9th Annual National Prosecutors' Conference

Saturday, 24 May 2008
Dublin Castle Conference Centre

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Law Library

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Reviewing Prosecution Decisions

REVIEWING THE DECISION TO PROSECUTE

Introduction

In relation to his prosecutorial discretion, the DPP enjoys a partial immunity from judicial review. There are circumstances in which a decision to prefer charges, or sometimes not to prefer charges, can be challenged. But such circumstances are the exception, not the norm.

The impetus of recent case law from the Superior Courts has been to cut down the prohibition jurisdiction. Over the past decade in particular, a large number of applications have come before the Courts in which accused persons have sought to injunct their criminal trial from taking place, usually on the basis of a claim that they cannot get a fair trial. There are three main categories: delay cases, lost evidence cases and applications concerned with prejudicial pre-trial publicity.

The thrust of recent pronouncements, particularly from the Supreme Court, has been to discourage such applications, largely on the basis that an applicant's grievance can be accommodated at the Court of trial. An analysis of recent cases shows a number of recurring themes, the effect of which has been to narrow considerably the parameters for bringing judicial reviews.

On the delay side, cases such as ***H -v- DPP***[1], ***PM -v- DPP***[2], ***McFarlane (No. 2)***[3] and ***Devoy -v- DPP***[4] illustrate the extent to which the delay jurisdiction has been emasculated. In some of those cases concerns have been expressed about the dangers of bringing unmeritorious and tactical applications that have more to do with tripping up prosecutions than a genuine desire to vindicate an accused's entitlement to a trial in due course of law.[5] Similarly on the ***Braddish*** front, such concerns have led to the emergence of a number of themes in the recent case law, usually invoked with a view to turning down an accused's application to stop his trial.

(i) An applicant must engage with the prosecution case, that is he must identify in clear-cut terms, by reference to the prosecution case set out in the book of evidence, how the loss of the evidence concerned has impaired his ability to defend the charges. He must show that a particular line of defence has been lost to him, or that his ability to contest the charges has been irretrievably damaged. (***Scully -v- DPP***[6]).

[1] [1994] 2 I.L.R.M. 285
[2] [2006] 3 IR 174
[3] Unreported, Supreme Court, 5th of March, 2008.
[4] Unreported, Supreme Court, 7th April, 2008.
[5] See the observations of Fennelly J. in ***Dunne –v- DPP*** [2002] 2 IR 305 and Hardiman J. in ***Scully -v- DPP*** [2005] 1 IR 242.
[6] [2005] 1 IR 242.

(ii) Prohibition will not be granted where the applicant can, by alternative means (other than by recourse to the lost evidence in question) make the point in his defence that he wishes to make (***McFarlane -v- Director of Public Prosecutions***[7] and ***PH -v- DPP***[8]).

(iii) It is not enough for the applicant to identify a possible area of difficulty, said to arise on foot of the lost evidence. He must show that, because of the loss of the evidence, there is now a real risk of an unfair trial. (***DC -v- DPP***[9], ***Braddish -v- DPP***[10], ***Z -v- DPP***[11] and ***D -v- DPP***[12]).

(iv) To succeed in having a prosecution prohibited, an applicant must do more than merely invoke a remote, fanciful or theoretical possibility that exculpatory evidence at one time existed. He or she must establish a real risk of an unfair trial. (***Braddish -v- DPP*** [13]and ***Scully -v- DPP***[14]).

(v) Where a Court is asked to prohibit a trial on the grounds that there was an alleged failure to seek out evidence, it would have to be shown that any such evidence would be—

(a) clearly relevant,

(b) that there was at least a strong probability that the evidence was available, and

(c) that it would have a real bearing on the guilt or innocence of the accused person.

It would also be necessary to demonstrate that its absence created a real risk of an unfair trial. (***DC -v- DPP***[15]).

(vi) The threshold that an applicant must meet is a high one. Such an application may only succeed in exceptional circumstances. (***Z -v- DPP***[16] and ***DC -v- DPP***[17])

[7] [2007] 1 IR 134.
[8] Unreported, Supreme Court, 29th January, 2007.
[9] [2005] 4 IR 281.
[10] [2001] 3 IR 127.
[11] [1994] 2 IR 476.
[12] [1994] 2 IR 465.
[13] [2001] 3 IR 127.
[14] [2005] 1 IR 242.
[15] [2005] 4 IR 280.
[16] [1994] 2 IR 476.
[17] [2005] 4 IR 281.

(vii) In general, prohibition will not be necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. It should be assumed that the trial judge will conduct the proceedings fairly, and will give all necessary rulings and directions to ensure a fair trial. (***DC -v- DPP***[18] and ***Blanchfield -v- Hartnett***[19]).

(viii) In considering an application for prohibition, a review Court should not merely pick out an element and conclude that there is a possibility of an unfair trial arising from it. That is not the test. The test is that of a *serious* risk of an unfair trial. An application based on a hypothesis that may or may not occur should not succeed (Denham J. in ***DC -v- DPP***[20]).

(ix) In general, eve of trial applications are to be deprecated. Unexplained delays in issuing proceedings may result in applications being refused *in limine*. An applicant's delay will be relevant not just to the issue of compliance with Order 84 Rule 21 of the RSCI, but also for what it says about an applicant's true view of the lost opportunity to obtain the missing evidence in issue (***Scully -v- DPP***[21] and ***Bowes -v- DPP***[22]).

Focus of this Paper

In the three areas mentioned, of delay, lost evidence and prejudicial publicity, the primary focus is on the question whether an accused person can get a fair trial. Such cases are nearly always viewed through the lens of a "fair trial". In this paper it is proposed to focus on a completely separate type of prohibition action, namely an attack on the decision to prosecute itself. The decision whether to prosecute in an individual case lies at the very heart of the prosecutorial function. The decision can have enormous consequences for the accused person, the injured party and society at large. For an accused in particular, the consequences of being charged include irretrievable loss of reputation, distress, and disruption of work and family relations. For a victim too, the implications of a decision to prosecute, or not to prosecute, can be considerable.

The body charged with deciding whether to bring a prosecution in an individual case is, of course, the Director of Public Prosecutions. The question whether to direct a prosecution is an individual case is a matter for the DPP's discretion. When exercising that discretion, the DPP enjoys a partial immunity from judicial review. The DPP's particular functions and role have led the Irish Courts to conclude that a "special protection" attaches to his decisions to prosecute or not to prosecute.[23]

[18] [2005] 4 IR 281.
[19] [2002] 3 IR 207.
[20] At p.296 of the report.
[21] [2005] 1 IR 242.
[22] [2003] 2 IR 25.
[23] *Dunphy (a minor) v. Director of Public Prosecutions* [2005] 3 I.R. 585; *Cunningham v. President of the Circuit Court* [2006] IESC 51, [2006] 3 I.R. 541; *H v. Director of Public Prosecutions* [1994] 2 I.R. 589; *The State (McCormack) v. Curran* [1987] I.L.R.M. 225.

In this paper it is proposed to focus on five areas:

1. The "special protection" attaching to the DPP's discretion. We will look at the origins of the doctrine of partial immunity, a brief analysis of the policy rationales underpinning it, a short review of cases from abroad, together with an outline of recent cases on the topic from the Supreme Court here.

We will then focus on three specific situations in which the decision to prosecute can be challenged. These include situations where—

2. The DPP decides not to prosecute and then changes his mind and directs a prosecution;

3. The DPP recommences a prosecution, having earlier entered a *nolle prosequi*;

4. The DPP directs a re-trial, after an accused has already endured two earlier trials;

We will conclude by looking at—

5. the abuse of process jurisdiction, and the possibility of using the doctrine to challenge a decision to prosecute.

For reasons of time and breadth of subject matter, I do not propose to cover prohibition actions generally, "fair trial" applications or applications to dismiss charges for insufficiency of evidence under section 4(e) of the Criminal Procedure Act 1967[24].

1. Special position of the DPP.

Up until the 1980s, the view prevailed that the prosecutorial discretion was unreviewable. This absolutist position of judicial reticence is reflected in such cases as ***State (Killian) -v- Attorney General***[25], ***Judge -v- DPP***[26] and ***Savage -v- DPP***[27]**.** Those cases concerned different aspects of the prosecutorial function, but together they illustrate the then absolutist view that the DPP could not be challenged when exercising his prosecutorial discretion.

That position lasted right up until the High Court position in ***State (McCormack) -v- Curran***[28]**.** In the High Court, Barr J. decided that the function of the DPP in deciding whether or not to prosecute an individual for a crime was an executive function, and therefore not reviewable by the Courts. On appeal, the Supreme Court differed with the High Court view, holding that the DPP's decision can, in certain circumstances, be subject to review.

[24] As inserted by s.9 of the Criminal Justice Act, 1999.
[25] [1957] 92 ILTR 182.
[26] [1984] ILRM 224.
[27] [1982] ILRM 385.
[28] [1987] ILRM 225.

The Supreme Court expressed those limited circumstances in the following terms:

> In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court.
>
> In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based.[29]

The decision in ***State (McCormack) -v- Curran*** was approved and followed in ***H -v- Director of Public Prosecutions***[30] where the Court rejected the applicant's appeal on the basis that no *prima facie* case of *male fides* had been made out against the Respondent and the facts of the case did not exclude the reasonable possibility of a proper and valid decision of the Respondent not to prosecute the persons named by the applicant.

Similarly, in the recent case of ***Monaghan -v- DPP***[31]**,** Charleton J. conducted a review of some of the cases that dealt with the "special protection" enjoyed by the DPP in this regard:

> In fulfilling his function, the Director of Public Prosecution is not to be obliged to give reasons for his decision as to whether to prosecute or not unless it can be demonstrated that such a decision was made in bad faith or under the influence of an improper motive or policy; *The State (McCormack) v. Curran* [1987] I.L.R.M. 225. Partly, the reasoning behind the series of decisions which later upheld that principle may be based on public policy in the sense that for reasons to be given as to why a prosecution should not be initiated, for instance due to lack of evidence, or the loss of evidence, such a declaration might undermine the presumption of innocence in favour of the accused. In addition, an extra administrative burden might be unjustifiably thrust upon the office of The Director of Public Prosecutions in explaining, and then defending, every decision made pursuant to the powers vested in the office by the Prosecution of Offences Act, 1974. Once there is a reasonable possibility that a valid decision has been made by the Director not to prosecute, or to prosecute, a decision by the Director is not reviewable by the High Court; *H v. D.P.P.* [1994] 2 I.L.R.M. 285. The Director is not exempt from the general constitutional requirements of fairness and fair procedures. The proof of the absence of such principles in any decision made by the Director of Public Prosecutions cannot be gathered through a speculative application for discovery; *Dunphy [a minor] v. D.P.P.* [2005] I.E.S.C. 75. There must be, at the least, evidence suggestive of an impropriety before the court would allow a proceeding for discovery to be initiated against the Director of Public Prosecutions.

[29] Finlay C.J., page 237.
[30] [1994] 2 I.L.R.M. 285.
[31] Unreported, High Court (Charleton J.) 14th March, 2007.

> **10.** An exception may arise where a decision has been communicated to an accused person that they will not be prosecuted but where that decision has been changed in favour of prosecution without the existence of any fresh evidence; *Eviston v. D.P.P.* [2002] 3 I.R. 260. In that case the applicant was told that she was not to be prosecuted in respect of a fatal road traffic accident but, following the receipt of a letter, an internal review was initiated which caused the decision to be reversed. It had been explained by the Director of Public Prosecutions that an internal review had caused the reversal of the decision. The Director cannot be called upon to explain his decision or to give the reasons for it or to explain the sources of information on which it is based. But, where a decision has been communicated and then withdrawn, the absence of fair procedures may make the decision reviewable. It would be otherwise where the review was conducted within the internal administration as a means of checking files and the correctness of decisions reached thereon, and only communicated when a final decision had been made.

It may be seen therefore that the particular function and role of the DPP have led the Irish Courts to conclude that a "special protection" attaches to his decision in an individual case whether or not to prosecute an individual.

This "special protection" has been recognised in a number of cases where attempts have been made to establish the reasons or basis of the DPP's decision. In ***Dunphy [a minor] -v- Director of Public Prosecutions***[32]**,** the applicant was aggrieved at the DPP's decision to prosecute her in circumstances where her co-accused had been given the benefit of the juvenile diversion programme. She sought discovery of documents touching on the decision to prosecute. The Supreme Court refused the application and stated that, where the "special protection" was relied on by the DPP, a special evidential standard rested on the applicant.

The policy basis underpinning the DPP's immunity.

The rationale for the judicial reluctance to interfere with the prosecutorial discretion include the following four arguments:

I. The constitutionally-enshrined separation of powers.

> Advocates of this view believe that the separation of powers doctrine generally prevents judicial interference with a prosecutor's broad discretion to initiate and conduct criminal prosecutions. Put bluntly, this argument says the judiciary cannot constitutionally interfere with the prosecutorial role of the executive branch.

II. The limit of court resources

> The argument that prosecutorial and judicial resources will be stretched beyond acceptable limits if frequent judicial reviews of charging decisions are allowed. According to this argument, collateral civil litigation challenging decisions to prosecute will place an unhealthy strain on prosecutorial and judicial resources, and will cause lengthy delays in criminal proceedings.

[32] [2005] 3 I.R. 585, at page 600.

III. The facilitation of legal enforcement

> The third policy argument is what American commentators refer to as the "chilling of legal enforcement" justification. Advocates of this view maintain that prosecutors may second-guess their charging decisions if they believe they will be constantly scrutinised by the Courts.

IV. Unnecessary disclosure of law enforcement strategies

> The fourth policy objection militating against judicial intervention is the idea that close judicial scrutiny of a prosecutorial decision may reveal law enforcement strategies, thus undermining effective crime control.

For a much more in-depth analysis and critique of the policy arguments said to underpin the doctrine of judicial restraint see Robert Heller's University of Pennsylvania Law Review article of May 1997.[33]

Less theoretically, and viewing the matter from an Irish perspective, the Supreme Court here has emphasised that the Constitution and the State, through legislation, have given to the DPP an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. Once the DPP has taken such a decision, the Courts should be slow to intervene. Denham J. identified the following rationale for judicial restraint in the 2005 case of ***DC -v- DPP***[34]:

> 1 The applicant in this case seeks to prohibit a trial ... Such an application may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the respondent an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The respondent having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
>
> 2 In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.
>
> 3 It is this exceptional jurisdiction which the applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this court is whether there is a real risk that by reason of the particular circumstances the applicant could not obtain a fair trial. [35]

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[33] The full title of the paper is "*Selective Prosecution and the Federalisation of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion"* by Robert Heller, University of Pennsylvania Law Review, Vol. 145, Number 5 (May 1997) pp. 1309-1358. See also "*Prosecutorial Discretion and Its Limits"* by Professor Peter Krug, University of Oklahoma College of Law, the American Journal of Comparative Law, Vol. 50.

[34] [2005] 4 IR 281.

[35] p. 283 of the report.

Comparison with other jurisdictions

Until ***Eviston***[36]**,** the position under Irish law was that a decision to prefer charges could only be reviewed where it was established that the decision was made *male fides*, was perverse or was influenced by an improper motive or improper policy. Before a review could get off the ground, an applicant first had to exclude the reasonable possibility of a proper and valid decision by the DPP. Before we examine the Supreme Court's decision in ***Eviston*** in a little detail, it is helpful to first of all consider the parameters for review in other countries.

United Kingdom and the Commonwealth

The recent Privy Council decision in ***Sharma -v- Brown-Antoine***[37] restates the narrow grounds on which a decision to prosecute can be reviewed. Judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. In ***Sharma***, the Privy Council conducted an extensive review of the common law cases and noted that the language of the cases showed a uniform approach: "rare in the extreme", "sparingly exercised", "very hesitant" and "very rare indeed".

The Privy Council approved of Lord Steyn's *dicta* when giving the House of Lords decision in ***R -v- DPP ex-parte Kebilene***[38]:

> My Lords, I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.

The facts of the Privy Council decision in ***Sharma*** are interesting. The appellant who, at the time was the Chief Justice of Trinidad and Tobago, was alleged to have attempted to influence the course of a trial being conducted by the Chief Magistrate. The Appellant denied the allegations and maintained that a decision by the Deputy DPP (to authorise his prosecution for attempting to pervert the course of justice) and the conduct of the police (in seeking to arrest him and search his premises) were all influenced by political pressure exerted by the Prime Minister and the Attorney General.

The Chief Justice sought a judicial review of the decision to prosecute him, and for a stay on the criminal proceedings against him pending determination of the judicial review. The Judge granted leave to apply for judicial review and an injunction staying the criminal proceedings and orders prohibiting the appellant's arrest. However, her orders were set aside by the Court of Appeal of Trinidad and Tobago following appeals by the Deputy Director and the Commissioner and Assistant Commissioner of Police.

[36] [2002] 3 IR 260.
[37] [2007] 1 WLR 788.
[38] [2000] 2 AC 326 at 371

On the appellant's appeal to the judicial committee, it was held, dismissing the appeal, that—

(i) although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with the prosecutor's independent judgement, such relief would in practice be granted extremely rarely;

(ii) in considering whether to grant leave for judicial review, the Court had to be satisfied not only that the claim had a realistic prospect of success but also that the complaint could not adequately be resolved within the criminal process itself, either at the trial or by way of an application to stay the criminal proceedings as an abuse of process;

(iii) the Court's power to stay criminal proceedings for abuse of process should be interpreted widely enough to embrace an application challenging a decision to prosecute on the ground that it was politically motivated or influenced;

(iv) the Judge had erred in failing to evaluate the extent to which the appellant's challenge could be resolved within the criminal process and in failing to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable;

(v) the Court of Appeal had therefore been justified in making its own analysis; and

(vi) since, in all the circumstances, all the issues could best be investigated and resolved in a single set of criminal proceedings, permission for judicial review ought not to have been granted and had rightly been set aside.

The Privy Council decision in ***Sharma*** has an echo in many of the recent pronouncements of the Courts in this jurisdiction.

United States of America

In the United States a doctrine of judicial restraint also operates, as evidenced by the US Supreme Court's decision in ***US -v- Armstrong***[39]**.** In ***Armstrong*** the Supreme Court had to consider an application by a number of black defendants who had been indicted on "crack" cocaine and other federal charges. The defendants had filed a motion for discovery or for dismissal, alleging that they were selected for prosecution because they were black. The District Court granted the motion over the Government's argument that there was no evidence that it had failed to prosecute non-black defendants.

[39](1996) 517 US 456

When the Government indicated it would not comply with the discovery order, the Court dismissed the case. The ninth circuit affirmed the District Court's decision, holding that the proof requirements for a selective-prosecution claim do not compel a defendant to demonstrate that the Government has failed to prosecute others who are similarly situated.

On appeal to the US Supreme Court, the Court emphasised that, for a defendant to be entitled to discovery on a claim that he was singled out for prosecution on the basis of his race, he must first reach the threshold of showing that the Government declined to prosecute similarly-situated suspects of other races. The Court held that, since the defendants had failed to do this, they had not met the high threshold of proof required of them.

The US Supreme Court noted that under the Equal Protection component of the Fifth Amendment's due process clause, the decision whether to prosecute may not be based on an arbitrary classification such as race or religion. The Court noted earlier decisions which held that in order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly-situated individuals of a different race were not prosecuted. Assuming that discovery is available in an appropriate case in aid of a selective-prosecution claim, the justifications for a rigorous standard of proof for the elements of such a case require a correspondingly rigorous standard for discovery in aid of it.

Thus, the US Supreme Court found, in order to establish an entitlement to such discovery, a defendant must produce credible evidence that similarly-situated defendants of other races could have been prosecuted, but were not. On the evidence in ***Armstrong***, the Supreme Court held that the defendants had not met the required proof threshold and therefore the trial Court had been in error in granting the motion to dismiss the charges.

In coming to its conclusions, the Supreme Court operated "the presumption of regularity" underpinning a prosecutorial decision, and the Court affirmed its own finding in the earlier cases of ***United States -v- Chemical Foundation Inc.***[40] where it held:

> In the absence of clear evidence to the contrary, courts presume that (prosecutors) have properly discharged their official duties.

In ***Armstrong***, the Supreme Court emphasised that in order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary".

[40] 272 US 1, 14-15 (1926).

Chief Justice Rehnquist summarised the argument for judicial deference in this area as follows:

> In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary". Chemical Foundation, *supra*, at 14-15. We explained in Wayte why courts are "properly hesitant to examine the decision whether to prosecute". Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake". … It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."

Northern Ireland

Closer to home, a recent unreported case in Northern Ireland also sets out the high threshold to succeed in a judicial review of a decision not to prosecute. In ***R -v- ex-parte Kincaid***[41], the applicant challenged what he said was the failure of the public prosecution service to provide reasons for the decision not to prosecute one Trevor Dowie for shooting the applicant. The facts were, that in the early hours of the 7th of August, 2005 the applicant, Mr. Kincaid was shot and injured by Mr. Dowie. At the time of the shooting Mr. Kincaid was on a motorcycle outside Mr. Dowie's house and his companion, William Anderson was in Mr. Dowie's garden throwing garden slates at the window of the house.

It is alleged that the applicant was involved with Mr. Anderson in an attack on Mr. Dowie's home and he had been charged with attempting to intimidate Mr. Dowie and with committing criminal damage to his property. The applicant had denied those charges and was awaiting trial. It was Mr. Dowie's position that, as he lay in bed on the morning in question, he was awakened by loud bangs which he believed were either petrol or pipe bombs. On going to the window of the bedroom he saw a man astride a motorcycle. He heard this man shout out "Finish them all" or "Finish them bastards". Mr. Dowie then discharged shots from a legally held firearm which he was licensed to have for sporting purposes. The applicant was shot and injured. Mr. Dowie admitted firing the shots but in his statement to the police he claimed that the actions he took were in self-defence.

He was charged with attempted murder but subsequently the DPP decided not to proceed with the prosecution against Mr. Dowie. The reason given for the decision was that there was "no reasonable prospect of refuting Trevor Dowie's claim that he was acting in self-defence when he discharged the firearm". Kerr LCJ. refused Mr. Kincaid's application for judicial review and emphasised that the threshold of a successful challenge to a prosecutorial decision is a high one.

[41] Unreported, High Court Northern Ireland, 19th April, 2007.

Kerr LCJ. followed the Privy Council's decision in ***Sharma*** and the House of Lords decision in ***Kebilene*** wherein it was held that, absent dishonesty and *male fides* or an exceptional circumstance, the decision of the DPP to consent to the prosecution of an accused is not amenable to judicial review. The Court held that the reluctance of the Courts to intervene in a decision whether or not to prosecute must also be relevant in relation to a challenge to the refusal to give reasons for that stance.

While a clear distinction must be maintained between the challenge and the decision not to give further reasons, and the decision not to prosecute, many of the policy considerations that confine the role of the Courts in reviewing a decision whether to prosecute apply to the review of the decision not to give further reasons. Therefore, in the circumstances, the Northern Ireland Court held that the applicant had not done enough to warrant the exceptional course of judicial intervention.

2. DPP reverses original decision not to prosecute

The first specific area of challenge to a decision to prosecute that we will look at is the situation where the DPP changes his mind from an initial decision not to prosecute in favour of a decision to prosecute. The leading case is of course that of ***Eviston -v- DPP***[42]**.**

Since each of the cases in this area must be viewed on its own individual facts, I will go into a little bit of detail on the facts: the applicant was driving from Kilkenny to Killarney. Her three-year old son was strapped into a baby seat in the rear of the car. Near a crossroads, her car was in collision with another car being driven by a Mr. Moynihan, who died as a result of the collision.

In her statement to the Gardaí, the applicant said that, in the course of the journey to the scene of the accident, the back left wheel of her car was punctured in Cashel. Two people in a B&B changed the wheel for her. As she approached the area of the accident, her car suddenly pulled itself across to the right-hand side of the road. She said that it was as if the steering "had taken on a life of its own". She said that the back left wheel and tyre of her car were in a deflated state after the accident. She produced in evidence a report from a firm of consulting engineers and assessors who examined the tyre and wheel. They confirmed the tyre was in a deflated state. They were also of the view that the car would have been out of the driver's control when the wheel deflated completely and this would also have caused the car to vibrate and veer to one side.

The DPP decided no prosecution should be initiated and that decision was notified to the solicitor for the defence. After this decision, the father of the deceased third party wrote a letter to the DPP asking him to reconsider the decision. That was done and the decision was reviewed. It was then decided to charge the applicant with dangerous driving causing death and the decision was then notified to the applicant. The applicant's solicitor sought an explanation as to why the decision was reversed and then subsequently the applicant sought an order from the High Court prohibiting her prosecution.

[42] [2002] 3 IR 260.

In the High Court the DPP candidly acknowledged that no new facts or evidential materials had become available to him between the making of the first decision and the subsequent decision to prosecute. The only change of circumstance had been the receipt of the letter from the victim's father. The applicant argued that the initial decision not to prosecute was, once communicated to the applicant, a final and conclusive decision and the DPP was acting ultra vires and contrary to law. It was also argued that, in the alternative, the DPP was guilty of a breach of fair procedures and constitutional justice by failing to advise and/or warn the applicant at the time of communicating the decision not to prosecute, that the DPP reserved the power to reverse that decision.

In the High Court Kearns J., in granting an order prohibiting the applicant's further prosecution, held that where the impugned decision was the reversal of a decision not to prosecute, the Court should assess the reasons for the decision but would only intervene on rare occasions. Kearns J. held that for the DPP to remake his original decision and to reinstate a prosecution without any new fact, material or witness coming to light, was arbitrary and perverse.

The DPP appealed Kearns J's findings to the Supreme Court and that Court held, in dismissing the appeal but in finding for the DPP on many of the broader issues, that the Director was entitled to review an earlier decision not to prosecute and to arrive at a different decision even in the absence of new evidence and was not obliged in either instance to give reasons for his decision.

Secondly, the Supreme Court held the stress caused to the applicant by the initiating of the prosecution following the communication to her of a decision not to prosecute would not, of itself, afford her legal grounds for an injunction restraining the continuance of the prosecution. There was no actual estoppel where the applicant had not acted to her detriment in reliance on the decision not to prosecute. Further, there could be no legitimate expectation in the absence of a departure, without prior notice from a legitimately expected particular procedure.

Thirdly, and this is the ground upon which ***Mrs. Eviston*** was successful in holding her order of prohibition, the Court found that the DPP was required to apply fair procedures in the exercise of his statutory functions in particular circumstances and that, on the facts of this particular case, the DPP had failed to accord the applicant fair procedures and that on that basis the prosecution should be stopped.

Giving the majority judgement of the Court[43] Keane CJ. stated as follows:

> It was undoubtedly open to the respondent in this case, as in any other case, to review his earlier decision and to arrive at a different conclusion, even in the absence of any new evidence or any change of circumstances, other than the intervention of the family of the deceased. The distinguishing feature of this case is the communication by the respondent of a decision not to prosecute to the person concerned, followed by a reversal of that decision without any change of circumstance or any new evidence having come to light. In the light of the legal principles which I have earlier outlined, I am satisfied that the decision of the respondent was prima facie reviewable by the High Court on the ground that fair procedures had not been observed.

[43] Murphy J. delivered an interesting dissent.

> Whether, in the particular circumstances of this case, fair procedures were not in fact observed is a difficult question. As I have emphasised more than once in this judgment, stress and anxiety to which the presumably innocent citizen is subjected when he or she becomes the accused in a criminal process could not conceivably be, of itself, a sufficient justification for interfering with the undoubted prosecutorial discretion of the respondent. It is, however, beyond argument that the degree of such stress and anxiety to which the applicant was subjected was exacerbated by the decision of the respondent to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and had not given her the slightest intimation that this was a decision which could be subjected to review in accordance with the procedures in his office.
>
> If those review procedures formed part of the law of the land, then, the applicant would be assumed, however artificially, to have been aware of that law. The review procedures of the respondent, however, are not part of the law: they constitute a legitimate, and indeed salutary, system of safeguards to ensure that errors of judgment in his department which are capable of correction are ultimately corrected. No reason has been advanced, presumably because none existed, as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in fact be reviewed at a later stage. In the result, she was subjected to a further and entirely unnecessary layer of anxiety and stress. Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the respondent in the present case were to succeed.
>
> I would, accordingly, dismiss the appeal and affirm the order of the High Court.

McGuinness J. also delivered a judgment in which she found that the "particular circumstances" of the case required fair procedures on the part of the DPP. On the facts, McGuinness J. held that:

> Once the respondent had unequivocally and without any *caveat* informed the applicant that no prosecution would issue against her in connection with this road traffic accident, it was a breach of her right to fair procedures for him to reverse his decision and to initiate a prosecution by the issuing of the summons on the 23rd December 1998.

Geoghegan J. agreed with the judgements of Keane CJ. and McGuinness J. Mr. Justice Frank Murphy gave a dissenting judgment in which he expressly disagreed with the proposition that the decision of the DPP is reviewable for want of fair procedures. Murphy J. held that the DPP not only has the right, but the duty, in a proper case to alter his decision to prosecute or not to prosecute in a particular case and that that was so notwithstanding that his original decision may have been made public. The learned Judge felt that whether the change of mind had a positive or negative result for an accused person would not impinge on the validity of the decision nor impose any novel obligation on the DPP to justify it where, as here, the accused was not embarrassed in her defence.

From the point of view of purely legal principle, it is difficult to find a chink in Murphy J.'s analysis in ***Eviston***. It is difficult to see how the fact of the prosecutor's change of mind could impact on the validity of the decision to proffer charges.

Having said that, Murphy J. expressed himself to be relieved that his view in the case had not prevailed:

> I confess to a sense of relief that my views have not prevailed. I believe that the prosecution of the applicant at this stage and in the particular circumstances would be understood, incorrectly but nevertheless widely, as resulting from an interference with the judicial process insofar as the same is properly said to include the investigation of the alleged crime and the decision to prosecute the same.

Is the DPP's decision reviewable for want of fair procedures?

The main finding of the majority in ***Eviston*** was that the DPP's decision whether to prosecute is reviewable for want of fair procedures. Quite what this may mean in an individual case, is not altogether clear. The particular features in ***Eviston*** that caused the former Chief Justice to find a breach of fair procedures included the fact that—

(a) the decision not to prosecute had been communicated to the accused;

(b) that communication contained no caveat that the decision might be revisited or reversed;

(c) the reversal of the decision meant the accused was subjected to a further and unnecessary layer of anxiety and stress; and

(d) no new evidence emerged in between the initial decision not to prosecute and the subsequent decision to bring charges, that might have justified the change of mind.

Those four elements taken together *and* the particular circumstances of ***Eviston*** and the defence that Mrs. Eviston intended to run, led the majority to conclude the applicant had not been afforded the fair procedures to which, in all the circumstances, she was found to be entitled.

The arguments advanced by counsel for the Director in ***Eviston*** are worth examining. Counsel submitted that ***State (McCormack) -v- Curran***[44] and ***H -v- DPP***[45] made it clear that the only circumstances in which the Superior Courts were entitled to review the discretion enjoyed by the DPP in this area were where it could be demonstrated that his decision had been arrived at in bad faith or as a result of an improper motive or an improper policy. None of those factors was present in the case.

Furthermore, it was argued that the adoption by the DPP of a policy of reviewing decisions by him to prosecute or not to prosecute was in the public interest: the consequences of his decisions for citizens, be they the victims of crime or suspects, could be extremely serious and far-reaching. The adoption by the DPP of a review procedure, such as he had operated in the present case, was no more than an

[44] [1987] ILRM 225.
[45] [1994] 2 IR 589.

acknowledgement that decisions by him could be erroneous and that as there was no appeal from them; they should be capable of being reversed. [46]

In relation to the applicability or otherwise of fair procedures to the DPP, counsel argued that neither of the two central maxims of natural justice (*audi alterem partem* and *nemo iudex in causa sua*) applied to the Director of Public Prosecutions. It was submitted that Kearns J. in the High Court had been incorrect in describing the prosecutorial function as "quasi judicial". On this issue, the Supreme Court found for the DPP. Keane CJ. put the matter thus:

> I would, with respect, question whether the High Court Judge was altogether correct in describing these functions as "quasi judicial", at least as that expression has generally been understood. It is usually applied to executive functions which involve the exercise of a discretion but require at least part of the decision making process to be conducted in a judicial manner. That would normally involve observance of the two central maxims of natural justice, *audi alterem partem* and *nemo iudex in causa sua*. Those canons are of limited, if any, application to the respondent who, like other litigants, initiates and conducts a prosecution but does not ultimately decide any of the issues himself and, specifically, has no role in determining the guilt or innocence of an accused person.
>
> Undoubtedly, the respondent remains subject to the Constitution and the law in the exercise of his functions and it has been made clear in decisions of this court that, while the nature of his role renders him immune to the judicial review process to a greater extent than is normally the case with quasi-judicial tribunals properly so described, he will be restrained by the courts where he acts otherwise than in accordance with the Constitution and the law.

Whether one sides with the majority view in ***Eviston*** or Murphy J.'s dissent, it is the law of the land that the Director, in the exercise of his statutory functions and in particular when reviewing an earlier decision not to prosecute, is obliged to accord the suspect fair procedures, where he has told the suspect that there will be no prosecution. Quite what this duty will mean in individual cases will only become clear in time.

I must confess, I do not know what this duty of providing to a suspect fair procedures entails. Does it mean all suspects who have been told there will no prosecution are entitled to be heard on the issue? Does it mean they should be given an opportunity to make representations? If so, how is this invitation to be extended? Should it be by letter, in person or through the Gardaí? Do suspects have a right to legal advice in the context of this issue? Do they have a right to a hearing on the matter? Do they have a right to sight of the materials the DPP proposes to rely upon? Must the DPP give reasons for his ultimate decision, following the completion of such a process? When will the right to be given such fair procedures be triggered? Will it be from the earliest time the DPP revisits the initial decision not to prosecute? Will a delay in informing a suspect that a review is under way be fatal to the review process? Or will it be sufficient if a suspect is given an opportunity to make submissions or representations prior to a final decision being heard?

[46] In that regard see the Director's Annual Report 1998 and also Prosecution Guidelines.

Can the giving of such "fair procedures" repair a communicated and uncaveated decision not to prosecute? In other words, on the facts in ***Eviston*** had the applicant at the relevant time been told the question of a prosecution was under consideration, and an opportunity given to make submissions on the issue, would that have put right the unfairness which had occurred up until that point in time, such that the prosecution would have been allowed to proceed?

These are not altogether academic concerns because judgment is awaited from the High Court (Hanna J.) in a case entitled ***Keane & Keane -v- DPP***, Record No: 1323JR/2007 in which that very issue — whether the giving of fair procedures subsequently can bring a case beyond ***Eviston***, such that the initial "unfairness" caused by the DPP's change of mind can now be put right, and the prosecution allowed to proceed — is to be decided.

The outcome in ***Eviston*** — an order of prohibition based on a denial of fair procedures — whilst understandable from a human point of view, has given rise to a somewhat artificial construct whereby the DPP has to be seen to openly engage in dialogue with a suspect or a range of suspects and somehow "involve" them in a consultative process, and possibly even the decision-making process itself.

The notion of a public prosecutor being required to interface with suspects in a criminal investigation is problematic. In the context of an ***Eviston*** type situation, involving an accused person charged with no more than road traffic matters, such a consultative process might not at first glance seem out of place. However, the process has less appeal when one moves into the realm of more overt criminality, say in a case involving organised crime or gang warfare or paramilitary violence.

Aside from any issue of principle, practical difficulties might also emerge whereby an invitation by the Gardaí to a suspect to make representations might be interpreted rightly or wrongly, as an attempt by crime investigators to extract more information (and thereby some evidence) from the suspect concerned.

In truth, the Supreme Court's judgment in ***Eviston*** in relation to this issue of fair procedures can be respectfully described as something of a crash landing. Having rejected each of the applicant's submissions in turn, including any claim in estoppel created by the indication that there would be no charges, the majority went onto conclude that the DPP's change of mind on the charging issue, having been communicated uncaveated, meant that "the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled". The Court's analysis does not say whether the situation was retrievable by the DPP and, if it was, what form such procedures ought to have taken.

At a minimum, the level of fair procedures that a prosecutor is obliged to accord a suspect when reviewing an initial decision not to prosecute should be reviewed in the context of the prosecutor's function and role: he is not an adjudicator, he does not decide on the issue of guilt or innocence. Yes, his decision does have considerable ramifications for persons affected by it, but he is not in the position of a judge or a jury, nor even in the normal position of a decision maker whose decisions are ordinarily subject to the full requirements of fair procedures.

Repeated cases down through the years have emphasised that the nature of the DPP's role necessarily renders him immune to the judicial review process to a greater extent than is normally the case with quasi-judicial tribunals or public bodies. From an applicant's point of view, the main importance of the ***Eviston*** decision is that it extends beyond *male fides* and improper policy. According to ***Eviston***, the DPP will be restrained by the Courts in his prosecutorial discretion where the exercise of that discretion involves his acting otherwise than in accordance with the Constitution. The requirement to accord a suspect fair procedures goes beyond the two cannons of *audi alterem partem* and *nemo iudex in causa sua*. Those two cannons are of limited, if any, application to the Director of Public Prosecutions who, like other litigants, initiates and conducts the prosecution but does not ultimately decide on the question of a suspect's guilt or innocence.

Suggested protocol where the DPP initiates review

Ideally, when suspects are being told the DPP has decided not to bring a prosecution, the person conveying the information should explain that the decision is capable of being reviewed.

Of course experience shows us that sometimes this does not happen, hence the ***Eviston*** line of cases brought by persons who have been upset and discommoded by the DPP's change of mind.

Should there be transparency in the process whereby the decision not to prosecute is being reviewed? In the information culture in which we all now live, it is frequently demanded that the DPP's review procedures should be conducted in an open and transparent fashion, with all interested persons consulted along the way, and generally involved in the process.

To those advocating such a "touchy-feely" approach, I would ask: why? How will it aid the ends of justice to require the DPP to open his file to suspects and victims' families? How will it assist confidence in the criminal justice system if citizens have to be told that their statements to the Gardaí might have to be disclosed to third parties, in the event of a review?

Whilst I do not wish to trespass into the difficult waters of the Director's "Reasons Project"[47], it seems to me that there are limits to how transparent and open the whole process can be.

That is not to say that a protocol should not be put in place, and basic manners of human courtesy adhered to, whenever an internal review is underway and the question of a prosecution is being considered afresh.

[47] See the Director's discussion paper on "*Prosecution Policy on the Giving of Reasons for Decisions*" January, 2008.

Eviston indicates fair procedures should be accorded where a suspect has previously been told there will not be a prosecution. There needs to be clarity on precisely what the subject is to be told, by whom and when. The fewer people in the loop the better, to avoid the danger of inaccuracy through Chinese whisper. Consideration might be given to the Director's office interfacing directly with the person concerned (or with his solicitor, where he has one), by correspondence, thereby removing the necessity for the involvement of the Gardaí or other intermediaries. That will also obviate the need for the Gardaí to invite further submissions from suspects, a practice which itself can give rise to misunderstanding and conflict.

By this direct and preferably written protocol, a suspect can be—

(a) informed that the question of a prosecution is now being reconsidered.

(b) invited to make representations on the issue, which the Director will consider prior to making a final decision and

(c) told that, when a final decision has been taken by the Director, the suspect will be informed as soon as is practicable.

Obviously, the review process should be conducted with reasonable dispatch. Where further reports or information are required, they should be commissioned early and it should be impressed upon members of An Garda Síochána and state solicitors that the matter should receive prompt attention.

These are just a few suggestions as to how the review process might usefully be carried out.

DPP's right to change his mind

On the issue of the Director's right to change his mind, all five Judges in ***Eviston*** sided with the DPP and held that the Director is entitled to review an earlier decision made by him not to prosecute and to arrive at a different decision. He is also not obliged in either instance to give reasons for his decision. He was entitled, as a matter of policy, to adopt the policy that he adopted of reviewing earlier decisions made by him.[48]

On this issue of the DPP's entitlement to change his mind, Murphy J. put the matter in memorable terms:

> I would disagree that a change of mind, however dramatic, based on the same evidence is necessarily either arbitrary or perverse. If the respondent concluded one day that a prosecution should not be brought and made an internal record of that decision and, perhaps, communicated the decision to his own officers, could it be said that his second thoughts on the same material — however dramatic the consequences — were arbitrary, perverse or irrational? The most distinguished judges would be gravely embarrassed by the assertion that the willingness to reconsider an opinion expressed orally or in writing and to substitute a diametrically opposite judgment on the same material would be perverse.

[48] See the judgment of Keane CJ. at p.296 of the report.

Murphy J. continued:

> The difficulty in this case is not that the respondent changed his mind but that he did so first, having made it known to the applicant that he would not prosecute and, secondly, within some six days of the receipt of a letter from Mr. Anthony Moynihan, the father of the victim seeking the review and adverting to the contact which he had already made with the Minister for Justice in relation to the matter. I can readily understand that the applicant would in these circumstances feel that the decision to prosecute was unjust. The problem, as I see it, is to convert this sense of injustice into an enforceable legal right.
>
> It cannot be said that the respondent is estopped from prosecuting the applicant. Apart from any other consideration, there is no suggestion that she altered her position for the worse as a result of being informed in the first instance that she would not be prosecuted. Again, I cannot see any basis on which the somewhat ill defined doctrine of legitimate expectations can be invoked. If the respondent is entitled as a matter of law to change his mind - and I am satisfied that he is - I do not see how any belief which the applicant may have to the contrary could alter the law in that respect.

Post *Eviston* Cases

Eviston was relied upon successfully in ***MQ -v- Judges of the Northern Circuit and the DPP***[49] and in ***LON -v- DPP***[50]**.** Both cases are interesting for the way in which the Supreme Court's determination on the fair procedures argument was applied. Both cases involved the reversal of a decision not to prosecute, together with an extensive delay between the original decision and the review decision.

In ***LON*** the interval of time between the two decisions was 13 years. In ***MQ*** the interval was four and a half years. The delay issue loomed large in both cases. In ***MQ***, McKechnie J. identified two additional features beyond the facts of ***Eviston***, that favoured the applicant. Firstly, the DPP's decision to proffer charges followed what was in effect a second review rather than a single original view. McKechnie J. doubted whether the DPP's review procedure as set out in the Director's Annual Report of 1998 envisaged a second review. Secondly, McKechnie J. emphasised the much greater period of time that had elapsed between the communication of the decision not to prosecute and the subsequent decision to prosecute.

Similar exceptional circumstances arose in ***LON***, leading McMenamin J. to conclude that that case came within the category of exceptional cases envisaged by ***Eviston***. That is, because of the nature of the communication and overall conduct, an issue of fair procedures arose, and that, on the facts, the prosecution should be stopped.

[49] Unreported, High Court (McKechnie J.), 14th November, 2003.
[50] Unreported, High Court (McMenamin J.), 1st of March, 2006.

On the other side of the coin, prohibition was refused by Peart J. in ***Hobson -v- DPP***[51]**.** Whilst that case is distinguishable on the basis of the Court's finding that fresh evidence emerged between the initial decision not to prosecute and the subsequent decision to charge the applicant, the case is also noteworthy in the light of Peart J's observation that:

> …since the *Eviston* case it has become public knowledge that the respondent may review decisions made by him, and that the applicant cannot successfully complain that the respondent failed to indicate when he made his first decision that he was entitled to review and alter that decision.

Whilst lawyers may well be aware of the possibility of review, it is by no means certain that members of the public are.

In ***Carlin -v- DPP***[52]**,** the applicant sought an order of prohibition on an ***Eviston*** type ground as well. He argued that, where there was a communicated and uncaveated decision not to prosecute, the DPP could not, as a matter of fair procedures, go back on that decision. On the facts of that case, Murphy J. rejected that contention, holding that the fair procedures to be applied were not those applicable to a court and that the applicant had failed to establish that there was a real or serious risk that he could not obtain a fair trial.

The truism that all cases are dependent on, and should be viewed in the context of, their own individual facts, is particularly applicable to ***Eviston*** type cases where a litigant is challenging the DPP's decision to change his mind about a decision to prosecute.

[51] [2006] 4 IR 239.
[52] *Ex-tempore* judgment of the High Court (Murphy J.), 25th February, 2008.

3. The Situation where the DPP re-commences a prosecution, having earlier entered a *nolle prosequi*

As all practitioners are aware, the entry of a *nolle prosequi* is provided for under section 12 of the Criminal Justice (Administration) Act 1924, which provides:

> **12.**—At the trial of a prisoner on indictment at the prosecution of the Attorney-General of Saorstát Éireann a *nolle prosequi* may be entered at the instance of the Attorney-General of Saorstát Éireann at any time after the indictment is preferred to the jury and before a verdict is found thereon, and every such *nolle prosequi* shall be in the following form, that is to say:—
>
> On the ..... day of ....., 19....., at the trial of A.B. on the prosecution of the Attorney-General of Saorstát Éireann on an indictment for..... ..... the said Attorney-General in his proper person (or by his counsel) stated to the court that he would not further prosecute the said A. B. on the said indictment, where upon it was ordered by the court that the said A. B. be discharged of and from the indictment aforesaid.

Notwithstanding the apparent wording of the section, case law over the years endorsed the practice of entering a *nolle prosequi* before an indictment is proffered to the jury. The leading case is that of ***State (O'Callaghan) -v- Ó hUadhaigh***[53]**.** So even though the express wording of the section appeared to confine the exercise of the power to the period between the preferment of the indictment and the verdict of the jury, the practice down through the years was to enter the *nolle prosequi* before counsel has even drafted the indictment.

This long held practice was considered in a case that came before the High Court in 2005. In ***Larry Cummins -v- DPP*** and ***Frank Ward -v- DPP***[54], the High Court had to consider an application for prohibition by two men charged in relation to the shooting of Mr. Charlie Chawke at the Goat Grill Public House in Goatstown in Dublin in October of 2003. Both applicants sought a declaration that the DPP acted in excess of jurisdiction and not in accordance with law in purporting to enter a *nolle prosequi* in respect of the criminal proceedings then before the Dublin Circuit Criminal Court in circumstances where no bill of indictment had been proffered.

The background to the case was that there was a question mark over the validity of the order returning the applicants for trial. The charges against the applicants included certain firearms charges contrary to the Firearms Act 1964 and the orders sending the applicants forward for trial had been made without the direction of the Director of Public Prosecutions. There was therefore a question mark over the validity of the return, which led to the DPP's decision to enter the *nolle prosequi* and recommence the criminal proceedings afresh.

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[53] [1977] IR 42.

[54] Unreported, High Court (Dunne J.) 15th June, 2005. The applicants appealed Dunne J's decision to the Supreme Court. In an ex-tempore ruling, the appeal was refused.

The applicants argued that it was at all times open to the DPP to apply to the High Court to have the return quashed, but he hadn't done so. Instead, he had adopted what was said to be the impermissible procedure of entering a *nolle prosequi*, and then seeking to restart the prosecution.

Counsel argued that, while section 12 of the 1924 Act had been broadly interpreted, the existence of an indictment was a *sine qua non* for the entry of a *nolle prosequi*.

It was submitted that the section itself was predicated on the existence of an indictment in the appropriate form and that the power to enter a *nolle prosequi* described in the section only arose in respect of the trial of a prisoner "on indictment".

Reference was made to the form of the order where a *nolle prosequi* is entered, namely to discharge an accused "from the indictment". Reference was also made to Finlay P.'s decision in ***O'Callaghan***, to an accused being discharged "of and from the indictment specified". It was submitted that before a valid *nolle prosequi* can be entered there must first of all be an indictment before the Court and reliance was placed upon the central role played by the indictment in the entire criminal process.

Counsel relied upon a passage from page 737 of *Walsh on Criminal Procedure*:

> The indictment is a formal document setting out the charge or charges against an accused who has been sent forward for trial on indictment. A valid indictment is an essential pre-requisite for the commencement of a valid trial. If the indictment upon which an accused is tried suffers from a defect which renders it invalid the whole of the subsequent trial proceedings are null and void. The indictment is drafted initially as a bill of indictment by counsel for the prosecution after the accused has been sent forward for trial. The bill of indictment is delivered to the court registrar to be signed. This is known as the preferment of the bill of indictment.

Counsel was obliged to concede that the entry of a *nolle prosequi*, according to the case law, did not amount to an acquittal on the merits, and counsel was undoubtedly correct in making that concession. From as early as the 1940s it appears to have been accepted that the entering of a *nolle prosequi* did not bar a fresh indictment for the same offence. [55]

[55] See ***State (Walsh) –v- Lennon*** [1942] IR 112.

Instead, counsel argued that the DPP's right to institute fresh proceedings is not an untrammelled right, and Finlay P.'s judgment in ***O'Callaghan*** was cited where he stated:

> If the contention of the D.P.P. is correct the applicant having undergone that form of trial (and remand a waiting trial) and having succeeded in confining the issues to be tried would be deprived of all that advantage by the simple operation of a statutory power on the part of the Director of Public Prosecutions. In this way the applicant would have the entire of his remand awaiting trial set at nought and he would have to start a fresh to face a criminal prosecution in which the prosecution by adopting different procedures could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused: if the trial judge makes decisions adverse to the interest of the accused the latter cannot obtain relief from them otherwise and by appeal from the Central Criminal Court or by appeal or review in the case of an inferior court. It seems to me that so to interpret the provision of s. 12 of the Act of 1924 is to create such an extraordinary imbalance between the rights and powers of the prosecution and those of the accused respectively and to give the director such a relative independence from the decision of the court in any trial would be to concur in a proposition of law which signally failed to import fairness and fair procedure…

It was further argued that, although there may have been an infirmity in the return for trial relating to one or more of the charges, infirmity did not affect the non-scheduled charges in the order returning for trial. Furthermore, it was argued that the order was severable on that basis and the accused was lawfully before the Court on the charges unaffected by the infirmity. Reliance was placed upon the decision of the Court of Criminal Appeal in ***People (Attorney General) -v- Finbar Walsh***[56]**.**

In her judgment, Dunne J. carried out an extensive review of the cases dealing with the entitlement of the DPP to recommence a prosecution, following the entry of a *nolle prosequi*. These cases include ***State (Walsh) -v- Lennon***[57], ***State (O'Callaghan) -v- Ó hUadhaigh***[58], ***Kelly -v- DPP***[59] and ***State (Coveney) -v- Special Criminal Court***[60].

Dunne J. noted that, where someone is charged with an offence scheduled under the Offences Against the State Act 1939, before that person can be tried before the ordinary Courts in respect of that scheduled offence, a direction must issue from the DPP to that effect and be communicated to the District Court. The Judge observed that in the instant case there was no evidence that such a direction issued or was communicated to the District Court in respect of the scheduled offences concerning the applicants.

Dunne J. noted the applicants' counsel's concession that, notwithstanding the provisions of section 12 of the 1924 Act, the practice of entering a *nolle prosequi* before the indictment has been profferred to the jury is one of longstanding and has been recognised in a number of cases which were referred to at length in the submissions. Equally, it was not disputed that the terms of section 12 are directive in nature and not mandatory (see the ***State (Coveney) -v- Special Criminal Court***).

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[56] 1 Frewen at p.363
[57] [1942] IR 112.
[58] [1977] IR 42.
[59] [1997] 1 ILRM 69.
[60] [1982] ILRM 284.

Dunne J. stated that it was difficult to deduce from any of the authorities cited a requirement that there must be an indictment before the Court before the *nolle prosequi* can be entered:

> One is forced to ask the question what benefit would accrue to an accused by having to postpone the entry of a *nolle prosequi* in order to have an indictment drafted and put before the court? As was stated by Finlay P. in *the State (Coveney) -v- the Special Criminal Court* at p. 288 "it is difficult to see what end of justice and in particular what right or interest of the accused could be secured by inhibiting the Director of Public Prosecutions as it now is from entering a *nolle prosequi* before the accused had been given in charge to a jury…". In the passage immediately following that which I have just referred to, Finlay P. went on to say "in a case such as the present where the entry of a *nolle prosequi* is a precedent to the institution of fresh proceedings in respect of the same charge its early rather than its late entry merely achieves one of the known objectives of justice, namely the speedy dispatch of criminal proceedings. Furthermore, expense incurred by an accused in his own defence and the anxiety associated with a pending criminal charge would be intensified if strict adherence were in all cases paid by the Director of Public Prosecutions to the provisions of the section appearing to provide that it was only when the accused has been put in charge of the jury that he could and should enter a *nolle prosequi."*
>
> It may be of assistance to consider briefly what, in fact, occurs following an order returning an accused for trial in the Circuit Court. The practice may vary on Circuit but in Dublin Circuit Criminal Court, the matter is listed for mention usually within a couple of weeks from the date of the return. The accused's Solicitor and the Chief Prosecution Solicitor are notified of the date for mention and the accused is cautioned to appear or, if in custody, arrangements are made to produce him in court. Thereafter, the matter may be adjourned from time to time while preliminary matters are dealt with, for example, disclosure. Then, if the accused is to plead guilty, an arraignment date is fixed. If it is indicated that a not guilty plea will be entered, a trial date will be fixed. All of these procedural steps take place without an indictment having been produced to the court. The existence of the indictment is a sine qua non for the arraignment of an accused before the court (see the passage from *Walsh on Criminal Procedure* at p. 737 thereof quoted above) and for a trial, of course, but I would have to say that having regard to the decision of Finlay P. referred to above that it is not a *sine qua non* for the entry of a *nolle prosequi* . I can find nothing in any of the authorities opened to me which support that contention. On the contrary, the passage quoted from the judgement of Finlay P. in the preceding paragraph seems to me to support the contention that the D.P.P. could be criticised for delaying the entry of a *nolle prosequi* to await the preparation of an indictment. To conclude otherwise would, in my view, render the decision in the case of *The State (Coveney) v Special Criminal Court* meaningless. Furthermore, it is a longstanding practice that occurs on a regular basis. Given the time that may elapse before a trial date or an arraignment date is fixed, it could involve even further delay in disposing of the matter. Accordingly, I cannot accept the arguments on this point.

Apart from the Court's thorough review of the cases on the topic, the judgement is also noteworthy for the practical insight it gives into the process which occurs following an order returning a person for trial to the Dublin Circuit Criminal Court – see page 17 of the judgement.

From a practitioner's point of view the cases on the right of the DPP to come again after entering a *nolle prosequi* appear to establish the following principles:

— The entering of a *nolle prosequi* is not of itself a bar to a fresh prosecution.
— The DPP's right to institute fresh proceedings is not an untrammelled right and may, in certain circumstances, be challenged.
— If for instance the *nolle prosequi* is entered for the sole purpose of overcoming a decision by the trial judge in a *voir dire*, the second prosecution will be barred as an abuse of process of the Court (***State (O'Callaghan) -v- Ó hUadhaigh***[61], ***Kelly -v- DPP***[62]**).**
— Where there has been no adjudication on any *voir dire* issue and no gain by the applicant which would be lost by the decision to institute fresh proceedings, judicial review will not ordinarily lie. (***Kelly -v- DPP***[63])
— There is nothing impermissible about the DPP entering a *nolle prosequi* where he is reacting to a change of plea by the accused**.**
— A *nolle prosequi* can be entered at any time, and it is not necessary that an indictment be in existence.

In ***State (Coveney) -v- Special Criminal Court***[64] the accused pleaded guilty to an assault with an offensive weapon with an intent to rob and was sent forward for sentence to the Circuit Court, but before he was sentenced he changed his plea to not guilty. At that point the DPP entered a *nolle prosequi*. The accused was subsequently re-arrested for the same offence and was sent forward for trial, the Director of Public Prosecutions having now certified for trial by the Special Criminal Court. The High Court refused an order of prohibition preventing the trial, holding that the DPP was entitled to react to a change of plea by the accused.

4. The situation of successive re-trials

Another situation in which prohibition may lie notwithstanding the absence of any suggestion of *male fides* on the part of the Director, is the situation where an accused is subjected to repeated re-trials.

In ***DS -v- Judges of the Circuit Court and the DPP***[65] the applicant had been tried on two occasions in respect of the same offences, both trials ending in jury disagreement. The applicant sought a permanent injunction restraining the DPP from proceeding with a third trial on the grounds that (a) to do so would offend the ancient common law prohibition of double jeopardy, (b) it would constitute an abuse of process, and (c) that a third trial would not be a trial in due course of law.

[61] [1977] IR 42.
[62] [1997] 1 ILRM 69.
[63] [1997] 1 ILRM 69.
[64] [1982] ILRM 284.
[65] [2007] 2 IR 298.

O'Neill J. granted an order of prohibition. The learned Judge held that the correct balance between the public right to prosecute a case to a jury verdict and guarding against the dangers of repeated trials, was achieved by limiting the number of trials that end in jury disagreement, to two. Accordingly, a third trial of an accused for the same offence, wherein two previous trials the jury have disagreed, would not be a trial in due course of law as required by Article 38.1 of the Constitution.

O'Neill's J.'s decision in ***DS*** is under appeal to the Supreme Court. The appeal has in fact been heard and judgement is awaited.

It will be interesting to see what view the Supreme Court takes on O'Neill J.'s ruling that the DPP has two bites of the cherry and no more. On behalf of the DPP it was argued that there was no rule in the common law that two jury disagreements equalled an acquittal. It was also argued that applying a fixed rule of allowing one retrial only amounted to the imposition of an inflexible policy, which was not known to the law, and which was ill-suited to being tailored to the individual facts of a case.

For the applicant, it was argued that allowing repeated re-trials would be oppressive, and that there must come a point in time in any case where it would be unjust to allow the State come again. It was argued that there was a recognised convention that after two jury disagreements, the State would not seek a fresh retrial and that, in the circumstances, O'Neill J. was entitled to injunct the hearing of a second retrial, once there had already been two jury disagreements.

It was also emphasised that on the particular facts of ***DS***, the DPP was now seeking to put the applicant on trial for the *fifth* time, when one took into account two other trials that had occurred involving similar allegations of a sexual nature from a sister of the complainant. In all the circumstances, it was argued it would be oppressive, unjust and a breach of the principle of double jeopardy (in the broad sense) to allow the DPP to proceed with what would in fact be a fifth trial.

As matters stand, the law of the land is that the DPP cannot come again for a third time, following two jury disagreements.

The same principle does not apply to a situation where earlier trials have been aborted, prior to the case going to the jury. Were it otherwise, a situation might develop whereby unmeritorious applications for a discharge could be made. Whilst it is of course inconceivable that such a practice might emerge, a firm distinction should be made between the prosecutor's right to re-prosecute following a jury discharge, as opposed to a completed trial that ends in a hung jury.

Indeed in the recent case of ***Michael McGealy -v- DPP***[66] O'Neill J. himself upheld the distinction.

[66] Unreported, High Court (O'Neill J.), 28th November, 2007.

In ***McGealy***, O'Neill J. commented that mishaps can occur that may result in a retrial. For example, if a jury is discharged. However, O'Neill J. distinguished the facts of ***McGealy*** from those in ***DS***. In ***McGealy***, after the first trial the applicant was actually convicted by a jury. The fact of a judgement in the Court of Criminal Appeal does not prevent a retrial and the public's right to prosecute has not yet been fully vindicated in the present case, he held. Judge O'Neill ruled that, in circumstances where the DPP has a case with no mishap, that goes all the way on two occasions to a jury, the balance tilts in favour of the applicant who may face risk.

The importance of the distinction was also recognised by Sheehan J. in the recent case of ***Pat Jennings -v- DPP and Judge McDonagh***.[67]

5. Abuse of process cases

We will conclude by looking at one further line of attack that accused persons might use to challenge the DPP's decision to prosecute. This area is to my mind under utilised, and has not received much judicial scrutiny in this jurisdiction. It is the area of abuse of process of the Courts.

To take a practical example, I am going back to our first area of the DPP changing his mind: take a situation of prosecution counsel who, through mistake or otherwise, indicates to the Court the charges are to be withdrawn or that no evidence will be offered by the prosecution. The case goes back for mention. Then on the next occasion there is new prosecution counsel in the case and the Court is now told the prosecution is to proceed.

What should happen? Would it be just or fair to allow the prosecution to continue? Or, as might be argued, would it be an abuse of the Court's own process for the prosecution to be allowed continue? We will come back to that example in a little while.

Abuse of Process Jurisdiction

The court has an inherent discretion to prevent proceedings that are oppressive or an abuse of process.[68] An abuse of process was defined in **Hui Chi-Ming v R** [69]as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding". According to *Archbold* (2006), the jurisdiction to stay for an abuse of process can be exercised in many different circumstances, but two strands have been identified in the authorities, namely (a) where the defendant would not receive a fair trial, and (b) where it would be unfair for the defendant to be tried.

[67] Unreported, High Court (Sheehan J.) 7th April, 2008.
[68] In a purely civil context see for example ***Barry –v- Buckley*** [1981] IR 306 (Costello J.).
[69] [1992] 1 AC 34

The latter includes cases where the prosecution has manipulated or misused the process of the court to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality. The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process is on the accused and the standard of proof is the balance of probabilities.

In ***Ryan -v- Director of Public Prosecutions***[70], Barron J. stated:

> The expression "abuse of the process of the court" is one which refers to a contamination of the entire proceedings. In the two cases relied upon the objection is to the fundamental basis upon which the proceedings are brought. No such objection is laid in the present case. The grounds for relief follow the passage which I have cited from the judgment of Finlay P., as he then was, in *The State (O'Callaghan) -v- Ó hUadhaigh* [1977] I.R. 42. The applicant is concerned solely with advantage. That is not the test. Justice must be done and must be seen to be done. Where proceedings are commenced which violate this principle, then they are an abuse of the process of the court.
>
> In the present instance, it cannot be said that to tender in evidence the statements which were ruled inadmissible at the first trial would be an abuse of the process of the court. Of course, if the retrial had been engineered for the purposes of overcoming the adverse ruling, the position would be as in *O'Callaghan's* case [1977] I.R. 42. Here the situation arises through the fault of neither party. Retrials occur for a variety of reasons. If the proposition for which the applicant contends is correct, then an accused would in the appropriate case be unable to contend that a statement admitted at the first trial should be excluded, a witness not available at the first trial might have to be excluded at the second, and so on. This is not correct.

Where the doctrine of estoppel is not available to a litigant (it would not have been available to the applicant in ***Eviston*** for instance, or in the English case, ***Bloomfield***, considered below) it might be possible to use the doctrine of abuse of process of the Courts.

Academics differ on whether the use of abuse of process in this way is appropriate or something to be condemned. Keane J. suggested it can be used "without doing violence to the established principles of issue estoppel"[71]. However, the use of the doctrine as a means of avoiding the rules of estoppel has been heavily criticised by some commentators:

> This approach is totally inadequate. It involves the exercise of an unprincipled discretion, without substantive guidance, except for a few analogous cases and the Judge's own *ad hoc* sense of what is appropriate. The absence of any attempt to articulate a rationale or standard deprives litigants of any guidance as to their conduct in the litigation process, and constitutes an abrogation of judicial responsibility.[72]

There is nothing wrong in principle with availing of the doctrine to stay a criminal prosecution, provided a litigant is not reliant on purely discretionary impulses of sympathy, and can bring himself within the established parameters of the doctrine.

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[70] [1988] IR 232

[71] McAuley –v- McDermott [1997] 2 ILRM 486 at 497.

[72] Tim Pinos, "*Res Judicata Redux*", (1988) 26 Osgood Hall LJ. 713 at 746, as quoted in P.A. McDermott's text on *Res Judicata* at p.176.

There has been a creeping tendency of late, for judicial review cases to be decided on purely discretionary grounds, unrelated to the application of established legal principles[73]. I would join with those who deprecate this approach, as it tends to involve the judicial review judge focusing on the merits of the substantive case, rather than the procedures under attack in the judicial review[74]. The same woolly thinking has it that all drunk driving points should be disallowed and legal arguments based on so-called "technicalities" rejected.

However, that is not to say that the Courts cannot continue to develop a structured and coherent set of legal principles in this area of abuse of process, so that justice in individual cases can be achieved, by applying established principles of law.

In the United Kingdom, some challenges to the DPP's prosecutorial discretion have been successful on abuse of process grounds. A number of cases in the UK have held that, in certain circumstances, a reversal of a decision not to prosecute may amount to an abuse of process.

In ***R -v- Croydon Justices, ex parte Dean***[75] the applicant had been arrested and interviewed by the police in the course of a murder investigation. He was released on the basis that he was going to be a prosecution witness. He subsequently made a prosecution witness statement and continued to assist the police voluntarily for a period of over five weeks. The police continued to refer to him as a prosecution witness and he alleged that they made specific assurances that he would not be prosecuted in connection with the murder.

Thereafter the Crown Prosecution Service decided that the applicant should be charged with doing acts with intent to impede the apprehension of another. He was later charged and committed for trial. His application for *certiorari* was granted and the Court held that:

> The prosecution of a person who had received a representation or promise from the police that he would not be prosecuted was capable of being an abuse of the process of the court notwithstanding the absence of bad faith on the part of the police or of any authority in them to make such a representation or promise; and that, since the court was satisfied that the police had told the applicant that he would not be prosecuted and having particular regard to his age, it was an abuse of process for him to be prosecuted subsequently, and the justices had been bound to treat the case as one of abuse of process.

The case of ***R -v- Mulla***[76] distinguished ***Bloomfield*** and found on the facts of that case that there had not been an abuse of process. The court stated that factors to be taken into account included—

> … [that] the prosecution had indicated to the Court what its view was, but that, as it seems to us, is only one of the factors to be considered in a case of this kind. Other factors include what view is expressed by the judge when the prosecution gives its indication, the period of time over which the prosecution reconsiders the matter, before they change their mind, whether or not the defendant's hopes have been inappropriately raised, and whether there has been, by reason of the change of course by the prosecution, any prejudice to the defence.

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[73] Perhaps an example of this is ***Noonan –v- Director of Public Prosecutions*** [2007] IESC 34.
[74] See AM Collins S.C. "*Judicial Discretion in Judicial Review*" Bar Review February, 2008 at p.27.
[75] [1993] 3 WLR 198
[76] [2004] 1 Cr. App. R. 6

An abuse of process was also found in ***R v Bloomfield***[77] where the prosecution counsel had indicated to defence counsel that the Crown wished to offer no evidence because it accepted that the defendant had been the victim of a set-up. The case was put back for mention.

The Crown Prosecution Service subsequently organised a meeting with new counsel and informed the defendant that it intended to continue with the prosecution. An application for abuse of process at the trial failed and the defendant subsequently pleaded guilty.

On appeal the Court held that it was an abuse of process. The case discusses some previous authorities on the issue. In ***Bloomfield*** the prosecution case was that on the evening of the 31st of May 1995, police officers arrested Mr. Bloomfield on suspicion of possession of drugs. Asked if he had any drugs on him, he agreed that he had, when a bag containing 100 ecstasy tablets was removed from his pocket. When interviewed he said he had bought the tablets for his own use and to share them with his girlfriend. He was released on bail.

He requested a further interview on the 23rd of July. He stated that a woman, whom he named, had given him the drugs for safe keeping as she was about to be raided by the police. He felt that he had been set up. His account was that at about 8pm on the 31st of May, he had a phone call from a named woman who said she had heard over the police scanner that her house was going to be raided and asked him to pop up and see her. He went to her house and she gave him these ecstasy tablets, and asked him to keep hold of them until the next day. When he got home three quarters of an hour later he was arrested.

The case was listed for plea and directions on the 20th of December 1995 at Luton Crown Court. Prosecution counsel approached defence counsel and indicated, in the clearest of terms, that the Crown wished to offer no evidence against the defendant on the charge of possession. This was because the prosecution accepted the defence account as to how he came to be in possession of the ecstasy tablets. They accepted he had been the victim of a set up.

In the hearing before the Court of Appeal, counsel for the Crown informed the Court there was in fact nobody from the Crown Prosecution Service present at the hearing, only police officers, and also that "prosecuting counsel was inexperienced".

It was common case that prosecution counsel had openly stated to the trial judge that because of the presence in Court of certain other people it would be embarrassing to the police and prosecution if no evidence were to be offered that day. It was therefore suggested that if the plea and directions hearing could be adjourned to a later date, then no evidence would be offered at that adjourned hearing. The Court then so ordered.

[77] [1997] 1 Cr. App. R. 135

Subsequently the Crown Prosecution Service arranged a conference with new prosecuting counsel and thereafter informed the defence solicitors that the Crown intended to continue with the prosecution. The defence moved an application at the trial to stay the proceedings as an abuse of process of the Court. That application failed. The defendant then pleaded guilty and was sentenced to three months imprisonment. The conviction was then appealed to the Court of Appeal.

The Court decided there were two net issues: (1) whether it was an abuse of process for the Crown to revoke a previous decision, communicated to the defendant and to the Court, to offer no evidence, and (2) if it could be an abuse of process, whether it made any difference if prosecuting counsel had made that decision and communicated it to the defendant and the Court without authority.

The Court of Appeal held that—

1. whether or not there was prejudice to the defendant, it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason been given as to what was wrong with it, particularly as it was made *coram judice* in the presence of the Judge, and

2. that neither the Court nor the defendant could be expected to enquire whether prosecuting counsel had authority to conduct a case in court in any particular way and they were therefore entitled to assume in ordinary circumstances that counsel did have such authority.

The Court of Appeal also rejected the Crown's argument that the fact the defendant had pleaded guilty showed it cannot have been an abuse of process to prosecute him. The Court pointed out that it is often the case that a defendant pleads guilty when some application made on his behalf fails, and that was not a bar to him appealing. It cannot be right that an accused has to plead not guilty in order to preserve his right of appeal against a refusal of a stay.

In ruling that the appeal should be allowed and the conviction quashed, Staughton LJ. stated:

> 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…
>
> …We simply find that in the exceptional circumstances of this case an injustice was done to this appellant. In those circumstances the appropriate course is to allow the appeal and quash this conviction.

Conclusion

It may be fairly said that, while exceptional circumstances have to be found before a decision to prosecute can be challenged, the category of cases in which a review can be brought is not closed.

The abuse of process cases in the UK and the ***Eviston*** type cases in this jurisdiction, make it clear that neither *male fides* nor evidence of an improper motive is essential for such a challenge. Where an applicant can demonstrate a marked unfairness or a situation of clear injustice, he will be nearly home.

To borrow from Murphy J.'s dissent in ***Eviston***, the task facing the lawyer will be to convert this sense of injustice into an enforceable legal right.

Micheál P. O'Higgins B.L.