had been dismissed on 30 June, and subsequently to provide full information as to why this had happened, despite numerous requests by the applicant herself and requests from her solicitors to the PPS.

[75] However, the applicant herself is not free from criticism in relation to the events leading up to 30 June decision because she failed to tell the PPS that she would not be available in early July because she had booked her holiday and that, as was recorded at the time, the matter slipped her mind.

[76] In this instance the District Judge was faced with an application to vacate the fourth contest date fixed in this case. That date was already long past the target date for disposal of matters of this sort of 12 May 2016. The case had already been adjourned on a number of occasions when dates fixed for contest had to be vacated, on one occasion because the trial date was not suitable for the defendant who was out of the jurisdiction.

[77] In these circumstances some judges might have agreed to vacate the trial date yet again and fix a new trial date, but others could properly have taken the view that the case had been adjourned so many times that a further adjournment was not justified. In making his decision the District Judge was entitled to give proper weight to what this Court described in *Morrison* at [40] as "…the public interest in the timely conclusion of summary proceedings", and by saying that he was not prepared to delay this case any further he clearly had this principle in mind. It was suggested the District Judge could have left the case in the list for 7 July but as he knew the main prosecution witnesses would not be available on that date there would be no useful purpose in doing so, merely a waste of precious court time and avoidable inconvenience and expense to the parties.

[78] It appears from Mr Gannon's affidavit that on 30 June the District Judge also expressed the view that this was a civil matter. We do not have the benefit of an

affidavit from the District Judge as to what he meant by that, but if he meant that the applicant and her daughter could pursue the matter by issuing civil proceedings against Mr Bell, as the allegation against Mr Bell cannot be regarded as an allegation of a serious crime in my view that was a proper consideration for him to take into account when deciding whether or not to grant another adjournment.

[79] As Mr Kennedy for the PPS reminded the court, the issue in this case is whether the District Judge was justified in refusing the prosecution application to further adjourn the case, and then dismissing the summons, not whether there were failures in communication at various stages by the PPS and/or the PSNI. Whilst those matters can be taken into account, I consider these are of limited significance when deciding whether the decisions by the District Judge on 30 June were a reasonable exercise of his discretion.

[80] This was a minor case which had already taken far longer than it should have done to get to court, and despite the commendable efforts of the District Judge to bring this case to trial it had still not been heard. This was the fourth contest date that the court was being asked to vacate. I am satisfied that the District Judge had all the relevant information before him when he exercised his discretion, and his decision to refuse the application and to dismiss the summons was within the proper range of decisions open to him.

[81] Given the minor nature of the alleged circumstances giving rise to the charge; the history of the case in the Magistrates Court, and the considerable delay by the applicant in issuing these proceedings, I do not consider that the public interest requires the resurrection of the charge by extending time and granting the relief sought, and I consider the application should be dismissed.