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Judgment: approved by the Court for handing down | *Delivered:* **25/9/2009**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

NIGEL JAMES BROWN
AND
GARY RYAN TAYLOR

(NO. 2)

_____

HART J

[1] Gary Ryan Taylor has been returned for trial for the murder of Thomas Devlin and other charges relating to the death of Thomas Devlin and the injury of Jonathan McKee on 10 August 2006 in circumstances which I have already described in some detail in my judgment of 2 July 2009. In that judgment I gave my reasons for refusing to enter a No Bill against both defendants, and I held that there was sufficient evidence to justify Taylor being put on trial on the charges which he faces.

[2] Taylor has now applied for a stay of the prosecution against him on the basis that there has been an abuse of process because the Public Prosecution Service (PPS) informed him that he was not to be prosecuted, but subsequently decided after a review of the case and obtaining an opinion from a second senior counsel that he should be prosecuted. I have had the benefit of skeleton arguments and oral submissions from Mr Farrell (who appears on behalf of Taylor with Mr John Orr QC), and from Mr Hedworth QC (who appears for the prosecution with Mrs McKay). I am indebted to them for their arguments and submissions which were a model of what skeleton arguments and oral submissions should be.

[3] In the course of his submission Mr Farrell stated that his client relied upon the second limb of the test laid down in R v Horseferry Road Court, ex

parte Bennett as formulated by Carswell LCJ in DPP's Application [1999] NI 406 at p. 116, when he stated that one of the only two main strands or categories of abuse of process was:

> "(b) Those like the ex parte Bennett case, where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all."

Mr Farrell expressly conceded that despite the prosecution indicating at one stage that the defendant would not be prosecuted he could have a fair trial. However, Mr Farrell relies upon the following arguments.

(i) That the line of authorities commencing with R v Croydon Justices ex parte Dean (1994) 98 Cr App R at 76 establishes that where the prosecution give an unequivocal representation to a defendant that he will not be prosecuted, and then prosecute the defendant, that is capable of being an abuse of process.

(ii) That the decision to refer the matter to different senior counsel for a second opinion was in breach of the PPS Code for Prosecutors.

(iii) Whilst accepting that the delay in itself would not be sufficient to justify granting a stay, the delay from the date of the commission of the alleged offence, and from the date of the PPS decision not to prosecute, amount to an additional factor justifying a stay of the proceedings.

[4] Mr Hedworth accepted that a clear and unambiguous statement was made to the defendant that he would not be prosecuted, but argues that it was open to the PPS to seek a second opinion, and, in the light of that opinion, to change its position and to decide to prosecute the defendant, a decision vindicated by the dismissal of the No Bill application to which I have already referred. He argued that in following this course there was no breach of the PPS Code, pointing out that it is not a statute but a statement of general principles.

[5] In particular Mr Hedworth relies on the principles formulated by Lord Phillips LCJ in R v Abu Hamza [2006] EWCA Crim 2918 at paragraph 54 where he stated:

> "These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless -

(i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted; and

(ii) that the defendant has acted on that representation to his detriment.

[(iii)] Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

[6] It is common case that there was an unequivocal representation by the PPS to Taylor that he would not be prosecuted, and that no new facts had come to light which would justify proceeding with the prosecution despite the representation. Mr Hedworth relied, however, on (ii) above, arguing that there is nothing to suggest that Taylor acted to his detriment upon the representation made to him, nor has he suffered any detriment as a consequence of the change of decision by the prosecution.

[7] Recognising the difficulty placed in his way by the decision in Abu Hamza Mr Farrell sought to distinguish it, and in the course of that argument relied upon a number of critical comments by academic and other commentators to which I shall refer in due course.

[8] There are therefore three questions which the court has to consider.

(i) What are the principles to be applied in circumstances where the prosecution make an unequivocal representation to a defendant that he will not be prosecuted, and subsequently decide to prosecute him, despite there being no new evidence giving rise to that change of position?

(ii) Did the procedure adopted by the PPS in this case breach the PPS Code for Prosecutors, and if so does that justify a stay of the proceedings?

(iii) Has there by any material delay on the part of the prosecution in the investigation and prosecution of this case, and if so would that justify granting a stay of the proceedings?

1. The principles to be applied where such a representation is made.

[9] In Ex parte Bennett the House of Lords had to consider whether the court had power to order the stay of proceedings in circumstances where, as Lord Griffiths put it at p.62:

> "… where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

This process had involved what Lord Bridge at p. 67 described as "executive lawlessness beyond the frontiers of its own jurisdiction".

[10] At p. 61 Lord Griffiths examined the circumstances in which a stay for an abuse of process would be normally granted in the following passage:

> "As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In Reg. v. Derby Crown Court, Ex parte Brooks (1984) 80 Cr.App.R. 164, 168—169, Sir Roger Ormrod said
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> > 'The power to stop a prosecution arises only when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable …The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution.'
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> There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to

> try the accused for the offence that it amounted to an abuse of process. In Chu Piu-wing v. Attorney-General [1984] H.K.L.R. 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, McMullin V-P. said, at pp. 417—418
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> > 'there is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain'.
>
> And in a recent decision of the Divisional Court in Reg. v. Croydon Justices, Ex parte Dean [1993] Q.B. 769, the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to section 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise."

[11] It is clear from Lord Griffiths' approval of the second limb of the principle formulated in Ex parte Brooks that he considered that it was necessary that a defendant be "prejudiced in the preparation or conduct of his defence", although this was expressed in the context of delay. Secondly, by approving the passage from the judgment of McMullin V-P that circumstances would arise where the prosecution had gained an unfair advantage over the defendant by reneging on a bargain made with him prior to the trial, it appears that Lord Griffiths was again referring to the concept of detriment, although in the context of the desirability of holding the state to its undertaking. Finally, he referred to the decision in Ex parte Dean and it is to that decision that I now turn.

[12] In Ex parte Dean Staughton LJ also quoted the passage from the judgment of McMullin V-P cited above, and at p. 84 said that it was an abuse of process to prosecute the defendant who was only 17 at the time when the police and prosecution had created an impression that he would not be prosecuted provided he co-operated with the police, and as a result he gave repeated assistance to the police over a period of five weeks until the impression was dispelled. Clearly in that case the defendant had acted to his

detriment in making statements and helping the police with their enquiries to a substantial extent, although he did not at times tell them the truth or the whole truth, when he was being treated as a prosecution witness. Staughton LJ said:

> "This case can, I think, be regarded as quite exceptional."

[13] The next relevant case is R v Bloomfield [1997] 1 Cr App R 135 where prosecuting counsel told the court in open court that the prosecution did not intend to offer evidence against the defendant and sought an adjournment to a later date to enable the formal procedure to be gone through. However, by the time of the adjourned hearing the prosecution had changed its mind and decided to continue with the prosecution, and the court held that that was an abuse of process. As Staughton LJ put it at p. 143:

> "[The representation] was made *coram judice*, in the presence of the judge. It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was.
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> Of course the circumstances of each case have to be looked at carefully, and many other factors considered."

[14] It is clear therefore that both in Bloomfield and in Ex parte Dean Staughton LJ was of the view that where a representation that the defendant would not be prosecuted was made, then irrespective of whether or not that caused prejudice to the defendant there could be circumstances when, as in Bloomfield, it would be an abuse of process to allow the prosecution to continue with the case after making such a representation. It is also noteworthy that in Bloomfield Staughton LJ said that:

> "… we are not seeking to establish any precedent or any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was done to this appellant."

In the circumstances of that case it was entirely understandable that the court would regard it as improper for the prosecution to say one thing in the face of the court and then take a wholly different line on the next occasion. Therefore, whilst there was not a bargain in any sense, nor had the defendant

in any way acted to his detriment as a result of the representation, in the special circumstances of that case it was felt that there was a clear element of impropriety on the part of the prosecution which justified a stay of the proceedings. In any event, the decision in Bloomfield can be justified as falling within the first category of abuse identified in Ex parte Brooks of misuse of the procedures of the court to obtain an unfair advantage over the defendant.

[15] The Court of Appeal considered this matter in R v Townsend, Dearsley and Bretscher [1997] 2 Cr App R 541. Rose LJ (see p. 551 C/D) accepted the following propositions advanced by Mr De Silva QC, counsel for Bretscher.

> "In summary, Mr De Silva advances three propositions. First where a defendant has been induced to believe he will not be prosecuted, this is capable of founding a stay for abuse: see Bloomfield. Secondly, where, in addition, a defendant has been told he will be called for the prosecution, the longer he is left in that belief the more unjust it becomes for the prosecution to renege on their promise. Thirdly, where, as here, the defendant, cooperating as a potential prosecution witness, was interviewed without caution and made a witness statement, and steps were then taken which resulted in manifest prejudice to him, it becomes inherently unfair to proceed against him."

[16] The third of these principles requires the defendant to have suffered manifest prejudice, and Bretscher had suffered such prejudice because his witness statements given to the prosecution whilst he was being treated as a prosecution witness were served on one of his co-defendants and then he was subsequently prosecuted. The service of these witness statements led Townsend to make a statement implicating Bretscher and he gave evidence at the trial against Bretcher. (See p. 552). Townsend was therefore decided upon facts which led the court to decide that the defendant suffered detriment. Rose LJ seems to have had the concept of detriment in mind when he said at p. 551D/E:

> "On the contrary, [the trial judge] rightly directed himself that there can be cases of abuse outside the categories of fairness or prejudice, and that breach of promise not to prosecute does not necessarily and, if so *ipso facto*, give rise to abuse, but may do if circumstances have changed."

[17] Mr Farrell also relied upon the decision of Mitting J in R (DPP) v Taylor [2004] EWHC 1554 (Admin). In Taylor Mitting J only referred to Bloomfield, and, although it was not suggested that there was any severe prejudice suffered by the defendant, concluded that the prosecution was "vexatious or abusive" and did not disturb the decision of the magistrates to order a stay of the proceedings. I respectfully consider that Taylor is inconsistent with those authorities which require not merely the prosecution to have reneged on a representation or bargain, but that the defendant must show that as a result prejudice has been created for him, whether or not he changed his position to his disadvantage as a result of the representation that he would not be prosecuted.

[18] This brings me to the decision in Abu Hamza . A number of issues arose in that case, but Lord Phillips dealt with the consequences of an assurance not to prosecute at [54] which I have already cited. Mr Farrell sought to distinguish Abu Hamza, or in the alternative, to persuade me that I should not follow it, relying on critical comments by the authors of Young, Summers and Corker – *Abuse of Process in Criminal Proceedings* at 2.42, where they refer to criticisms by Professor Ormerod in his commentary on Abu Hamza at [2007] Crim L R 334, and Professor Choo, who refers to the concept of detriment, saying that it was difficult to see what tangible "detriment" the defendant in Abu Hamza had suffered. Mr Farrell also relied on comments by Jonathan Rodgers in his article "Boundaries of Abuse of Process" in *Current Legal Problems* 2008 where he says at pp 305-06:

> "Finally, it can be abusive to start a prosecution after the prosecutor has promised the defendant not to do so. Where this occurs, it does not matter that no prejudice in the trial would be suffered by the defendant."

As authority for this proposition at footnote 74 Mr Rodgers cites Bloomfield and Taylor and continues:

> "The Court of Appeal thought otherwise in Hamza, … but without detailed reference to the authorities and in a case where no legitimate expectation arose on the facts."

[19] In order to see whether these criticisms are well founded it is necessary to set out at some length the relevant portions of Lord Phillips' judgment which precede his formulation of principle at [54].

> [50] "As the judge held, circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been

given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances, other than to say that they must be such as to render the proposed prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply the common law principle of 'legitimate expectation' in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest.

[51] Such circumstances can arise if police, who are carrying out a criminal investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance upon that undertaking, acts to his detriment. Thus in R v Croydon Justices, ex parte Dean (1994) 98 Cr. App. R. 76, a 17 year old youth, who had assisted in destroying evidence after a murder had taken place, was invited by the police to provide evidence for the prosecution and assured that, if he did so, he would not himself be prosecuted. He thereupon provided evidence against those who had committed the murder and admitted the part that he had played. In these circumstances, which Staughton LJ presiding in this court described as 'quite exceptional', it was held to be an abuse of process subsequently to prosecute him.

[52] In R v Townsend, Dearsley and Bretscher [1997] 2 Cr App R 540 the Vice-President, Rose LJ, giving the judgment of this court approved the propositions: where a defendant has been induced to believe that he will not be prosecuted this is capable of founding a stay for abuse; where he then co-operates with the prosecution in a manner which results in manifest prejudice to him, it will become inherently unfair to proceed against him. He added

that a breach of a promise not to prosecute does not give rise to abuse but may do so if it has led to a change of circumstances (pp 549, 551). These propositions echo the observation of Lord Lowry in R v Horseferry Road Magistrates' Court, ex parte Bennett [1994] AC 42 at p. 74:-

> 'It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted.'

[53] R v Bloomfield [1997] 1 Cr App. R 135 was a case where it was held to be an abuse of process to proceed with a prosecution in the face of an unequivocal statement by counsel for the Crown to the Court that the prosecution would tender no evidence. In that case there was no change of circumstances which might have justified departing from that statement.

[54] These authorities suggest that that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these (iii) may justify proceeding with the prosecution despite the representation."

[19] It is therefore clear that, contrary to the assertion of Mr Rodgers, Lord Phillips did refer in detail to several of the relevant authorities, and that his conclusion at [54] that the authorities suggest, inter alia, that the defendant has to have acted upon the representation to his detriment is in keeping with Ex parte Bennett, Ex parte Dean and Townsend. As those cases demonstrate, it is not hard to identify where a defendant has acted to his detriment when an assurance has been given by the police or prosecution authorities that leads him to believe that he will not be prosecuted. Bloomfield is an example of a promise being made in circumstances where a prosecution had been

initiated and then the prosecution took advantage of an adjournment it had requested to renege on its considered opinion. As was made clear by the court in Bloomfield, it is to be regarded as an exceptional case, and in my opinion does not establish that the requirement of detriment is unnecessary.

[20] Not only is Abu Hamza entirely consistent with those authorities which require the defendant to show he has suffered detriment by the reversal of the representation or assurance that he would not be prosecuted, but in Tsang [2008] NIQB 135 Weatherup J considered this line of authority, and at [14] expressly adopted Lord Phillips' formulation of the principles already set out, describing it as "this most recent authoritative statement of the proposition" and adopted it.

[21] Finally, I must refer to H v Guildford Youth Court 2008 EWHC 506 (Admin). As Weatherup J pointed out in Tsang this was a case where the defendant did act to his detriment by making admissions after an unequivocal promise that there would be no prosecution, and I consider it is in accordance with the principles laid down in Abu Hamza.

[22] I am satisfied that, contrary to Mr Farrell's submissions, supported though they may be by the opinions of the learned commentators to which he refers, that the preponderance of authority in the cases I have considered requires the court to be satisfied that, in the great majority of cases at least, the defendant has to show that he has acted to his detriment, or that some form of detriment to him has been brought about as a result of the prosecution making a representation that he will not be prosecuted and he thereafter changes his position, or events occur (other than the prosecution deciding to prosecute) which are to his detriment. In my opinion cases such as Bloomfield form a limited exception to that rule and do not controvert or undermine the general rule.

[23] Of course a defendant who has received a representation from the prosecution that he will not be prosecuted, and then is prosecuted even though there is no new evidence, may feel that this is unfair. However it is important to remember that although fairness to the defendant is an important consideration, that is not the test. In Moevao v Department of Labour [1980] 1 N.Z.L.R. 464 Richardson J said at p. 482:

> "The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes

> are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court." (Emphasis added)

[24] In Ex parte Bennett at p. 74 Lord Lowry stated that one of the two grounds upon which a stay could be granted was that:

> "… because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."

But he went on to emphasis the jurisdiction must be exercised carefully, and sparingly, and only for very compelling reasons. That a stay must be wholly exceptional has been emphasised by the Court of Appeal in R v Murray & others [2006] NICA 33, and recently reaffirmed in R v McNally & McManus [2009] NICA 3.

[25] Taylor is charged with the gravest crime in the criminal calendar, and the court has found that there is sufficient evidence against him to justify his being put on trial on that and related charges. There has not been any impropriety on the part of the prosecution remotely comparable to the type of "executive lawlessness" found in Ex parte Bennett, nor has there been any detriment caused to the defendant by the prosecution change of position on whether he should be prosecuted. I do not consider that it can be said, to adopt Lord Lowry's phrase, that it offends the court's sense of justice to try Taylor in the particular circumstances of this case where the PPS, relying upon a second opinion that plainly disagreed with the earlier views of those who had considered the matter, has succeeded in showing that there is sufficient evidence to justify putting Taylor on trial. I therefore refuse the application insofar as it is based upon the first ground.

2. Has there been a breach of the PPS Code?

[26] *The PPS Code for Prosecutors* (Revised 2008) contains a number of passages that bear upon this issue. The purpose of the Code is described at 1.2.1 in the following terms:

> **"1.2 PURPOSE OF THIS CODE**
>
> 1.2.1 The purpose of this Code is to:
>
> i. Give guidance on the general principles to be applied in determining, in any case:
>
> - whether criminal proceedings should be instituted or, where criminal proceedings have been instituted, whether they should be continued or discontinued, and
> - what charges should be preferred.
>
> ii. Provide general guidelines for the conduct of criminal prosecutions; and
>
> iii. Define the standards of conduct and practice that the Public Prosecution Service expects from prosecutors including those barristers and solicitors to whom the Director assigns the institution or conduct of criminal proceedings.
>
> …
>
> 1.2.3 This Code is not intended to be a detailed manual of instructions for prosecutors or a comprehensive guide to the policies and procedures of the Public Prosecution Service. Further, this Code does not lay down any rule of law. While this Code outlines the approach to decision taking that the Public Prosecution Service has adopted, every case must be considered individually having regard to its own facts and circumstances."

[27] As the terms of 1.2.1 make clear, the Code does not attempt to provide a manual as to how every particular set of circumstances should be dealt with, rather it gives guidance as to the general principles to be adopted, and makes clear at 1.2.3 that "… every case must be considered individually having regard to its own facts and circumstances." Therefore, as Mr Hedworth pointed out, it expressly purports to give general guidance and not

to lay down rigid prescriptive rules. It also states that this "Code does not lay down any rule of law", thereby no doubt consciously echoing the comments of Staughton LJ in Bloomfield at p. 141G when referring to its English counterpart:

> "That, as it seems to us, is not law. It is not even delegated legislation. It is what it says: Code giving guidance and general principles for Crown Prosecutors issues by the Director."

[28] At paragraph 4.11 under the heading "Review of Prosecution Decisions" the approach to be adopted by the PPS is set out at 4.11.1 and 4.11.2.

> **"4.11 REVIEW OF PROSECUTION DECISIONS**
>
> 4.11.1 People should be able to rely on decisions taken by the Prosecution Service. Normally, if the Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again.
>
> 4.11.2 However, there may be reasons why the Prosecution Service will review a prosecution decision, for example, where new evidence or information becomes available or a specific request is made by a person, typically a victim, involved in the case. It is impossible to be prescriptive of the cases in which a review will be undertaken and a flexible approach is required."

[29] It is important to bear in mind when considering the approach of the PPS in the present case that these provisions of the Code for Prosecutors are non-prescriptive as to what will happen if consideration is given to reinstating a prosecution. In 4.11.1, the second sentence commences with "Normally" and in 4.11.2 it is stated that:

> "It is impossible to be prescriptive of the cases in which a review will be undertaken and a flexible approach is required."

[30] Mr Farrell accepted that the conduct of the review was entirely in accordance with the provisions of the Code until the point at which it was decided to seek a second opinion, and he accepted that he had to argue that it was improper for the PPS to do so. I cannot accept that there should be such

a rigid rule. I consider that in exceptional circumstances the Director must be entitled to seek a second opinion even when the internal processes of review have been concluded and those processes incorporated, as was the case in this instance, the views of senior counsel. As Mr Hedworth pointed out, in the present case, when the opinion of a different senior counsel was obtained that view was vindicated by the dismissal of the No Bill application, and that shows that the prosecution were justified in seeking a second opinion.

[31] No doubt it will only be in very rare cases that a decision will be taken to restart a prosecution in the absence of new evidence when a defendant has been told that there will not be a prosecution, because were it otherwise the general principle would be undermined that normally a prosecution will not be re-started when a defendant is told by the PPS that a decision has been taken not to prosecute him. However, I consider that neither the Code nor principle prevent a prosecution being re-started in every case where a defendant has been told he will not be prosecuted. I do not consider that the doctrine of legitimate expectation is one that can be safely incorporated into an abuse of process application because I respectfully agree with Lord Phillips CJ in Abu Hamza where he stated at [50]:

> "The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest."

[32] In the present case the defence are effectively arguing that it was unfair and improper of the PPS to seek a further opinion when the family of the deceased sought a further review, when the second opinion recommended a prosecution, and that that recommendation has been shown to be justified by the court's decision that there is sufficient evidence to justify the accused being put on trial on these charges. In those circumstances I do not consider that to try the accused would be "offensive to justice" in Lord Phillips' words. I therefore hold that the defendant has failed to establish the second ground upon which the stay has been sought.

3. Has there been delay?

[33] Mr Farrell argues that there has been culpable delay on the part of the PPS in bringing this prosecution, although he conceded that on its own the delay was not sufficient to justify the grant of a stay, but he argued that it was a relevant factor. As I have already held against Mr Farrell's principal arguments this issue does not require to be considered but as it has been raised I consider that I should deal with it.

[34] The chronology of events divides the sequence of events into two stages. On 21 September 2005 the defendant was interviewed by the police but released without charge. Just over two years later, on 20 October 2007 he was again interviewed by the police and released without charge. Therefore, whilst he was undoubtedly aware that he was a suspect, he had not been charged, he was at liberty and in view of the gravity of the allegations against him I do not consider that the defendant can claim to have in any way been adversely affected by having the allegations hanging over him for that period of time.

[35] The second period commences with the letter to the defendant of 29 July 2008 from the PPS in which he was told that:

> "I am writing to inform you that the Public Prosecution Service have decided, having considered the evidence currently available, not to prosecute you."

Some 7½ months then elapsed during which the review process was carried out, and it was not until 12 March 2009 that the defendant was informed by the PPS that:

> "Following the conclusion of the review process, decisions have been taken to prosecute you for the murder of Thomas Devlin and related offences in respect of the attack on Jonathan McKee'."

[36] The review process, lasting as it did some 7½ months, could have been conducted more speedily, nevertheless I do not consider that the time which elapsed from the notification to the defendant of the decision not to prosecute and the decision to restart can be considered to have created any prejudice to the defendant in the conduct of his defence to these charges, nor has any been suggested.

[37] I am satisfied that the defendant has not made out any of the grounds upon which the stay has been sought. The application is accordingly refused.