

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MICHAEL ARMSTRONG
FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for judicial review of the decisions of the Department of the Director of Public Prosecutions and the Chief Inspector, Central Process Office, Strandtown. The decision of the Chief Inspector was to recommend prosecution of the applicant on a charge of assault occasioning actual bodily harm to Jonathan Robert Livingstone on 12 December 2002. The decision of the Department of the Director of Public Prosecutions dated 25 May 2001 was to direct the prosecution of the applicant on that charge, a decision that was confirmed on behalf of the Department on 4 March 2002 and on 8 March 2002.

The background

[2] The incident involving the applicant and Livingstone occurred on the evening of 12 December 2000 at McDonald's Restaurant, Connswater Retail Park, Belfast. The applicant was aged 16 and Livingstone was aged 17 and the incident had started earlier that day at the school they attended and ended in the evening when the applicant went to the restaurant where Livingstone had a part-time job. On 16 December 2000 the investigating officer, PC Curlett, interviewed the applicant in the presence of his father. The applicant contended that several times during the interview and at the conclusion of the interview PC Curlett stated to the applicant and his father that she would be recommending that the applicant be dealt with by way of a caution. PC Curlett contended that she did not state during the interview that she would be recommending a caution. However she agreed that at the end of the interview she stated that she would recommend a caution and that she informed the applicant and his father that any decision on whether a caution would be offered

was one for her authorities. PC Curlett then completed an "Investigating Officers Report on Juvenile" known as form "JL5" which was forwarded to the juvenile liaison officer. On form JL5 PC Curlett recommended that the applicant be dealt with by official caution rather than prosecution.

[3] The juvenile liaison officer was PC Glass and she interviewed the applicant at his home in the presence of his parents on 11 January 2001. The applicant contended that PC Glass advised that she would be recommending a caution and that she stated her belief that a caution would be the outcome of the case. PC Glass agreed that she informed the applicant and his parents that it was her intention to recommend a caution but she stated that she had also indicated that her recommendation would be subject to the decision of senior police officers and the DPP. PC Glass denied that she had stated that she believed that a caution would be the outcome of the case. PC Glass then completed a juvenile liaison officer's report known as form "JL1" in which she recommended that the applicant be dealt with by way of caution. Form JL1 was returned to the investigating officer PC Curlett.

[4] PC Curlett then completed a police report for her authorities. The police report comprised a file of witness statements and the juvenile liaison officer's report form JL1 and her own investigating officer's report in which she did not make any recommendation either in favour of or against a charge against the applicant or in relation to a formal caution. It is to be noted that the investigating officer's form JL5, which PC Curlett had forwarded to the juvenile liaison officer recommending an official caution, was not included in the police report.

[5] The police report was forwarded to Acting Inspector McClurg. He considered the police report, including the recommendation of PC Glass that the matter be dealt with by caution, and he recommended a prosecution. The police report with Acting Inspector McClurg's recommendation was then sent to Chief Inspector Ellis and he too considered the contents of the report, including the recommendation of PC Glass that the matter be dealt with by caution, and he too recommended prosecution. The police report with the recommendations was forwarded to the DPP and considered by Gerard Bonner, a senior legal assistant, on the 25 May 2001. He considered the file of witness statements and the report from PC Glass and the report from PC Curlett and the recommendations. Mr Bonner stated the DPP's policy in respect of the issuing of directions to prosecute to be that prosecution should normally occur where there was a reasonable prospect of a conviction and a prosecution was in the public interest. Having applied the DPP policy Mr Bonner directed the prosecution of the applicant. A summons was issued against the applicant dated 7 June 2001.

[6] By letter dated 26 June 2001 to the DPP the applicant's solicitor stated that the investigating officer may have recommended that the matter be dealt with by way of caution and requested that consideration be given to dealing with the matter in that manner. There was no reply to that letter or to a reminder dated 23 August 2001. The applicant's case was listed for hearing as a contest at Belfast Magistrates' Court on 26 February 2002. On that date it appears that PC Curlett and PC Glass informed

the applicant that they had recommended that the matter be dealt with by way of caution and the respective legal representatives for the applicant and the DPP at the hearing believed that the DPP may not have considered proceeding by way of caution. The case was adjourned and by letter dated 1 March 2002 to the DPP the applicant's solicitor requested reasons for not proceeding by way of caution. It would appear that the adjournment of the hearing brought to the DPP's attention the unanswered correspondence from the applicant's solicitor and by letter dated 4 March 2002 Mr Bonner replied to the earlier letters of 26 June 2001 and 23 August 2001 that it was not considered that a caution was appropriate and it was proposed to continue with the prosecution. By further letter dated 8 March 2002 Mr Bonner replied to the applicant's solicitor letter of 1 March 2002. It was only on receipt of the letter of 1 March 2002 that Mr Bonner became aware that recommendations that the matter proceed by caution had been made not only by the juvenile liaison officer but also by the investigating officer. Having considered the matter Mr Bonner confirmed the decision to proceed with the prosecution. In response the applicant's solicitor commenced the present application for judicial review, initially against the DPP and subsequently, as the facts emerged in replying affidavits, by amendment to include the police.

The applicant's grounds.

[7] The applicant's grounds for judicial may be summarised as follows:

- (i) Failing to take into account all relevant considerations and in particular the recommendations of PC Curlett and PC Glass that the matter proceed by way of caution;
- (ii) Proceeding on the basis of a mistaken fact that PC Curlett had made no recommendation as to caution;
- (iii) Breach of the applicant's legitimate expectation that PC Curlett's recommendation would be taken into account;
- (iv) Breach of the substantive legitimate expectation that the applicant would not be prosecuted;
- (v) Abuse of process to proceed with the prosecution in the circumstances;
- (vi) Breach of article 6 of the European Convention right to a fair trial by continuing the prosecution in the circumstances;
- (vii) Breach of article 3 and article 40 of the United Nation's Convention on the Rights of the Child;
- (viii) Failing to take into account the applicant's complaint against Livingstone;

(ix) The decisions of the DPP and the police were unreasonable.

[8] The principles to be applied in considering an application to review a decision as to prosecution have been set down by the Court of Appeal in Re Adams Application [2001] NI 1 and Re D's Application [2003] NIJB 49. It is necessary to establish some unlawful policy or disregard of a settled policy or perversity or improper motive or bad faith. An additional ground, which the Court of Appeal did not accept as being applicable, may arise where the decision maker has taken into account an irrelevant consideration by acting on a mistake of fact. In the event of the additional ground arising the proper test to be applied is to ask whether the decision maker would necessarily have reached the same conclusion if he had not acted on the erroneous fact. While mindful of the limits of review, and of the role of the police as well as the DPP, I consider below all of the grounds relied on by the applicant.

Relevant considerations, mistaken fact and legitimate expectation.

[9] The first three grounds can conveniently be dealt with together. They concern the circumstances surrounding the recommendations of PC Glass and PC Curlett. In the case of PC Glass she recommended a caution in the juvenile liaison officer's report form JL1 and that document was included in the police report considered by the senior police officers and the DPP. All those concerned confirm on affidavit that they took into account PC Glass's recommendation in deciding that the matter should proceed by way of prosecution. Accordingly there is no foundation for the complaint that the decision makers failed to take into account the recommendation of PC Glass.

[10] PC Curlett is in a different position. As investigating officer of a case involving a juvenile, she had two different opportunities to make recommendations. First, as investigating officer, she reported to the juvenile liaison officer, and made the recommendation for a caution in form JL5. The juvenile liaison officer interviewed the applicant and submitted her report in form JL1, recommending a caution, for inclusion in the police report. Form JL5 was sent to the juvenile liaison officer and was retained by that officer and did not become part of the police report, and it was not suggested that this was other than in accordance with normal practice. The investigating officer's second opportunity to make a recommendation arose when she completed the police report, which included the juvenile liaison officer's report. PC Curlett made no recommendation in the police report. Accordingly, in the present case the investigating officer made different recommendations to the juvenile liaison officer (where she recommended an official caution) and to senior officers (where she made no recommendation as to prosecution or caution).

[11] The senior police officers and the DPP, in considering the police report, took into account the absence of recommendation from the investigating officer in deciding that the matter should proceed by way of prosecution. The decision makers could only take into account the recommendation of the investigating officer

that she chose to forward with her police report. The applicant's grounds are ill founded to the extent that they proceed on the assumption that PC Curlett's recommendation *to her authorities* was that the matter should proceed by way of caution.

[12] However the applicant's grounds also have to be considered in light of her decision not to recommend to her authorities that the matter proceed by way of caution. PC Curlett stated to the applicant that she would recommend a caution, although she did not state that she would make that recommendation directly to her authorities. In her affidavit PC Curlett acknowledged that she had not made any recommendation in her police report and stated that it was for the juvenile liaison officer to recommend formal caution if she viewed it to be the suitable course. This appears to indicate that PC Curlett considered that, in the light of her statements to the applicant, her appropriate course of action was to recommend caution to the juvenile liaison officer, who in turn would make that recommendation to the authorities if she considered it to be appropriate, and ultimately it was for the authorities to make the decision. I conclude that PC Curlett considered that what she stated to the applicant was fulfilled by her recommendation to the juvenile liaison officer. However, in view of what PC Curlett agrees she stated to the applicant, he might reasonably have understood that PC Curlett would recommend *to her authorities* that the applicant receive a caution.

[13] Further PC Curlett did not notify her authorities that she had made such a recommendation to the juvenile liaison officer. If the investigating officer's recommendation that a caution be administered to the applicant was not to be made *to her authorities*, then, had the applicant been aware of the procedures to be adopted, he might reasonably have understood that PC Curlett would inform her authorities of the recommendation she had made to the juvenile liaison officer.

[14] As PC Curlett elected not to recommend to her authorities that the matter proceed by way of caution, or to notify them of her recommendation to the juvenile liaison officer, the decision makers can not be said to have failed to take into account a relevant consideration or to have proceeded on the basis of mistaken fact. However, by her statement to the applicant, PC Curlett created a legitimate expectation that she would recommend to her authorities that the applicant be dealt with by way of caution or alternatively that they would be notified of her recommendation to the juvenile liaison officer.

[15] Having been informed that both PC Glass and PC Curlett recommended a caution, Mr Bonner for the DPP reconsidered the decision to prosecute on 8 March 2002 and decided to continue the prosecution. The applicant contended that Mr Bonner's affidavit indicated that this reconsideration was tainted by a lack of appreciation that PC Curlett had recommended a caution but I am satisfied from a consideration of the correspondence and the affidavits that that was not the case. At that stage he was not aware of PC Curlett's form JL5 recommendation to PC Glass but he had been made aware by the applicant's solicitor that the investigating officer

had recommended a caution. In the event Mr Bonner made the further decision on 8 March 2002 taking into account PC Curlett's recommendation of a caution. While the DPP's decision to prosecute was first made without having notice of PC Curlett's recommendation to PC Glass, and on the basis that she had made no recommendation, I am satisfied that the later decision to continue the prosecution was made in the knowledge that PC Curlett had recommended a caution. Accordingly the absence in the police report of a recommendation for a caution by PC Curlett to her authorities, or of notice of her recommendation to PC Glass, became of no effect.

[16] Further, each of the decision makers responded on affidavit to the recommendation of PC Curlett to the juvenile liaison officer, when the matter was later brought to their attention, by stating that if form JL5 had been included in the police report each would have made the same decision to proceed by way of prosecution. It is necessary to review with particular scrutiny an averment that reinforces an original decision, despite the later introduction of a further ingredient. Each decision maker, including the DPP, had already recommended prosecution despite the recommendation for a caution made by the juvenile liaison officer. The DPP had already recommended the continuation of the prosecution in the knowledge that both officers had recommended a caution. I am satisfied that the decision would not have been different if the investigating officer's recommendation had been known when the matter was first considered. In any event it is apparent that ultimately the DPP confirmed the decision to prosecute in the light of the recommendation for a caution by both officers.

Substantive legitimate expectation, abuse of process and fair trial rights.

[17] The fourth, fifth and sixth grounds relied on by the applicant proceed on the basis that in the circumstances the decision to prosecute was in breach of the applicant's substantive legitimate expectation, an abuse of process and a breach of the applicant's fair trial rights. The applicant contends that he entertained a substantive legitimate expectation that he would not be prosecuted. The applicant did not receive any undertaking that he would not be prosecuted. PC Curlett informed him that she would recommend a caution but that the matter was one for her authorities. She did recommend a caution to the juvenile liaison officer. She did not recommend a caution in her police report to her authorities. She did forward with the police report the juvenile liaison officer's recommendation for a caution. In view of the contemporaneous letter from Counsel for the applicant sent to his instructing solicitor on 28 February 2002 after the adjourned hearing at Belfast Magistrate's Court, I accept that PC Curlett expressed some surprise to Counsel that the matter had come to Court, and PC Curlett's recollection to the contrary appears to be faulty. PC Glass recommended a caution but did not undertake that disposal would be by way of caution. In the case of each officer it was stated that the decision would be made by others and it could not be said to be implicit that the applicant would be dealt with by way of caution. There is no basis for a legitimate expectation that the applicant would not be prosecuted.

[18] The applicant contends that the decision to prosecute amounted to an abuse of process. In R v Croydon Justices ex parte Dean [1994] 98 CAR 76 the Divisional Court held, in an application for judicial review, that the prosecution of a person who had received a promise, undertaking or representation from the police that he would not be prosecuted was capable of being an abuse of process. The applicant in that case had not received any express promise, undertaking or offer of immunity but the undisputed evidence showed that the applicant was given to understand over a considerable period that he was to be prosecution witness, from which it almost certainly followed that he was not himself to be prosecuted for the offence. The Divisional Court decided that in the circumstances, and particularly having regard to the fact that the applicant was only 17 at the time, it was clearly an abuse of process for him to be prosecuted subsequently. While the appropriate venue for an abuse of process application is the court dealing with the substantive proceedings the Divisional Court stated that it had, "quite exceptionally", reached a decision on the application for abuse of process in the judicial review proceedings rather than requiring the matter to be decided in the court of trial. In the present case it was made clear by both officers that it was a matter for their authorities as to whether there would be a prosecution. No step was taken that indicated to the applicant that there would not be a prosecution.

[19] Further the applicant relied on DPP v Ara [2001] 4 All ER 559 where Rose LJ stated at paragraph [24] that:

"It is not in the public interest or the interest of a defendant that criminal proceedings should be instituted and pursued against a defendant in relation to whom the police are prepared merely to caution when that defendant is prepared to accept such a caution."

The Divisional Court heard an appeal by the prosecution by way of case stated in respect of a justices' order for the stay of proceedings for abuse of process by reason of the non disclosure of interview notes to the applicant's solicitor to facilitate advise to the applicant as the issue of a caution. It is important to note the facts of the case. After interview the investigating officer advised the applicant that he would be recommending a caution, subject to verification by his supervising officer. The police refused to disclose the interview notes to the applicant's solicitor so that he could advise the applicant in relation to the caution. The applicant later attended the police station where a caution was to be offered, subject to verification. However the applicant's solicitor advised the applicant not to consent to the caution as the interview notes had been withheld and the supervising officer charged the applicant. The Divisional Court held that the police had a duty to disclose a previous interview to a suspect's solicitor so that the solicitor could advise the suspect whether or not to consent to a caution. It is apparent that the action of the police in refusing disclosure

of the interview had effectively prevented the matter from proceeding by way of caution. I do not read the statement of Rose LJ as a general proposition that the views of an investigating officer as to the administration of a caution to a juvenile will determine police action. In any event the statement does not assist the applicant in the present case, as the “police” were not prepared merely to caution the applicant. There is no basis for the claim for abuse of process.

[20] The applicant contends that the prosecution involves a breach of the applicant’s article 6 fair trial rights. To the extent that this complaint concerns the involvement of the applicant in the DPP decision I find that article 6 is not engaged. In any event the applicant and his solicitor have had the opportunity to make representations to the DPP and the original decision has been reconsidered in the light of those representations, a process which adequately fulfilled any obligation that might have arisen had article 6 been engaged. To the extent that this complaint extends to the trial of the charge against the applicant I do not consider that the invocation of article 6 adds anything to the consideration of the issues that is not otherwise dealt with under the other grounds relied on by the applicant.

The Rights of the Child.

[21] The applicant relied on the United Nations Convention on the Rights of the Child. Article 3 states that in all actions concerning children “the best interests of the child shall be a primary consideration”. Article 40.1 recognises the right of every child “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedom of others, which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child assuming a constructive role in society.” By article 40.3(b) it is provided that the State should adopt “whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, provided the human rights and legal safeguards are fully respected.”

[22] International treaties are not part of domestic law. By his third affidavit Mr Bonner stated that he and the office of the DPP take into account various international standards including the United Nations Convention on the Rights of the Child. Accordingly any issue as to the domestic application of international standards does not arise in the present case because the DPP standard for decision-making was stated to take into account the relevant international instrument on which the applicant relied. The applicant contended that in the circumstances the DPP decision did not comply with the Convention as it did not treat the best interests of the child as a primary consideration and did not adopt a measure for dealing with the applicant without resort to judicial proceedings and did not recognise the interests specified in article 40.1. None of the provisions referred to by the applicant excludes judicial proceedings where appropriate, nor do the provisions indicate that judicial proceedings would be inappropriate in the circumstances of the present case. I do not find that the purported adherence to any of the principles can

be said to be erroneous or that any of the provisions has been breached by the actions of the DPP.

Taking into account the applicant's complaint.

[23] The applicant contrasts the approach taken to him with that taken to Livingstone. When the applicant saw PC Glass on 11 January 2001 she stated that on the basis of the applicant's account of what had happened on 12 December 2000 the applicant had the right to make a statement of complaint against Livingstone. As a result the applicant made a formal complaint against Livingstone to PC Curlett on 14 January 2001. The applicant complains that there was no further police action in relation to that complaint and that Livingstone was not interviewed again. PC Curlett's response was that the incident had already been investigated and statements obtained from both the applicant and Livingstone and that she did not consider it necessary to carry out any further investigation, and that was an entirely reasonable position to adopt. Each of the decision makers had all the statements obtained by police, including those of the applicant and Livingstone, and with knowledge of the circumstances and the background and the ages of those involved recommended prosecution of the applicant. The DPP view was stated by Mr Bonner to be that the injuries sustained by Livingstone were sufficiently serious to sustain the charge "and it was clear both from the statements of witnesses and from the applicant's interview with the police that the applicant had been the aggressor on the evening in question." The DPP made the assessment based on all the material presented and that included the versions of events described by the applicant and by Livingstone.

Reasonableness.

[24] Finally the applicant contended that the decision to prosecute was Wednesbury unreasonable in all the circumstances and particularly having regard to the age of the applicant, the origins of the incident as a dispute in school and the circumstances of the incident itself. The DPP was aware of the above particulars and made the assessment that the conditions for prosecution were satisfied. The circumstances of the present case do not render the decision to prosecute Wednesbury unreasonable.

[25] The application for judicial review is dismissed.

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