Neutral Citation No. [2013] NIQB 57 | *Ref:* **MOR8891**

Judgment: approved by the Court for handing down | *Delivered:* **29/05/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Millar's (Darren) Application and Director of Public Prosecutions Applications [2013] NIQB 57

IN THE MATTER OF AN APPLICATION BY DARREN MILLAR TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF DISTRICT JUDGE (MC) HAMILL MADE ON 12 NOVEMBER 2012

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF DISTRICT JUDGE (MC) PERRY ON 19 OCTOBER 2011

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF ANTRIM YOUTH COURT ON 12 DECEMBER 2011

Before: Morgan LCJ, Coghlin LJ and O'Hara J

MORGAN LCJ

[1] These three applications for judicial review were heard together as they raised issues about the correct approach by a Magistrates' Court in determining whether to grant or refuse an adjournment application. In Millar's application the applicant challenges a decision by District Judge (MC) Hamill, sitting at Newtownards Magistrates' Court on 12 November 2012, whereby he granted an application by the Public Prosecution Service to vacate the contest date for the hearing of the charges against the applicant. The DPP's application for judicial review in Public Prosecution Service v Steele ("the Steele case") relates to a decision by District Judge (MC) Perry, sitting at Magherafelt Magistrates' Court on 19 October 2011, whereby he refused an application by the Public Prosecution Service to either adjourn or part-hear a case

listed for contested hearing that day. The DPP's application for judicial review in Public Prosecution Service v H ("the H case") relates to a decision by Antrim Youth Court on 12 December 2011 whereby it refused an application by the Public Prosecution Service to adjourn a case listed for a contested hearing that day. Mr McAlister appeared for the DPP, Mr McGleenan appeared with Mr Atchison for Millar and Ms Murnaghan for the district judges. We are grateful to all counsel for their helpful oral and written submissions.

[2] The Magistrates' Courts dealt with over 55,000 criminal cases last year which was far and away the biggest volume of such cases in any judicial tier. The procedure is summary. Any delay in dealing with a case inevitably has a knock on effect on the ability of the court to deal with other outstanding cases. There is, therefore, a particular emphasis on expedition in this court tier.

The cases on Magistrates' Courts adjournments

[3] The power to adjourn proceedings in the Magistrates' Court is stated in general terms and is contained in Article 161(1) of the Magistrates' Courts (Northern Ireland) Order 1981. The relevant principles are not controversial. They can be derived from a series of well-known cases which we summarise below. Much of this material repeats a discussion of this issue by McCloskey J in Re Quigley and others [2010] NIQB 132.

[4] In R v Hereford Magistrates' Court ex parte Rowlands [1998] QB 110 the applicant received late disclosure of two witness statements which were helpful to the defence. His solicitors contacted the witnesses who indicated that they would give evidence but one could not take time off work on the day fixed for the hearing and the other had an interview for admission to a university on that day and was also not available. The justices refused an application for adjournment. The applicant sought judicial review. Lord Bingham reviewed the law.

> "It is not possible or desirable to identify hard and fast rules as to when adjournments should or should not be granted. The guiding principle must be that justices should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences both to the prosecution and the defence. Ultimately, they must decide what is fair in the light of all those circumstances.
>
> This court will only interfere with the exercise of the justices' discretion whether to grant an adjournment in cases where it is plain that a refusal will cause substantial unfairness to one of the parties. Such

> unfairness may arise when a defendant is denied a full opportunity to present his case. But neither defendants nor their legal advisers should be permitted to frustrate the objective of a speedy trial without substantial grounds.
>
> Applications for adjournments must be subjected to rigorous scrutiny. Any defendant who is guilty of deliberately seeking to postpone a trial without good reason has no cause for complaint if his application for an adjournment is refused: see, for example, Reg. v. Macclesfield Justices, Ex parte Jones [1983] R.T.R. 143. In deciding whether to grant an adjournment justices will bear in mind that they have a responsibility for ensuring, so far as possible, that summary justice is speedy justice. This is not a matter of mere administrative convenience, although efficient administration and economy are in themselves very desirable ends. Delays in bringing summary charges to trial are, unfortunately, not infrequent; last minute adjournments deprive other defendants of the opportunity of speedy trials when recollections are fresh. The difficulties adjournments cause give rise to a proper sense of frustration in justices confronted with frequent such applications:"

The court concluded that the applicants were deprived of a reasonable opportunity to bring forward relevant witnesses through no fault of their own and quashed the convictions.

[5] DPP v Picton [2006] EWHC 1108 (Admin) was an assault case in which at a pre-hearing review it was agreed that three prosecution witnesses and four defence witnesses would be called. The case was fixed for 10 am on 1 August 2005. By mistake the prosecution had asked their witnesses to attend at 2 pm that day. There was no explanation for that mistake. Although the justices had another case listed that day which proceeded for some of the morning, they refused the prosecution application for the following reasons.

> "They concluded that the prosecution failure was unreasonable; that in accordance with *R (Walden and Stern) v Highbury Corner Magistrates' Court [2003] EWHC 708* (Admin) the request for an adjournment should be subject to rigorous scrutiny; that in accordance with *Essen v Director of Public Prosecutions [2005] EWHC 1077* (Admin) they should consider

> carefully whether it was right to rescue the prosecution from the consequences of its own neglect; that in accordance with Walden and Stern to do so would encourage such failings; that the interests of the accused and his witnesses had to be considered as well as those of the victim; that on any basis if they granted an adjournment there was likely to be significant delay before the trial could be completed; and, finally, that given the unreasonable failure of the prosecution and balancing the interests of the victim and the accused and the likely delay, it was not in the interests of justice to grant an adjournment until later that day or to a new trial date."

The defendant was acquitted in the absence of any prosecution evidence. The Divisional Court concluded that the decision to adjourn was within the area of discretionary judgment open to the justices. There was no need to wait until lunchtime even where there was another case to start in the meantime. The estimate for the hearing was one day and the case would therefore have gone part heard. A further hearing might not be possible without significant delay. The following factors were suggested as relevant when considering such applications:

> "(a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.
>
> (b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.
>
> (c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.
>
> (d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it

> is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.
>
> (e) In considering the competing interests of the parties the magistrates should examine the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.
>
> (f) The reason that the adjournment is required should be examined and, if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment.
>
> (g) The magistrates should take appropriate account of the history of the case, and whether there have been earlier adjournments and at whose request and why.
>
> (h) Lastly, of course the factors to be considered cannot be comprehensively stated but depend upon the particular circumstances of each case, and they will often overlap. The court's duty is to do justice between the parties in the circumstances as they have arisen."

[6] There are two points to note about this decision. First, there is a line of authority in England and Wales suggesting that the courts should be slow to adjourn cases because of prosecution failures, because to do so is to condone such failures. The point is put clearly in a passage from Mitchell J's judgment in R(Walden and Stern) v Highbury Magistrates' Court [2002] EWCA 708. That was a driving with excess alcohol case listed for contest on the first occasion where the application to adjourn was made because the prosecution witnesses had not attended as they had not been warned.

> "The longer the courts tolerate the sort of inefficiency which seems, in each of these cases, to be the explanation for the failure of the witnesses to attend court on the date fixed for the hearing, the longer it

> will continue. To tolerate it is to encourage it … delays in the administration of justice are a scandal. They are the more scandalous when it is criminal proceedings with which the court is concerned."

The cases tend to suggest that the Divisional Court and the Court of Appeal in that jurisdiction encouraged the view that a culture of adjournment within the prosecution service needed to be addressed in a robust fashion. We do not consider that in this jurisdiction we have yet reached the point where such action by the courts is either necessary or appropriate. We do, of course, accept that fault on the part of a party applying for an adjournment is relevant.

[7] The second issue to note is the absence of any specific reference to the interests of the victim in the matters which Picton suggests should be considered as relevant. The justices referred to the interests of the victim in their decision but the case tends to suggest that the interests of the victim were significantly outweighed by the fault of the prosecution even in circumstances where another case was ready to proceed and the position could have been reviewed at lunchtime. We consider that Picton would have been decided differently in this jurisdiction. The interests of the victim and the desirability of having prosecutions determined on their merits would have made it unfair not to wait until later in the day to assess the position once the witnesses arrived, and in particular to assess whether the case might have been completed in a shorter time or possibly finished shortly thereafter.

[8] There are two relevant decisions of the Divisional Court in this jurisdiction decided within a short time of each other. In Re DPP [2007] NIQB 3 the defendant faced burglary charges. His defence was that he had permission to enter the premises. The person who lived in the flat was an essential witness. She attended court but was not located in her waiting room. The prosecutor sought an adjournment on the basis that she had not attended. The district judge refused the application as a result of which the defendant was acquitted.

[9] The court noted the interests involved in the criminal law as stated by Lord Steyn 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 of 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."

It is important to note the emphasis on the public interest in effective prosecution and the place of the victim in the criminal justice system.

[10] The court looked at the relevance of fault at paragraphs 12 and 13.

> "[12] In *R v Enfield Magistrates' Court ex parte DPP* 153 JP 415, the Divisional Court in England and Wales (Parker LJ and Henry J) held that it was a breach of the rules of natural justice for justices to refuse an application by the prosecutor for an adjournment to enable his witnesses to attend the trial in circumstances where through no fault of their own the prosecution were unable to present their case. In that case the defendant, having agreed to be tried summarily, at first pleaded guilty but then, having taken advice on the suggestion of the justices, changed her plea. The prosecutor applied for an adjournment to enable his witnesses to attend. The application was refused and the justices dismissed the case.
>
> [13] It is unsurprising that this decision was quashed for it cannot be right to refuse an application for an adjournment where there has been no fault on the part of the prosecuting authorities for the absence of witnesses and no compelling reason that the matter should not be adjourned. The case is significant in the present context principally because of its recognition that the question of the fault (or the lack of it) on the part of the prosecution in bringing about the state of affairs that a necessary witness is absent is plainly germane to the question whether an adjournment should be granted. In the present case, the resident magistrate had no basis on which he might reasonably have concluded that the prosecution was to blame for the absence of the witness."

[11] Finally, the court was critical of the failure of the magistrate to carry out an adequate enquiry.

> "[19] In the present case the magistrate made no inquiry of the prosecutor as to whether the witness had indicated a willingness to attend to give evidence. He asked merely whether there was an explanation for her failure to attend. He made no

> inquiry as to the steps taken by the police to ascertain Mrs McGurk's whereabouts. He did not ask if the defendant had contributed to adjournments in the past nor whether a short adjournment would have allowed the matter to proceed without substantial delay. He does not appear to have addressed the question whether the prosecution was in any way responsible for the non-attendance of the witness."

The Divisional Court quashed the acquittal and directed a hearing before a different magistrate.

[12] Re DPP [2007] NIQB 10 was another judicial review of a decision not to adjourn, this time an assault case in the Youth Court. The case had been reviewed on 1 August 2006 in preparation for a hearing on 15 August. The prosecutor dealing with the court on 15 August was not provided with the prosecution file for the case and was unaware that it was listed. She was able to examine a police file and asked an inspector to enquire if the witnesses were present. She was advised that they were not. She informed the district judge that the file was not present and that she was not in a position to proceed. Her application for an adjournment was refused. As it happened on leaving the court she discovered that the civilian witnesses had been in the court building all along but were placed in a discrete waiting room.

[13] The Divisional Court referred to AG Ref (No 3 of 1999) and stated that the Picton checklist was useful. The decision was quashed, however, on the basis of lack of enquiry as set out at paragraph 25.

> "[25] Mr Maguire accepted that it was incumbent on the magistrates to examine whether a short or lengthy adjournment would have been required in order to allow the case to proceed. This was, after all, the first occasion on which the case was listed to proceed as a contest. It is clear that this was not considered by the Youth Court. In relation to the only matter that had been canvassed as a reason for the adjournment (the absence of the file) it might well have proved possible to rectify the omission within a very short time indeed. It appears to us that the failure of the court to inquire into this issue constitutes an omission to take a relevant consideration into account and for that reason the decision must be quashed."

[14] In the course of the hearing in the cases before us Mr McAlister submitted that it was only in highly exceptional circumstances that an adjournment application made by the prosecution on the first occasion a case was listed for hearing as a

contest would be refused. The only possible support for such a submission was an interpretation of the passage set out in the preceding paragraph. We do not accept that proposition. 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. We do not consider that the passage quoted supports any different interpretation.

[15] There are two further cases to which we wish to refer. The first is Re Quigley and others [2010] NIQB 132. Mc Closkey J set out a very helpful and comprehensive review of the authorities for which we are grateful. He discussed the reasonable time guarantee in Article 6 of the Convention. He noted that Lord Bingham stated in Dyer v Watson [2004] 1 AC 379 that the threshold for breach of the reasonable time guarantee was an elevated one. It will be a very rare case indeed where the threshold would be reached in a summary case.

[16] At paragraph 30 of his judgment McCloskey J set out some general principles.

> "The overarching general principle which emerges is that it is in the public interest that 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. This, in my view, is properly characterised a strong general rule. General principles of this nature are the bedrock of both the common law and the jurisprudence of the European Court of Human Rights. "

We agree with these observations. One of the objectives of the criminal law is to protect the innocent by convicting and punishing the guilty. There is a strong general rule that a trial should take place where a charge is maintained. The learned judge went on, however, to assert that the general principle can only be displaced in exceptional or truly exceptional cases. There is no authority in this jurisdiction to support that assertion and in our view it introduces too stringent a test. Each case should be considered on its individual merits bearing in mind the general rule at all times.

[17] The last case to which we refer is Visnaratnam v Brent Magistrates' Court [2009] EWHC 3017 (Admin). The applicant was charged with driving while unfit through drugs. The contest was listed for 6 June 2008. The first necessary witness was a doctor who examined the applicant and expressed an opinion on his fitness to drive. The doctor's report was not disclosed in advance of the hearing, he was not warned to attend the hearing and consequently was not present for the hearing. The second necessary witness for the prosecution was a forensic analyst. He had

indicated to the prosecution in good time that he was unable to attend on the day fixed. No application was made in advance of the hearing to vacate the date because of his unavailability. The outcome was that the prosecution arrived for the hearing without any witnesses. The magistrates granted an adjournment application.

[18] The Divisional Court overturned the magistrate's order. There are difficult issues about the remedy resulting from such a conclusion which were also touched on by McCloskey J in Quigley and upon which we wish to reserve our opinion. The Divisional Court gave the following reasons.

> "17. The magistrates here had to balance the public interest in the claimant's trial for driving under the influence of drugs against the gravity of a series of very serious errors made by the prosecution, which were unexplained and indeed inexplicable. There was no indication of when it would be possible to re-fix the trial, but we all know that very frequently trial dates are set in the Magistrates' Courts very many months in the future. I do not doubt that this would have caused further anxiety and costs to the claimant. It is true that this was the first date that the case was set for trial and there was no history of other ineffective hearings. It is also true that this was not a case which depended upon recollection.
>
> 18. The prosecution must not think that they are always allowed at least one application to adjourn the case. If that idea were to gain currency, no trial would ever start on the first date set for trial.
>
> 19. So these are the competing considerations. I have no doubt that there is a high public interest in trials taking place on the date set for trial, and that trials should not be adjourned unless there is a good and compelling reason to do so. The sooner the prosecution understand this - that they cannot rely on their own serious failures properly to warn witnesses - the sooner the efficiency in the Magistrates' Court system improves. An improvement in timeliness and the achievement of a more effective and efficient system of criminal justice in the Magistrates' Court will bring about great benefits to victims and to witnesses and huge savings in time and money."

[19] We consider that the observations in paragraphs 17, 18 and the first half of paragraph 19 would have justified the Divisional Court's conclusion. We would have taken into account the fact that there was no direct victim in this case. We do not accept that the observations in the last sentence of paragraph 19 would be of significance in this jurisdiction. The duty to ensure an effective and efficient system of prosecution is placed upon the Director of Public Prosecutions. We now turn to the individual cases.

R v H

[20] On 25 September 2011 H, who was 16 years old at the time, was charged with indecently assaulting a 15 year old girl at a swimming pool earlier in the day by touching her thigh in the pool, contrary to Article 7(1) of the Sexual Offences (NI) Order 2008. His first appearance before Antrim Youth Court was 10 October 2011 on which date the case was adjourned to 14 November 2011. At court on 14 November 2011 H pleaded not guilty to the charges. The Deputy District Judge who was presiding enquired as to whether special measures were needed for the case. The prosecutor replied that there was nothing on file. The case was listed for contest on 12 December 2011 with a pre-trial review to take place on 28 November 2011.

[21] At the pre-trial review on 28 November 2011 District Judge (MC) Alcorn was presiding and was informed by the prosecutor that no special measures were being sought and there was no difficulty with the contest on 12 December proceeding. The enquiries about special measures reflected the fact that the complainant and her boyfriend were both 15 years old.

[22] On Monday 12 December 2011, the date of the contest, the district judge was again presiding with two lay magistrates. The prosecution made an application for the case to be adjourned on the grounds the investigating officer was on annual leave and the prosecution also needed to apply for special measures directions in relation to two witnesses. The defence indicated that whilst the special measures applications had been posted to them under cover of a letter dated Friday 9 December 2011, they had only arrived in their offices on the morning of the hearing.

[23] In his affidavit the district judge stated that the court had considered the triangulation of interests. In addition it considered the following factors.

> "(i) The defendant was present for the contest and was a 16 year old child;
> (ii) The case had not previously been listed for contest;
> (iii) At the pre-trial review both prosecution and defence indicated there were no outstanding issues;

(iv) The complainant, a 15 year old child, was present and the nature of the charges indicated it may be a distressing episode for her;
(v) The public interest in criminal charges being tried on their merits;
(vi) The costs to the public of adjourning cases on the day of trial, including the impact on resources;
(vii) The public concern at unnecessary delay in criminal trials."

He specifically stated and we accept that the decision to adjourn was not designed as punishment for PPS failings and concluded:

> "The application for adjournment was made of necessity as a result of what I stated in Court to have been an appalling mishandling by the PPS of this case. The Court was of the view, taking account of all the circumstances, that incompetence on the part of the prosecution was not in the particular case a sufficient basis for the granting of an adjournment, particularly when every facility had been afforded to the prosecution service to ensure that this case was in order for hearing. This was not designed to be a punishment for the Public Prosecution Service's failing. Simply it was the Court's assessment of the correct course of action to take because of the circumstances arising from those failings."

[24] It was submitted by Mr McAlister that the district judge had applied the wrong test because in the response to the pre-action protocol the respondent had relied upon the passages at paragraphs 18 and 19 of *Visvaratnam* excluding the last sentence. We do not consider that there was any misdirection in taking that passage into account along with the other material considerations.

[25] We agree that this case was appallingly mishandled by the PPS. On two occasions prior to the hearing the court had specifically raised the issue of the need for special measures and on each occasion been informed that there was no such need. A vulnerable complainant had been brought to court in potentially distressing circumstances and would have had the prospect of a return hanging over her for some time if the case had been adjourned. We consider that the court took into account all relevant circumstances and its conclusion was within the area of discretionary judgment open to it. We dismiss this application.

R v Steele

[26] Robert Steele was summonsed to appear before Magherafelt Magistrates' Court on 27 April 2011 for the offence of causing grievous bodily injury to Kevin Smith on 9 March 2010 by inconsiderate driving contrary to Article 11A of the Road Traffic (NI) Order 1995. On that date Mr Steele pleaded not guilty to the offence and the case was adjourned to 18 May 2011 in order for the prosecution to obtain witness availability. On 18 May 2011 the case was listed for contested hearing on 6 July 2011.

[27] The circumstances alleged were that Mr Steele was driving a lorry and trailer on the Desertmartin Road when, in negotiating a bend, he allowed the trailer to stray onto the wrong side of the road. The trailer collided with a pick-up truck travelling in the opposite direction driven by Jeffrey McKelvey. As a result of the collision the front offside wheel of the pick-up was dislodged, as a result of which it collided with a vehicle driven by Mr Smith, as a result of which he sustained a fracture of the right hip.

[28] On 6 July 2011 the case was adjourned as the defendant had commissioned an engineer's report which was not yet finished. The case was re-listed for contest on 5 September 2011. However, this new contest date was subsequently vacated on 10 August 2011, again on the application of the defence. On 5 September the case was listed a third time for contest, this time on 19 October 2011. There is no suggestion that these adjournment applications were not well founded in the circumstances.

[29] Ms Nicholl, public prosecutor, made an affidavit stating that she was assigned to prosecute the contest on 19 October 2011. When she was preparing the case the day before, she noticed that Mr McKelvey had not been listed as a witness for the prosecution. He had initially been interviewed as a suspect. The PPS contacted Mr McKelvey but he was unavailable to attend court the next day. Ms Nicholl said that she consulted with the other witnesses at court on the morning of 19 October but concluded that Mr McKelvey was vital to prove the prosecution case as none of the other witnesses saw Mr Steele's trailer hit Mr McKelvey's car. She pointed out that the defence only disclosed their engineer's report to the prosecution on the morning of the contest. Ms Nicholl made an application to District Judge (MC) Perry either to adjourn the contest or permit the contest to be part-heard that day thereby allowing Mr McKelvey to give evidence on another day. The learned judge indicated he was not prepared to adjourn the contest, or part-hear it, and dismissed the summons.

[30] In his affidavit District Judge (MC) Perry stated that in making his decision he took into account the need to consider and balance the triangulation of interests. He identified a number of relevant factors:

(i) The summons had been issued more than a year after the accident which was more than adequate time to identify Mr McKelvey as the essential eye witness

to prove the mechanics of the accident. The failure to do so indicated marked incompetence on the part of the PPS;

(ii) The defendant was present at court; he was a lorry driver who had travelled from England for the contest;

(iii) The case had been previously listed for contest and adjourned, although not by the prosecution but Mr McKelvey should have been identified on this occasion as an essential witness;

(iv) Mr Smith, who had suffered the injuries in the accident, was present to give evidence and had an interest in the outcome of the proceedings;

(v) The defence had provided their engineer's report to the prosecution on the morning of the court but this was incidental to the fundamental gap in the prosecution case;

(vi) The public interest in the charge being determined on its merits;

(vii) The costs to the public of adjourning cases on the day of trial, including the impact on resources;

(viii) The public concern at unnecessary delay in criminal trials;

(ix) The duties placed on the prosecution by the Protocol on Criminal Case Management in the Magistrates' Courts;

(x) Even if the case was part-heard, it was obvious the prosecution had no evidence going to the kernel of the case, namely, whether the defendant's driving had caused the injuries to Mr Smith.

[31] The learned judge concluded that the application for the adjournment was made of necessity as a result of the prosecution's utter incompetence in the preparation of this case. Having balanced the various factors engaged he was satisfied that the proper, lawful and just decision was to refuse the adjournment request. This was not designed to be a punishment for the prosecution's failings. It was simply an assessment of the correct course of action to take because of the circumstances arising from those failings.

[32] We accept that this was a case in which a different view might have been taken. There was a specific victim with an interest in the prosecution and there was every reason to think that Mr McKelvey would attend court if given proper notice. The public interest in pursuing the prosecution was also engaged. As against that the defendant had travelled from England for the hearing and the pattern of previous adjournments suggested that the case would not get on for many weeks subject to

Mr McKelvey's availability. The invitation to part-hear the case was fraught with difficulty as the second part of the case might have been dealt with many weeks after the first part. Such a course is plainly undesirable.

[33] We agree that the prosecution was seriously at fault. The need for Mr McKelvey to attend as a witness should have been obvious to the directing officer when the case was being prepared. When the case was listed for contest on 6 July someone should have reviewed the file and established that he had not been directed. There was a third opportunity when the case was further adjourned on 10 August. No explanation has been offered for those failures. As Kerr LCJ said in Re DPP [2010] NIQB 3 the question of fault leading to the absence of a witness is clearly germane to the question of whether an adjournment should be granted. It does not follow, however, that just because of some fault on the part of the prosecution in securing the attendance of a witness, an application to adjourn should be refused. In many cases the balancing of the factors will favour an adjournment. Each case must be dealt with on its individual merits.

[34] We have concluded that in light of the serious fault of the prosecution, the absence of any explanation for these failures and, to a much lesser extent, the inconvenience to the defendant who had travelled from England, this was a case in which the decision to refuse the adjournment application lay within the area of discretionary judgment open to the learned district judge. The application is dismissed.

Millar

[35] According to the applicant's pre-action protocol letter this is a complex and high profile prosecution in which the applicant and his co-accused were investigated and later arrested as part of a UK-wide police operation targeting suspected badger baiting across the UK. On 3 April 2012 the applicant was charged by police with two offences of causing unnecessary suffering to animals and a further offence of interfering with a badger set relating to an incident on 24 February 2012. He was released on police bail to appear before Newtownards Magistrates' Court. Further connected charges were put to him on 30 July 2012. On 6 September 2012 the applicant pleaded not guilty to all charges. On 20 September 2012 the case was fixed for a contested hearing on 21-22 November 2012. These dates were set aside in order to deal solely with the case in which the applicant was involved. The prosecutor confirmed in court that all witnesses were available to attend the hearing on these dates.

[36] On 24 October 2012 the applicant's case was mentioned in court for the purpose of a pre-trial review. The prosecutor indicated that two police witnesses were no longer available to attend the hearing on 21-22 November and sought an adjournment. One officer was on a course and the wife of the other officer was

expecting a baby. The learned district judge refused the application. He concluded that the course could wait and the date of confinement was too uncertain.

[37] On 6 November 2012 the PPS advised the applicant's solicitors that they wished to pursue a further application for adjournment. The matter was mentioned in court on 9 November when it was indicated that an expert investigation witness who was an essential prosecution witness was unavailable because of his involvement in a badger cull investigation in London.

[38] The application was pursued on 12 November. It was indicated that the prosecution had difficulty with two essential expert witnesses. One, Mr Hutchinson, could only attend on 21 November but Mr Mawhinney could not attend on either date as he was required as a witness in the Azelle Rodney Inquiry dealing with a controversial shooting. The prosecution accordingly sought an adjournment. Counsel for the applicant resisted the application. He did not dispute that Mr Mawhinney was an essential witness but questioned whether the attendance of the witnesses had been secured when the case was reviewed on 24 October. He noted that in a public enquiry notification of witness attendance was often given a substantial time in advance of the hearing. Although further investigations have subsequently been suggested by the applicant these were the criticisms advanced in the pre-action protocol letter. The learned district judge adjourned the hearing to February 2013 because of the unavailability of the witness.

[39] The leave hearing took place on 22 April 2013. By that time the applicant had examined the Azelle Rodney Inquiry website and discovered that Mr Mawhinney had given evidence on 13 November 2012 which was the last day of evidence. The Inquiry did not sit again until 17 December when it took submissions. It was clear, therefore, that the account given to the district judge on 12 November was inaccurate.

[40] The prosecution evidence in this judicial review showed that the necessary witnesses were contacted on 1 October 2012 to confirm their attendance. It does not appear, therefore, that the prosecutor was in a position to confirm that the witnesses were available on 20 September. Mr Mawhinney confirmed that he would be available on 4 October. Mr Hutchinson apparently received a letter advising him of the hearing on 21 November but did not realise that the case had been fixed for two days. On 30 October 2012 Mr Mawhinney contacted the PPS to advise them that the Inquiry he was in would not release him. The prosecution were aware that Mr Hutchinson was involved in a badger cull investigation and assumed that Mr Mawhinney was similarly involved. That explains the remarks on 9 November. On the same day Mr Boal of the PPS spoke to Mr Mawhinney and was told by him that he could not attend on 21 or 22 November because he was attending the Azelle Rodney Inquiry as an expert witness. That was obviously not true. Mr Mawhinney has contributed to an email note in which he says that he does not recall specific dates being mentioned but if they were he would have checked his position with the

Inquiry before responding. The position is highly unsatisfactory but the outcome is that the prosecution accepted the word of this expert witness that he could not attend on the two days fixed for the hearing of this case, he having previously confirmed that he would be available.

[41] In his affidavit District Judge (MC) Hamill stated that he took into account the triangulation of interests. He was aware of the relevant authorities. He had no reason to doubt the veracity of what he was being told by the prosecution. The prosecution had alerted the parties to their difficulties in advance. He did not disagree that he had referred to the fact that the Divisional Court had overturned any previous refusal of an adjournment on the first occasion that the matter was listed for contest. He took into account the following matters:

(a) the dates in November 2012 were the first listing of the Applicant's case as a contest;

(b) two court dates had been set aside for the hearing of this matter;

(c) the defence did not dispute that the witnesses were essential to the case;

(d) the period between the incident and the dates for a contested hearing at the time of the prosecution's application to adjourn was seven months and

(e) the likely delay in a hearing would be minimised the sooner alternative dates were obtained rather than await a renewal of the application to adjourn on the morning of the special court listing.

[42] The applicant's challenge is on the basis that there was a lack of rigorous scrutiny of the application. In particular it is suggested that the reference by the district judge to the Divisional Court restrained him from carrying out the appropriate scrutiny of such an application. That submission is somewhat undermined by the fact that the district judge clearly had taken a robust attitude to the first application made on 24 October. In general we consider that the court is entitled to proceed on the basis that information provided to the court in this sort of application by the prosecution accurately states what is known unless there is some cause to doubt it. We do not accept that there was sufficient reason in this instance for the district judge to go behind the indication that Mr Mawhinney was not available because he was required in London. He was dealing with information supplied to the prosecution by an expert witness. Such witnesses generally have professional or other duties which properly give the court confidence in the accuracy of what the court is being told. The position was drawn to the attention of the parties and the court timeously as required by the Case Management Protocol. As it happens further investigations might have disclosed doubts about the accuracy of the information but it would be unfair to judge this case with the benefit of hindsight. We consider that in the circumstances of this case the district judge was

entitled to accept the accuracy of what he was being told and was not required to engage in further enquiry. We dismiss the application.

Conclusion

[43] We have dismissed each of these applications. In each case we were dealing with prosecutions applications. Many of the general principles will also apply in the case of applications for adjournment by defendants. All parties are required to comply with the Case Management Protocol in order to ensure that witnesses are in court so that cases can be dealt with expeditiously.