

**Neutral Citation No. [2010] NIQB 58**

Ref: **COG7803**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **27/04/10**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**DIVISIONAL COURT**

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**McCabe's (Jim) Application [2010] NIQB 58**

**IN THE MATTER OF AN APPLICATION BY JIM McCABE FOR  
JUDICIAL REVIEW**

**-and-**

**IN THE MATTER OF:  
DECISIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS IN 1983  
-and-  
DECISIONS OF THE PUBLIC PROSECUTION SERVICE  
COMMUNICATED TO THE APPLICANT ON 30 SEPTEMBER 2008**

\_\_\_\_\_  
**Before: Higgins LJ, Girvan LJ, and Coghlin LJ**

**COGHLIN LJ**

[1] This is the judgment of the court.

[2] The applicant for judicial review in this case, Jim McCabe, seeks orders of certiorari to quash decisions made by the Director of Public Prosecutions ("DPP") in 1983:

(i) Not to prosecute any individual for murder or manslaughter arising out of the circumstances of the death of his wife, Mrs Nora McCabe on 9 July 1981.

(ii) Not to prosecute any individual for an offence of perjury, perverting the course of justice or conspiracy to pervert the course of justice arising out of evidence given for the purposes of the police investigation and inquest into

the said death of Mrs Nora McCabe and in the alternative declarations that the said failures were wrong in law and/or illegal and/or irrational.

He further seeks certiorari to quash decisions taken by the Public Prosecution Service ("PPS") communicated to the applicant on 30 September 2008:

(iii) Not to prosecute any individual for murder or manslaughter arising out of the circumstances of the said death.

(iv) Not to consider the prosecution of any individual for an offence of perjury, perverting the course of justice or conspiracy to pervert the course of justice arising out of the evidence given for the purpose of the police investigation at inquest into the said death. Further, or in the alternative, he seeks declarations that the said failures in respect of the 2008 decisions were wrong in law and/or illegal and/or irrational.

[3] For the purposes of this application the applicant was represented by Mr Macdonald QC and Ms Doherty while Mr Maguire QC and Mr McAllister appeared on behalf of the respondent. The court is grateful to both sets of counsel for their well researched and helpful written and oral submissions.

### **Background facts**

[4] In July 1981 the plaintiff and his wife, Nora McCabe, resided at 13 Linden Street, Belfast. Travelling along the Falls Road in the direction of the Springfield Road, Linden Street is the next street to the right after Clonard Street. In the early hours of the morning of 8 July 1981 Joseph McDonnell, a Republican prisoner held at Her Majesty's Prison Maze, died after a prolonged period of hunger strike. As the news of his death spread a degree of civil unrest developed in the general vicinity of the Falls Road. Over time this seems to have extended from civilians rattling dustbin lids and blowing whistles to encompass the commandeering of vehicles for use as barricades across the mouth of side streets, some of which were set on fire, and the throwing of various types of missiles at security force patrols.

[5] Shortly before 7.00 am a patrol of two landrover vehicles manned by officers in the Royal Ulster Constabulary ("RUC") was proceeding along the Falls Road in a country wards direction. During the course of the patrol the lead vehicle deviated towards the right hand side of the road and stopped in the vicinity of the mouths of Clonard Street and Linden Street. A single plastic baton round was fired from the off-side of that vehicle.

[6] Mrs McCabe and a friend had walked down Linden Street towards the Falls Road where they joined a number of other women who were saying a rosary for Joseph McDonnell. Mrs McCabe was struck by the plastic baton round discharged from the off-side of the lead police landrover as a consequence of which she sustained a comminuted fracture of the left side of her skull causing laceration and severe bruising of her brain. As a result of

the injury that she sustained she died at the Royal Victoria Hospital on 9 July 1981. An inquest was subsequently held in relation to the circumstances of the death and, in the course of delivering its verdict, the jury appear to have recorded that:

“At the mouth of Linden Street the leading vehicle in the patrol turned sharply to the right and stopped briefly, at which time a plastic baton round was discharged from an off-side porthole. There is no clear evidence to suggest that there was a legitimate target to be fired at in that street. Neither is there evidence to suggest that the deceased was other than an innocent party.”

[7] The applicant subsequently issued civil proceedings claiming compensation in respect of the death of his wife and in November 1984 those proceedings were settled on behalf of the respondent. In a statement read to the court at that time counsel on behalf of the RUC accepted that, at all material times, Mrs Nora McCabe had been “an innocent passerby”.

### **The police investigation and inquest**

[8] Each of the two police vehicles was crewed by five officers and the patrol was under the command of Chief Superintendent Crutchley who travelled as observer in the lead vehicle. Statements were obtained from the various police officers and these were subsequently used as the basis of the depositions made by certain of the officers who gave evidence at the inquest. Apart from the Chief Superintendent, the officers were referred to by alphabetical letters. For the purposes of this application the salient matters referred to in the police depositions included the following:

(i) The Chief Superintendent maintained that, after passing Leeson Street on the left, the roadway was “strewn with beer barrels and concrete blocks”. He stated that there was a vehicle burning at the mouth of Spinner Street and that two youths with lit petrol bombs came running from the Clonard Street direction. He described how he had ordered witness A to discharge one baton round at the youths and he was adamant that no baton rounds had been fired after his vehicle passed Clonard Street. He was able to be quite definite that no baton rounds had been fired into Linden Street or at the junction of Falls Road/Linden Street.

(ii) Inspector F, who was the front seat passenger in the second landrover, stated that on approaching the junction of Leeson Street his vehicle came under heavy attack with petrol bombs and stones. He described vehicles overturned and on fire across the junctions of Leeson Street and Spinner Street with the Falls Road. He also described two youths running out from

the mouth of Clonard Street and heard a baton round discharge from the off-side of the lead landrover. After the discharge of that round he said that the youths ran back into Clonard Street and the petrol bombs that they had thrown at the lead landrover exploded on the roadway just in front of that vehicle. He told the court that at no stage had the lead vehicle turned into Linden Street and that it would be a serious error to say that it had done so.

(iii) Constable C, travelling in the lead vehicle, confirmed that the road was littered with beer barrels, lumps of bricks and other items of rubbish and described a group that had come out of Leeson Street in front of the vehicle throwing petrol bombs. He had no doubt that his vehicle was angled towards Dunville Park when the baton round was discharged and maintained that it would have been impossible to hit anyone at the junction of Linden Street. A similar statement was made by Constable E.

(iv) In a statement that was tendered to the inquest Sergeant A, who discharged the baton round that struck Mrs McCabe, confirmed that the road was littered with beer barrels, concrete blocks and other debris. He described clouds of black smoke billowing into the area at the mouth Leeson Street when his vehicle came under heavy petrol bomb and stone attack. He used the phrase "as the petrol bombs rained round us". He said that he had seen two youths running from the junction of Clonard Street towards his vehicle with lit petrol bombs and that he discharged the baton round in their direction. He did not think that he had hit either of the youths although he saw one half turn, stumble and fall before getting up and running back up Clonard Street. He was able to state categorically that no rubber bullets were fired at or into Linden Street by any member of the crew of the vehicle in which he was travelling.

[9] A Mrs Mooney who had been taking part in saying the rosary at the mouth of Linden Street saw the approach of the landrovers and said that the first vehicle made a right turn into Linden Street. She did not hear the landrovers being attacked or the sound of baton rounds being fired and asserted that there were "very few people about". She agreed that an attack could have been made on the police without her being aware of it but she had not seen any petrol bombers run out of Clonard Street. Mrs McLennan, who had been staying at the McCabes house overnight, described how she had gone to the mouth of Linden Street with the deceased. She said that a landrover approached from the direction of Springfield Road and drove onto the footpath on the Linden Street side of the Falls Road. Both of these assertions were denied by Mrs Mooney. She told the police that she had not seen any burning cars and that there was no hijacking, although there were some youngsters throwing stones at Spinner Street. Mrs McLennan did not attend the inquest, despite promising to do so and being offered transport.

[10] At the conclusion of the oral and documentary evidence before the coroner the applicant's representatives produced a video film taken by two Canadian cameramen positioned at the junction of Sevastopol Street looking in the direction of Springfield Road. The film purported to show the two landrovers travelling along the Falls Road and the lead landrover stopping with the front of vehicle inclined towards the mouth of Linden Street when a baton round was discharged from the off-side portal. During the course of the journey of the vehicles shown on the film there did not appear to be any evidence of beer barrels, concrete blocks or other obstructions on the surface of the roadway and no petrol bombs were seen to be thrown. Upon production of the film the inquest, held in November 1982, was adjourned to permit the authenticity and provenance of the film footage to be carried out by Detective Superintendent Entwistle. The film was handed to Superintendent Nesbitt by the applicant's solicitor at the office of the DPP on 26 November 1982.

[11] Detective Superintendent Entwistle travelled to Royal Canadian Mounted Police Headquarters in Montreal where he interviewed the two Canadians who had made the film and obtained a copy of the original video cassette. The makers of the video were not professional journalists one being a teacher and the other a trained movie camera operator. The detective superintendent found them to be "honest and straightforward" during interview, which took place in the presence of their solicitor, and he confirmed that the cassette that he received had not been out of the possession of the original cameraman. The Canadians confirmed that they had been filming from the junction of Falls Road/Sevastopol Street, approximately 150 yards from Linden Street, and that they had been prompted to start filming by the discharge of baton rounds. Detective Superintendent Entwistle viewed the cassette that he received from the Canadians and, having done so, observed that it was longer than the copy previously handed over to the police by the applicant's solicitors. It seems that two deletions had been made from that copy, one relating to the hijacking and overturning of a motor vehicle and the second to a petrol bomb burning on the road. No explanation has been forthcoming as to the circumstances in which either of those deletions came to be made from the tape originally produced for the police and, unfortunately, the original is no longer available.

[12] In an effort to establish the position of the lead vehicle at the time that the relevant baton round had been discharged Detective Superintendent Entwistle, with the assistance of Constable Arnott of the Photography Branch of the RUC, carried out an experiment. Photographs were taken of a police landrover in an attempt to reproduce the movement of the lead vehicle as it approached the Clonard Street/Linden Street junctions. A comparison of the photographs with the video led the Detective Superintendent to conclude that, at a point more than 10 yards beyond the zebra crossing the leading

landrover had braked suddenly preparatory to pulling across the Falls Road and that, when the vehicle stopped on the right hand side of the Falls Road and a puff of smoke was seen to come from the side of the vehicle, the landrover had reached the junction of Linden Street. The Detective Superintendent concluded that the landrover would have been at an angle of approximately 60 degrees to the footpath a position from which it would have been possible to discharge a baton round at a person standing at the junction of either Clonard Street or at Linden Street. As a result of viewing the full video the chief superintendent expressed the view that it showed a lesser degree of street violence than he would have expected from reading the police file and he noted that the film did not disclose any evidence of burning vehicles or persons throwing or carrying petrol bombs apart from a petrol bomb burning on the road at the end of the film. He formed that view that it was probable that Mrs Nora McCabe had been struck by a police baton round at the junction of Linden Street.

### **The sequence of DPP decisions**

[13] After consideration of the file and statements submitted by the police as a consequence of their original investigation, the then DPP had concluded that the evidence was insufficient to warrant criminal proceedings against any person and directed no prosecutions on 30 November 1981. As indicated above, the inquest subsequently took place which was adjourned when the existence of the Canadian film was disclosed.

[14] The report from Detective Superintendent Entwistle, the original video cassette that he retrieved from Canada together with the statements of the two Canadian witnesses were subsequently furnished to the DPP and made the subject of a report by one of his officers, Mr Herron, dated April 1983. Mr Herron described the opening sequences of the film that had been deleted from the original video furnished to the police in the following terms:

“A group 30-40 youths are seen overturning a van at Lower Clonard Street junction. The van when overturned is sitting slightly back into Lower Clonard Street. A white Vauxhall car is seen coming out of Lower Clonard Street and is driven into Spinner Street where it is overturned. A large number of youths are involved in this. Note - that when the youths overturned this car they move away from it - as if there is the possibility that it might explode. There is considerable activity in the area - groups of people can be seen milling about from the city side of Spinner Street as far as Linden Street and beyond. A Saracen followed by two police landrovers is seen travelling citywards on the Falls Road and came

under heavy stoning from youths just above Sevastopol Street on the countryside.”

After a careful consideration of the evidence of the civilians, Mrs McLennan and Ms Mooney, the ambulance attendant and the film, Mr Herron formed the opinion that the baton round that had caused the death of Mrs Nora McCabe had been discharged by Officer A from the landrover under the command of Chief Superintendent Crutchley upon the latter’s orders. He accepted that Mrs McCabe had been an innocent person who had been struck in error by a baton round directed at a petrol bomber. Mr Herron did not consider that the evidence was of such a degree as to amount to gross negligence warranting a prosecution for manslaughter. The evidence and the reports were subsequently referred to Mr Herron’s superior officers at the DPP and further consideration was given as to the question whether the circumstances warranted criminal proceedings in respect of murder or manslaughter. Ultimately, the case was reconsidered by the Director in the light of the further evidence and submissions and, having done so, he reaffirmed the original direction of no prosecution. Subsequently, the inquest resumed and Superintendent Entwistle together with another police officer gave evidence. Statements from the Canadian cameramen were also read.

[15] After the inquest ended the reports, statements and other evidence, including the evidence given at the adjourned inquest hearing, were re-examined by DPP officers. In December 1984 the Director confirmed his opinion that the Crown could not rebut beyond a reasonable doubt the presence or existence of two petrol bombers in Clonard Street. In such circumstances the Director’s view remained that Chief Superintendent Crutchley could not be prosecuted for any offence. In his view while manslaughter had to be considered in relation to witness A in the context of what had occurred on the left hand side of the road shortly before the relevant discharge he did not consider that a court would find gross negligence on the part of that officer.

### **The correspondence**

[16] On 28 May 1985 the applicant’s solicitors wrote to the DPP requesting him to reconsider the papers with a view to prosecution or referral of the papers to senior counsel or to co-operate with a private prosecution of the police officers concerned. On 24 June 1985 the respondent replied declining to comply with such a request on the basis that full and proper consideration had already been given to the available evidence. The same letter confirmed that in the event of any further evidence or additional information being drawn to the attention of the respondent the matter would receive further consideration. The solicitors exchanged similar correspondence with the Chief Constable of the RUC in June and July of 1985. On 21 June 2001, some 16 years after the initial letter, the solicitors wrote to the respondent referring

to a number of decisions of the European Court of Human Rights and they requested an Article 2 compliant effective investigation into the death of Mrs McCabe. The respondent replied on 31 January 2002 pointing out that, in order to give the request proper consideration, it had been necessary to make a number of enquiries as well as seeking the advice of senior counsel and holding a number of consultations. The respondent expressed the view that the judgments to which he had been referred did not give rise to the rights asserted on behalf of the applicant subject to the formal response of the UK Government to the Committee of Ministers of the Council of Europe being finalised.

[17] On 5 September 2007, some 22 years after the initial letter, the applicant's solicitors wrote to the Public Prosecutions Service ("PPS"), the successor to the DPP, requesting reasons for the decision not to prosecute any individual arising out of the death of Mrs McCabe. The PPS replied to that letter on 1 February 2008 apologising for the delay and pointing out that extensive searches had been required in the course of attempting to locate the original documentation. Mr Kitson, Senior Assistant Director in the PPS, provided a synopsis of the history of the matter including the reconsideration of the evidence after the disclosure of the existence of the film. He set out the police case in brief and concluded his letter in the following terms:

"It was concluded that it would not have been possible to rebut beyond a reasonable doubt these assertions by the police that there were two petrol bombers in Clonard Street.

It was further concluded that on the available evidence a court could not be satisfied beyond reasonable doubt that the police officer fired at Mrs Nora McCabe in Linden Street (rather than petrol bombers) with the intention of killing her or causing serious injury to her. Accordingly, it was considered that there was no reasonable prospect of conviction of any police officer arising from the death of Mrs McCabe."

Further correspondence was exchanged between the applicant's solicitors and Mr Kitson culminating with a response from the latter dated 30 September 2008. These proceedings were instituted by ex parte application on 24 October 2008.

### **The relevant legal framework**

[18] The office of Director of Public Prosecutions was constituted by the Prosecution of Offences (Northern Ireland) Order 1972, Article 5(1) of which



defined the functions of that office. By Article 5(1)(a) the Director was to consider or cause to be considered, with a view to his initiating or continuing in Northern Ireland any criminal proceedings, any facts or information brought to his notice, whether by the Chief Constable of the RUC or by the Attorney General or by any other authority or person. By Article 5(1)(c) the Director was empowered, where he thought it is proper to do so, to initiate, undertake and carry on behalf of the Crown proceedings for indictable offences and some summary offences. The Director was a public official appointed by the Attorney General for Northern Ireland as the head of an independent, professional service entrusted by Parliament with discretionary powers to investigate and prosecute offences.

[19] It is clear that, in appropriate cases, the court does have power to review decisions of the Director. In Re Adams Application for Judicial Review [2001] NI 1, at page 12, Carswell LCJ described the grounds of challenge upon the basis of which judicial review could be mounted thus:

- (i) The decision was tainted by the DPP applying an unlawful policy.
- (ii) The decision was tainted as a result of the DPP failing to act in accordance with its own settled policy.
- (iii) The decision was tainted on grounds of perversity.
- (iv) The decision was infected by an improper motive.
- (v) The decision was made in bad faith.

[20] In Sharma v Antoine and Others [2006] UKPC 57 Lord Bingham dealt with the matter in the following terms at paragraph [14] of his judgment:

“The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

- (i) ‘The great width of the DPP’s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits (Matalulu, above page 735, cited in Mohit, above, para 17);

- (ii) ‘The wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account’ (counsel’s argument in Mohit, above, para 18, accepting that the threshold of a successful challenge is ‘a high one’)...
  
- (v) The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and civil courts; Director of Public Prosecutions v Humphries [1977] AC 1, 24, 26, 46, 53; Imperial Tobacco Limited v Attorney-General [1981] AC 718, 733, 742; R v Power[1994] 1 SCR 601, 621-623; Kostuch v Attorney General of Alberta, above, pp. 449-450; Pretty, above, para 121.”

[21] The threshold for review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute and, in that context, the remarks of Lord Bingham CJ in R v Director of Public Prosecutions, ex parte Manning [2001] QB330 at paragraph 23 are apposite:

“In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to be fair in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.”

Such an approach was accepted as correct by the Privy Council in Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20. Similar principles have been endorsed in this jurisdiction by Weatherup J in Hamill’s

Application [2008] NIQB 73 and Kerr LCJ in the Divisional Court decision of Re Lawrence Kincaid [2007] NIQB 26.

## **The relevant decisions**

### **The 1983 decision**

[22] This was the decision reached by the Deputy Director of Public Prosecutions on 10 June 1983 not to prosecute witness A or Chief Superintendent Crutchley. That decision had been reached after a reconsideration of the police investigation by ACC Whiteside assisted by the oral evidence of the police witnesses at the inquest, the video film and the report on the provenance of the film together with its impact upon the investigation carried out by Detective Superintendent Entwistle. All of those materials had subsequently been considered by Mr Herron, the relevant officer in the DPP, and made the subject of his report to Mr Fraser of 1 April 1983. It is clear from the report submitted by Mr Herron and the subsequent report from Mr Fraser dated 11 April 1983 that consideration was given to the offences of both murder and manslaughter.

[23] Throughout the relevant period, although at times slightly differently phrased, the test adopted initially, by the DPP and, later, by the PPS for determining whether or not to issue a direction to prosecute has been that such a direction will only issue if:-

- (i) the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the “Evidential Test”;
- (ii) prosecution is required in the public interest – the “Public Interest Test”.

Each aspect of the test must be separately considered and the evidential test must be passed before consideration is given to the public interest test. It is clear that Mr Herron, the professional officer in the DPP who compiled the report of 1 April 1983, had access not only to the relevant documents but also to the full video tape taken by the Canadian cameraman.

[24] There can be no reasonable doubt that Mrs McCabe was killed as a result of being struck by the baton round discharged by witness A on the orders of Chief Superintendent Crutchley. However, in order to comply with the evidential test it would have been necessary for the DPP to conclude that the evidence to be adduced in court was sufficient to provide a reasonable prospect of establishing that:-

(i) The baton round had been discharged with the intention to kill or inflict grievous bodily harm. Alternatively, if the offence of manslaughter was under consideration, it would have been necessary to conclude that the evidence was sufficient to provide a reasonable prospect of establishing that the discharge, in the circumstances, had constituted an unlawful and dangerous act or gross negligence. In R v Bateman [1925] 19 Criminal Appeal Reports 8 Lord Hewart LCJ dealt with the concept of gross negligence in the following terms:

“In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, judges have used many epithets such as ‘culpable’, ‘criminal’, ‘gross’, ‘wicked’, ‘clear’, ‘complete’. But whichever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.”

[25] The salient points of evidence considered by the DPP in the cumulative process of reaching the ultimate decision not to prosecute in June of 1983 may be summarised as follows:

(a) It would not have been possible to mount a prosecution for either murder or manslaughter without relying upon the evidence of the civilian witness, Mrs Mooney. Mrs Mooney maintained that the general area of the Falls Road was quiet, that the traffic was flowing normally and that there were very few people about. She said that she had not seen the landrovers coming under attack as they came up the Falls Road and that she would have heard baton rounds if they had been discharged at the mouth of Leeson Street, although she added that the police might have been attacked without her being aware of it. She did not see a petrol bomber run out of Clonard Street and she maintained that the two front wheels of the leading police landrover had been in Linden Street prior to the discharge of the baton round.

(b) The complete video taken by the Canadian cameraman clearly illustrates, contrary to the evidence of Mrs Mooney, a considerable degree of public disorder in the area shortly before the discharge of the relevant baton round including, for example, 30-40 youths overturning a van at the Lower Clonard Street junction, the Vauxhall car driven out of Lower Clonard Street and overturned at the mouth of Spinner Street, the stoning of the

landrovers travelling citywards on the Falls Road, the discharge of baton rounds by the landrovers proceeding countrywards as they passed Spinner Street and Lower Clonard Street and the position of the lead landrover when the baton round was discharged.

(c) While the film clearly supports some parts of the statements and depositions made by the police officers, it also clearly contradicts those parts of their evidence that describe the vehicles coming under attack by large numbers of petrol bombs, the presence of burning vehicles and the obstruction of the road with large numbers of obstacles.

(d) Shortly before the discharge of the fatal baton round, the lead landrover is seen on the film to suddenly stop with the front inclined towards the junctions of Linden Street/Clonard Street. This sudden alteration of the progress of the vehicle must have been in response to some significant observation or event. Detective Superintendent Entwistle's careful reconstruction of the scene convinced him that, at the time when the fatal baton round was discharged, the lead vehicle had reached the junction with Linden Street where it braked quite suddenly, pulled to the right hand side of the road and stopped at an angle of approximately 60 degrees to the footpath. In his opinion it would certainly have been possible from that position to discharge a baton round at a person standing at Clonard Street and it would also have been possible to fire at a person standing at the junction of Linden Street. He considered that the position in which the landrover stopped would have presented an advantage to a member of the crew discharging a baton round towards the mouth of Clonard Street but such an angle would have been much less desirable if the intention had been to fire into Linden Street. The Canadian cameraman and his associate did not see any petrol bombs being thrown at the police. Their initial filming had taken place some 150 yards from Linden Street. After the discharge of the final baton round they had walked up the Falls Road and were informed that a woman was lying injured further along the road. They did not shoot any film on the walk between Sevastopol Street and Linden Street, apart from some ten seconds as they crossed the zebra crossing at Clonard Street, but after their arrival at Linden Street filming was almost continuous until the departure of the ambulance. At that point, towards the end of the film a petrol bomb is shown burning on the Falls Road.

[26] Subsequent to the direction not to prosecute issued on 15 June 1983 the inquest was duly completed. It is to be noted that, after the completion of the inquest, the matter was further reviewed by the DPP taking into account all of the evidence given before the coroner and the jury, including the film and the statements made by the cameraman, together with the verdict. Mr Fraser, then a senior officer in the Department concluded on 11 December 1984 that it would not be possible to rebut beyond a reasonable doubt the presence of two petrol bombers at Clonard Street. In such circumstances it was not felt

that there was a reasonable possibility of sustaining a charge of murder or manslaughter. On the basis of all of the evidence then available, the investigations that had taken place and the reports and analysis to which the relevant matters had been subjected we have concluded that was a decision that was open to the DPP and not one that could be condemned as being irrational in the *Wednesbury* sense, irrationality being the only one of the grounds identified in Adams relevant to the circumstances of this particular case.

### **The 2008 decision**

[27] The Order 53 statement also seeks an order of certiorari to quash "... the decision of the PPS, communicated to the applicant on 30 September 2008, not to prosecute any individual for murder or manslaughter arising out of the circumstances of the death of Mrs Nora McCabe on 9 July 1981" together with associated relief. This aspect of the application is grounded upon correspondence between the appellant's solicitors and the PPS seeking further information as to the reasons for failing to issue relevant directions to prosecute.

[28] On 5 September 2007, more than twelve years after the cessation of earlier correspondence on the matter, the applicant's solicitors wrote to the PPS requesting reasons to be given for the decisions not to prosecute any individual arising out of the death of Mrs McCabe. The PPS replied on 1 February 2008 providing details of the investigation and decisions. On 14 April 2008, after pointing out that the letter of 1 February had contained the first explanation for the failure to commence prosecutions, the solicitors made further requests for information which were dealt with in a reply from the PPS dated 7 July 2008. On 8 August the applicant's solicitors wrote seeking access to the full original DPP file together with further answers to a number of questions. The PPS replied on 30 September 2008 and, in the course of that letter the author, Mr Kitson, wrote as follows:

"I have considered the matters you raise in your commentary on the information I have provided as to why there was no prosecution. I have looked at the copy DVD of the 'First Tuesday' programme you have forwarded with your letter.

I have considered the relevant internal minutes and memoranda contained in the DPP file which set out processes of consideration (in the three stages referred to above) of the evidence and information available in reaching the decisions as to prosecution. In particular I have considered the internal memoranda relating to consideration of the film evidence and the evidence of

the inquest. The matters raised in your commentary were considered.

I can detect no error of law; no failure to take into account relevant considerations; no evidence of taking into account irrelevant factors and no indication of bad faith or other improper motive in the process of consideration of this case. I do not agree that the conclusion reached [that on the available evidence a court could not be satisfied beyond reasonable doubt that the police officer fired at Mrs Nora McCabe in Linden Street (rather than at petrol bombers) with the intention of killing her or causing serious injury to her] does not withstand scrutiny."

[29] In the course of his affidavit sworn herein on 1 May 2009 Mr Kitson emphasised that during the correspondence between September 2007 and September 2008 his role, at all material times, was simply to respond to the correspondence from the applicant's solicitors and, in doing so, to provide information sought and related commentary. In the amended Order 53 statement it is asserted that, in 2008, the PPS "reconsidered" the decision taken in 1983 but such an exercise upon his part is firmly denied by Mr Kitson. After carefully considering the relevant correspondence and the submissions of counsel we are not persuaded that any further "re-consideration" of the original 1983 decision took place in 2008 and, accordingly, we reject that ground of the applicant's case.

**The alleged failure to consider and direct prosecutions for perjury, perverting the course of justice or conspiracy to pervert the course of justice**

[30] Article 3(1) of the Perjury (Northern Ireland) Order 1979 provides that:

"3(1) Any person lawfully sworn as a witness ... in a judicial proceeding who wilfully makes a statement material to that proceeding, which he knows to be false, or does not believe to be true, shall be guilty of perjury ...".

Knowingly seeking to prevent true evidence from being given or agreeing to provide false evidence could potentially constitute the crime of perverting the course of justice or conspiracy to do so.

[31] In support of this ground of the application the applicant has concentrated upon the differences between the statements and depositions of the police witnesses and the events as shown in the edited video. We have

read the relevant documents, viewed the edited video and had the benefit of the submissions of counsel. The most significant of those differences appear to be as follows:

(i) Contrary to the police evidence burning vehicles were not present at the mouth of either Leeson Street or Spinner Street. It would appear from the unedited version of the film that there were barricades at the mouth of both streets, that in Leeson Street being comprised of rubble while a vehicle had been earlier overturned at the mouth of Spinner Street. It also seems that the unedited film showed the presence of a large number of people present in the area prior to the arrival of the landrovers most of whom retired into the side streets and, presumably, behind the barricades.

(ii) Contrary to the assertions by Chief Superintendent Crutchley, Officer C and Officer E, the edited video does not show the relevant section of road to have been littered with beer barrels, rubble, or lumps of bricks.

(iii) Inspector F, Chief Superintendent Crutchley, Officer C and Officer E all described the vehicles coming under attack by petrol bombs as they passed the mouths of Leeson Street and Spinner Street. In the course of his written statement, as noted earlier in this judgment, Officer A referred to heavy petrol bomb and stone attacks at the junction of Leeson Street and described how the petrol bombs "rained round us". The edited video film does not show the impact of any petrol bombs whether against the vehicles or on the roadway.

(iv) Inspector F described two youths, both of whom were holding petrol bombs, "running out from" the mouth of Clonard Street on the right of his vehicle. After the discharge of a baton round he stated that the youths "ran back" into Clonard Street and the petrol bombs exploded on the roadway in front of the vehicle. Chief Superintendent Crutchley also described two youths with petrol bombs "running from the Clonard Street direction". In his statement read to the Coroner's Court witness A described two youths at the junction of Clonard Street each of whom had a petrol bomb who were "running towards us with them lit". It is not possible to discern from the edited video anyone running from the mouth of Clonard Street onto the main road with petrol bombs but it is also important to note that location was approximately some 150 yards from the point of filming which makes it very difficult to ascertain any activity in detail taking place at the mouth of Clonard Street.

[32] No direction was ever issued to prosecute or not to prosecute any individual for an offence of perjury, perverting the course of justice or conspiracy to pervert the course of justice and there is nothing to indicate in the various reports, memoranda and recommendations produced by the police, DPP or PPS that the possibility of prosecutions for any such offences



were ever considered. The potential basis for prosecutions for such offences substantially arose after the discovery of the video film. There is no doubt that a number of DPP/PPS officers were aware of significant factual conflicts between a number of police officers and the events depicted on the film. Of these conflicts the evidence relating to petrol bombs and petrol bombers was of particular significance in view of the purported justification for the discharge of the fatal baton round. In his original report of 1 April 1983 Mr Herron recorded that:

“On the issue of the existence of petrol bombs no lit petrol bombs were obvious from the film. But in the film the sound of breaking glass was noted from the time the landrovers past the junction of Spinner Street.”

He later concluded that this did “... suggest that the least the throwing of bottles.” In his own report of 11 April 1983 Mr Fraser also qualified the absence of petrol bombs by noting that the film recorded the sound of breaking glass as the landrovers past the junction of Spinner Street. When the Deputy Director formulated his memorandum of 10 June 1983 he noted that one of the important and relevant issues in respect of which the film confirmed the evidence of the police was that “the sound of breaking glass indicating petrol bombs”. However in his final memorandum dated 16 December 1984, compiled after the completion of the inquest, Mr Herron expressed himself to be reasonably satisfied, inter alia, that:

“Apart from what seems to be a petrol bomb burning on the roadway convenient to Linden Street after the ambulance left there is no evidence in the film of the throwing of petrol bombs.”

[33] Having reviewed the documents in the context of the film and the submissions of counsel we are persuaded that consideration ought to have been given by the DPP/PPS officers to the offence of perjury. The conflict between the evidence of the officers and the film, particularly with regard to the graphic terms used by the relevant officers in relation to the alleged throwing of substantial numbers of petrol bombs, and, possibly to a lesser extent, the extensive and multiple obstructions said to have been present on the road is of significance. In the skeleton argument the respondent points out that the police investigation into the death of Mrs McCabe did not commence until the day after the incident and some time elapsed before the individual officers were interviewed. In such circumstances it is submitted that it would not have been easy for them to have isolated this particular trip along the Falls Road. The respondent also refers to the absence of any recommendation for prosecution for perjury on the part of the coroner at the conclusion of the inquest. These may well have been relevant factors that

should have been considered in the course of reaching an appropriate decision but do not constitute a justification for not initiating the decision making process. In practical terms it might have been easier to mount a prosecution against the relevant officers for this type of offence insofar as a straight conflict could be demonstrated between their statements and depositions and the film taken by the Canadian cameraman.

## Delay

[34] The terms of Order 53 Rule 4 are clear and specific:

“4.-(1) 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.”

A number of authorities have emphasised how important it is for an applicant to act “promptly” and that doing so does not mean that there is a general three month time limit – see Re Shearer’s Application [1993] 2 NIJB 12 at 27; Re McCabe’s Application[1994] NIJB 27 at 28*a*; and Re Zhanje’s Application [2007] NIQB 14 at para. 7.

[35] The original decision not to prosecute any person in relation to the death of Mrs Nora McCabe was confirmed by the Deputy Director of the DPP on 10 June 1983. The ex parte application for leave to apply for judicial review was not made until 24 October 2008, some 25 years later. Even if the decision not to prosecute taken on 11 December 1984, after the completion of the inquest, is considered the gap is close to 24 years. The initial letter written on behalf of the applicant complaining about the failure to initiate criminal prosecutions was dated 28 May 1985. The response from the DPP dated 24 June 1985 confirmed that no further action was to be taken in the absence of additional evidence or information. Nothing further seems to have occurred until the letter from the applicant’s solicitor of 21 June 2001. That letter made no reference to earlier correspondence but sought reasons for the direction not to prosecute, access to investigation and prosecution files and information as to any steps intended to ensure that the applicant received an Article 2 compliant effective investigation into the death of his wife. The DPP replied by letter dated 31 January 2002 declining these requests. A further period of more than 5½ years had expired before the next letter from the applicant’s solicitors dated 5 September 2007. Again without referring to any previous correspondence, that letter sought reasons for the decisions not to prosecute any individual arising out of the death of Nora McCabe. The PPS replied on 1 February 2008 and further correspondence was exchanged before the ex parte application for leave on 24 October of that year.

[36] No explanation, adequate or otherwise, has been advanced for this virtually unprecedented delay on the part of the applicant's advisers. We are unable to ascertain any satisfactory reason as to why judicial review proceedings were not initiated within three months of November 1984 or, at the latest, in response to the DPP refusal contained in the letter of 24 June 1985. At any stage thereafter such proceedings could and should have been initiated. The practical effect of such delay is obvious in that, even if the applicant had succeeded in persuading the DPP/PPS to reconsider its decision and prosecute Chief Superintendent Crutchley and/or Sergeant A any such action has been rendered impossible by the subsequent death of both individuals. Mr Macdonald sought to persuade the court to extend the relevant time on the basis of the exceptional circumstances of this case including the verdict of the jury, the fact that the death had been caused by an agency of the State, the allegations of a "cover up" and the failure of the DPP to deal with such a situation. He also reminded the court that the failure to consider perjury and/or perverting the course of justice was a continuing obligation.

[37] It is not difficult to have sympathy for the applicant whose sense of powerlessness and frustration are eloquently articulated at paragraph 11 of his affidavit:

"11. The fact that no one has ever been made amenable for my wife's death or for the evidence given before the inquest touching her death has been a source of bewilderment to me and my family in light of the evidence that was available. Over the years it has been the cause of much distress and anguish to us and has affected our lives greatly."

However, this court must act fairly and impartially and it has to be recorded that any legal remedy by way of judicial review that might have assisted in helping the applicant to come to terms with his loss could and should have been initiated many years ago. In In Re Marie Louise Thompson [2004] NIQB 62 and in Re Julie Doherty [2004] NIQB 78 Girvan J considered similar types of the cases involving deaths attributed to the security forces and subsequent directions by the DPP not to initiate prosecutions. In one case proceedings were initiated after a period of 18 years and in the other some 30 years had expired. No good reason for the delay was forthcoming and he concluded that it was neither fair nor reasonable that the integrity and competence of the original decision-makers should be open to attack so many years after the relevant event. We respectfully agree. While the failure to consider potential charges of perjury and/or perverting the course of justice may be seen as a continuing obligation we would be prepared to exercise our discretion to refuse relief in respect of such a failure on the basis that any

positive decision to prosecute at this stage could only be regarded as unfair and wholly disproportionate and would inevitably be the subject of successful abuse of process applications. In the circumstances, we must refuse the applications.