Judicial Communications Office

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COURT OF APPEAL DELIVERS BLOODY SUNDAY DECISION

Summary of Judgment

The Court of Appeal[1] today quashed the PPS's decision to discontinue the prosecution of Soldier F for the murder of William McKinney in 1972. It directed the PPS to reconsider the decision. The court upheld the PPS's decision not to prosecute soldiers for the deaths of five other civilians killed on Bloody Sunday on the basis that the soldiers' evidence was obtained by compulsion.

In paragraphs [12] – [34] of its judgment, the court outlined the PPS decisions on prosecution dated 14 March 2019 and the review decisions dated 29 September 2020. It also set out in paragraphs [35] – [39] the discontinuance decision issued to the family of William McKinney by correspondence dated 2 July 2021. This was on the basis that, in light of the ruling in *R v Soldiers A & C* [2021] NICC 3, there was "insufficient admissible evidence to provide a reasonable prospect of conviction" in the case and that the test for prosecution was no longer met. The core issues for determination by the court were:

- Did the PPS err in deciding that there was no reasonable prospect that soldiers' own statements/evidence would be admissible against themselves in any future prosecution?
- Did the PPS err in deciding that there was no reasonable prospect that soldiers' statements/evidence could be admissible as evidence against other soldiers in the prosecution of Soldier F?
- Were adequate reasons given to the families to explain the decisions made?
- Was there a breach of the Victims' Charter in the way the PPS interacted with the families in the McKinney case?

The court referred to the three phases of evidence gathering and investigation in this case in paragraphs [45] – [51]. These were:

- The Royal Military Police ("RMP") statements taken in 1972;
- The statements taken shortly thereafter in 1972 for the Widgery Tribunal. These were taken for the purpose of cross checking against the RMP statements to establish whether any differences could be reconciled and explained. In some cases this resulted in soldiers being interviewed again and further statements taken;
- The evidence from the Saville Inquiry.

Judicial review of PPS decisions

The decision of the PPS not to prosecute is amenable to judicial review. Successful judicial reviews in this area are rare underlining the need for the court to respect the fact that the task of deciding when, and when not, to prosecute is primarily one for the independent prosecuting authority:

[1] The panel was Keegan LCJ, Maguire LJ and Scoffield J. Keegan LCJ delivered the judgment of the court.

> "This court is not permitted to substitute its own view but rather is required to decide if the decisions at issue have been made in error, allowing the appropriate margin of discretion to the prosecuting authority."

Each case will depend on its own facts and context. The court cited the following factors:

- Prosecutorial decisions are not immune from judicial review but the review must bear in mind the nature of the decision at issue;
- Absent mala fides or dishonesty, there must generally be a clear error of law or breach of policy;
- There is a possibility that cases may also hinge on an error of fact, however that will also be in rare cases and the error of fact must be stark and material;
- There is a significant margin of discretion available to the prosecutor in reach a judgment in a particular case;
- Decisions may also be quashed on satisfaction of the traditional judicial review ground of irrationality or unreasonableness;
- The court cannot exercise a merits bases review or quash a decision which is a matter of reasonable judgement on the part of the prosecuting decision maker.

Compulsion

The core question for the court was whether the evidence in this case fell into the category of being obtained under compulsion. If so, this would have a bearing on whether it can be admitted. Article 18 of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order") sets out the statutory checklist that a court has to consider when deciding to admit hearsay evidence and directs a judge to issues of value, whether there is other evidence, the circumstances in which the evidence was made, reliability, and the ability to challenge the evidence. Hearsay will rarely be admitted under Article 18(1)(d) of the 2004 Order where the purpose is to circumvent the statutory constraints imposed by Article 20 of the 2004 Order (admission of statements from an unavailable witness). Also, Article 74 of the Police and Criminal Evidence (NI) Order 1989 ("PACE") raises oppression and unreliability as grounds for exclusion and Article 76 of PACE raises the feature of fairness.

There was debate as to whether the RMP statements and the Widgery statements were to be viewed as voluntary or compelled. The court was referred to various documents from the time, in particular, a protocol in relation to the taking of evidence which was created by the Army in the form of an *aide memoire*. The Saville Inquiry dealt with this issue in detail in Chapter 173 of its Report where it stated that in 1970, a decision was reached between the General Officer Commanding NI ("GOC") and the Chief Constable of the RUC whereby RMP would tend to military witnesses and the RUC to civilian witnesses in the investigation of offences and incidents. The effect of this decision was that that at the time of Bloody Sunday, soldiers involved in an incident were interviewed by officers of the Special Investigatory Branch ("SIB) of the RMP and not by the RUC. The purpose of the SIB investigation was cited as being to inform the higher military command of what happened and to make evidence available if required to settle any future claim or for a Coroner's Inquest. Paragraph 173.115 of the Saville Inquiry report referred to the legal protection given to soldiers. It said that it was mandatory for soldiers to make statements to the SIB. The statements were not made under caution, and soldiers interviewed by the SIB were not represented. In effect, soldiers were interviewed as witnesses rather than suspects. The Saville Inquiry report commented that it was felt important to find a method of interviewing soldiers outside the constraints imposed by criminal legislation or rules of procedure relating to the giving of a caution.

The court did not look behind the Saville Inquiry report on this point which clearly stated: "These were involuntary statements, collected by the army for a particular purpose". It noted that soldiers were ordered to give evidence. The court also noted that the Army Act 1955 reinforced the fact that soldiers must obey orders with section 34 specifically referring to the fact that any person subject to military law who disobeyed orders was liable to court martial and punishment. Applying article 6 ECHR, the court said it was clear that this type of compulsion came within the category where a suspect was obliged to testify under a threat of sanctions:

> "It is plainly not a case of the statements being compelled by torture or subterfuge. That does not mean that compulsion no longer applies; it just means that the form and type may be different and that has a bearing on how a court would adjudge it. … Compulsion still applies as we have found here and, allied to the lack of any other safeguards, it was not unreasonable in our view for the PPS to conclude that there is not a reasonable prospect of the admission of such statements for use against a soldier on a criminal charge."

The court also considered that the soldiers' rights were compromised during the Widgery process:

> "It is clear to us that these statements were involuntary rather than voluntary, as with the original RMP statements. We see no real difference between the cross-checking statements and the written statements to the Widgery Tribunal on the one hand and the RMP statements on the other. In reality, these were all part of a sequential process which occurred within a very narrow window of time of some six weeks."

The court held that the oral evidence at the Widgery Inquiry was potentially of a different species:

> "First, we consider the issue of the purported assurance given to soldiers that their evidence could not, or would not, later be used against them in criminal proceedings. Having examined the documentation in relation to this, it is clear that the army proceeded on the footing that this evidence would not be used subsequently. … However, it is equally clear to us that this was not followed by a formal assurance in writing from either the Attorney General for England and Wales or for Northern Ireland. This is in contrast to the clear assurance given in the Saville Inquiry. Therefore we can understand the point made … that there was no clear assurance that evidence would not be used in a subsequent format."

The court added, however, that this must be related to the position of the individual soldiers. It said there was no evidence that individual soldiers knew anything of their rights and as they were not being treated as suspects the issue of whether or not their evidence would subsequently be used for the purpose of criminal proceedings probably did not arise:

> "Of course the fault lies with the Army, which set up a self-serving process from the outset which may well have been designed to protect individual soldiers who would later become suspects. However, the nature of the process itself appears to us to underline the absence of legal protections for the soldiers concerned who may have been encouraged to make statements which later transpired to be inculpatory (even in part) which they would not have made in a formal interview under caution with appropriate legal advice. As the … Bloody Sunday Inquiry report … recognises, the fact that soldiers were not being treated as suspects in the investigations immediately following Bloody Sunday may itself have been a factor tending to encourage (partially)

> incriminating admissions they would otherwise not have made with the benefit of a proper caution and legal advice, rather than being a point in favour of the admission of such statements (as the applicants contended) because of the absence of hostile or threatening conduct towards them during the process."

The court accepted that the prevailing rules in 1972 did not require the legal protections of a caution and independent legal representation that are raised now, but said this was not the point: "The soldiers were not suspects at that time. Subsequently having become suspects, the issue of legal protections became live and the fairness of any trial must be adjudged by application of the rules applicable in 2021."

The No Prosecution Decisions

The court said the conclusion that there was no reasonable prospect of resisting an application under Article 76 of PACE given the circumstances in which the RMP statements and the cross-checking statements were made was reasonable. It also held that the decision to consider the Widgery evidence was highly likely to be ruled inadmissible in the course of criminal proceedings was not unreasonable. The court was satisfied that the PPS had considered each case in the round assessing the available evidence.

Commenting on the specific concern raised regarding the potential prosecution of Soldier F for the death of Mr Kelly, the court said it was clear that the PPS had viewed this as a particularly difficult case as there was forensic evidence linking the death to a particular rifle. It said that while there was an expert forensic report which had a reasonable chance of being admitted, the evidence connecting that rifle to Soldier F was more problematic. During his evidence to the Widgery Soldier Inquiry F accepted that the rifle in question was his but he was not an accused at that stage. The court said that had he been provided with independent legal advice and a full caution (including that he had the right to remain silent and that anything he did say may be used against him in criminal proceedings), he may have been advised or chosen not to answer that question:

> "Therein lies the difficulty that the evidence has been given in a public forum but cannot on the face of it be admitted in a criminal prosecution. We share a sense of concern about that ourselves but we cannot see that the PPS has made an error in its assessment which is sufficient to vitiate its decision in law. Of course there is another very obvious gap here which is not directed to the PPS and which relates to the absence of armoury records from this period which may prove the connection. That is a matter for investigators and is beyond the remit of this court."

The court did not believe that the PPS erred on the basis of any of the grounds argued by the applicants. It also recorded that the investigation of this case was hampered by the unsatisfactory way in which evidence was gathered and by the lack of independence in the investigations at the time.

The Discontinuance Decision

Different considerations applied in relation to the challenge to the discontinuance decision as a prosecution had commenced and the committal proceedings were part heard. The prosecution of Soldier F for the murder of William McKinney had been recommended on the basis of a reasonable prospect that third party statements from *other* soldiers would be admitted at trial in support of a prosecution.

The court said it was important to state that the original prosecution decision was not impugned in any way. It was accepted by the parties that the PPS were entitled to review the decision following *R v Soldiers A & C* but the question for the court was whether in law the decision could be vitiated by virtue of the change of mind. In determining the answer the court noted that the reasoning contained in the PPS review decision was based solely the import of the *R v Soldiers A & C* decision. The PPS review decision made the following points:

- While acknowledging this case was not identical *A & C* provided insight as to the way courts will view attempts to use the 1972 compelled statements;
- Acknowledging that the ruling is not binding it is from a senior criminal judge and there was no appeal;
- The application of the test for prosecution requires an informed judgement as to how arguments will fare; and
- The original decision was difficult and marginal.

The PPS concluded that in all the circumstances, and giving greater weight to the impact of the denial of rights on the issues of fairness and reliability than were given at the time of the original decision to prosecute, there was no reasonable prospect of a court ruling in favour of the prosecution's application to admit the 1972 statements. It held that the test for prosecution did not remain met and the proceedings against Soldier F should be discontinued.

The starting point for the court was the stated reasoning for the change of mind by the PPS. It said the inexorable conclusion to be taken from this was a belief on the part of the PPS that a prosecution was no longer sustainable due to the effect of the *R v Soldiers A & C* judgment. The PPS must therefore argue that the evidential test, previously established, is no longer met in that there is no reasonable prospect that the third party evidence would be admitted and there is no sufficient other evidence for a reasonable prospect of conviction. The court recognized that this was an extremely difficult case for the PPS to handle but said the usual course would be for the specialist criminal court of trial to determine issues such as admissibility of evidence.

It was accepted that the case of *R v Soldiers A & C* is a relevant decision but the court said the difference in this case is that the statements are not made by the accused but third-party statements which the prosecution want to use against F. The PPS accepted that the evidence itself had not changed but now considered that there was no reasonable prospect of a conviction due to the difficulties with this evidence being admitted given the decision in *R v Soldiers A & C*. The court, however, considered that the discontinuance decision should be quashed for the following reasons:

- Whilst, there may be reasons for the three witnesses to be untruthful about some aspects of the material events (especially Soldiers H and G who had themselves opened fire and therefore were seeking to justify their actions) there was no compelling reason why they would have lied or been mistaken as to the fact that Soldier F had discharged his weapon. The court said this evidence can be tested and assessed by comparing and contrasting the different accounts given and by Soldier F giving any evidence he wishes as to the material events.
- The court did not consider that the decision in *R v Soldiers A & C* should have altered the PPS's assessment. It said there had been over-reliance on the case of *R v Soldiers A & C* and over-application of it to a different factual circumstance: "Fundamentally, that case did not deal with third party statements, which are in a different category and obviously do not

attract the same protection from self-incrimination which is the striking characteristic of the other cases we have been examining".

- It is extremely difficult to predict how a court would determine an application to exclude such third-party hearsay evidence in advance. The use of such evidence is not without difficulty. The case of *R v Soldiers A & C* cannot be taken to signal an absolute prohibition on the admission of historical evidence as each case will turn on its own facts.
- The original decision anticipated an Article 76 challenge and so the only difference is the additional reliance on Article 74 in *R v Soldiers A & C*. The court did not consider this a proper reason to change position, particularly as there is a live argument raised by the applicant in relation to the applicability of Article 74 to the facts of this case.
- The case of *R v Crilly* [2011] NICC 14 has been afforded too much weight. In *Crilly* the judge found that it would be wholly unfair to require *Crilly* to rebut the evidence but said that "it will be for each court to consider the surrounding circumstances in individual cases having regard to the interests of justice or the impact on the fairness of trial."

The court concluded that the rationale for the change of mind by the PPS was not sustainable as it strayed too far away from the original merits based assessment in circumstances. It considered the decision should be quashed and reconsidered:

> "We say this because in our view there was no material change in either the available evidence or applicable legal principles. The decision was based on a prediction as to how a court may rule on admissibility of hearsay. This is a difficult and highly complex legal area. The PPS is certainly entitled to exercise judgment in any case. However, in our view, there is a difficulty with the conclusion that the reasonable prospect of conviction previously found had dissipated so that the prosecution should be discontinued at this stage, when the *R v Soldiers A & C* case which was the catalyst for this was not directly on point."

The court also considered that the highly unusual context of this case, where the prosecution was already extant and the matter would have been considered by the relevant court, warranted a greater intensity of review than would usually be the case:

> "It follows that the matter should remain with the PPS to reconsider the decision. There has already been considerable delay in the criminal process and so it may be that the swiftest and most effective course is for the District Judge to simply be asked to rule on the admissibility issue, at least in the first instance. It may be that public confidence and the interests of justice are best served by a definitive judicial determination on this issue by a court properly seized of the merits. These comments are by way of observation only as the PPS will now have to decide on the next steps."

The Reasons Challenge

This ground of challenge was that, whilst substantial reasons had been given, the text of the full original decision was not provided to the applicants. The court had previously ordered the entire review decision be provided to the applicants and did not consider that it was necessary to order disclosure of the original decision given that it was the review decision which was under challenge. The court remained of the view that disclosure of the original decision was not necessary for the fair disposal of the proceedings. It said the clear rationale of the PPS can be found in the substantial decisions, the reasoning was detailed and dealt with all of the core issues in a satisfactory way. The court considered the reasons challenge was not sustainable.

The Victims Charter and PPS Victims and Witnesses Policy

The Victims' Charter was issued by the Department of Justice under section 31 of the Justice Act (Northern Ireland) 2015. It implements the EU Directive establishing minimum standards for the rights, support and protection of victims of crime. Paragraph 80 of the Charter incorporates Standard 2.2 which states that victims are entitled to be "informed … without unnecessary delay, of a decision by the PPS to prosecute or not to prosecute an alleged offender." The Charter also refers to the procedure to be followed when prosecution decisions change: "The PPS will, whenever possible, and where you want this, explain to you why this is being considered and listen to you views. In some cases it may not always be possible to speak to you if issues have to be dealt with relatively quickly at court."

The PPS Victims and Witnesses Policy 2017 also deals with changes to charges: "Where a decision is taken by the PPS to substantially alter a charge, to discontinue all proceedings, or to offer no evidence, the victim will be informed of this decision and given reasons for the decision when requested."

The court said the system of communication and consultation by the PPS is generally beyond reproach. However, in the particular circumstances of the *McKinney* case, the court said it could not reach the same conclusion. It said the discontinuance decision was reached without the same level of communication as the original decision:

> "In truth, the real engagement was after the decision had been made. We cannot see that there was any impossibility in consulting and listening to the views of the deceased families in advance. The issue is not how the decision maker could have been informed by views on legal and evidential matters but rather the facilitating of proper victim input in a high profile case such as this. We do not consider that this would have placed an overly onerous or procedurally difficult burden upon the PPS."

The court, while recognizing the circumstances of this case are exceptional, concluded that the deceased families were not properly involved in, or appraised in advance of, the discontinuance decision which was a significant change of course. It followed, therefore, that the requirements of the Victims Charter had not been adequately met.

Conclusion

The court dismissed the judicial reviews in the cases of *Duddy & Others* and *Montgomery*. The court quashed the decision to discontinue the prosecution of Soldier F in the *McKinney* case and directed the PPS to reconsider the decision. It also made a declaration in the *McKinney* case for failure to comply with the Victims Charter and policy regarding engagement with victims.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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