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COURT QUASHES DPP'S DECISION NOT TO PROSECUTE SOLDIER FOR 1973 KILLING

Summary of Judgment

On 28 February 2018 the Divisional Court quashed the Director of Public Prosecutions' decision not to prosecute a soldier for the killing of Daniel Hegarty in 1973 on the basis that it was flawed and founded on an "unreasonable and rationally unsustainable hypothesis". It also held that the delay in issuing the decision was "manifestly excessive, inexplicable, unjustified and unlawful". **The Court granted leave to amend the challenge to consider whether the DPP misapplied the test for prosecution. The Divisional Court today held that he had not and that this ground of challenge had not been made out.**

Margaret Brady ("the applicant") sought leave to challenge a decision made by the Director of Public Prosecutions ("DPP") not to prosecute a soldier ("Soldier B") for the killing of her brother, Daniel Hegarty. She also challenged the delay in promulgating the decision.

Daniel Hegarty, aged 15, was killed during "Operation Motorman" on 31 July 1972. He was with his cousins Thomas Hegarty aged 18 and Christopher Hegarty aged 16. At some time shortly after 04.15 am there was a burst of machine gun fire. Daniel Hegarty died after being shot twice in the head by Soldier B. Christopher Hegarty was injured.

The Divisional Court said there were two mutually exclusive accounts of what happened. On one account a group of aggressive, threatening youths, one of whom was believed to be armed, approached soldiers they had already 'spotted' with the express and obvious intent of attacking them. The soldiers issued three clear warnings for them to halt but the youths continued their menacing approach. They were then fired upon from a distance of 25m, and these shots resulted in the death of Daniel Hegarty and the wounding of his cousin Christopher. In this scenario Soldier B's action was capable of being seen as a legally justified response of a frightened young soldier who believed he was facing a serious and imminent threat - a lawful act of self-defence.

In the second scenario a group of three youths were retreating from the risk of an encounter with soldiers. They were heading in the direction of their home and were unaware of the two soldiers positioned in the front garden of 114 Creggan Heights. They were not challenged or warned by these soldiers. They only became aware of the presence of the soldiers when shots rang out from virtually point blank range killing Daniel and wounding Christopher. In this scenario the action of Soldier B was capable of being found to be the unjustified use of force causing the unlawful death of Daniel Hegarty and the unlawful wounding of another.

History of Investigations

Several investigations have taken place into these disputed events:

- A police investigation resulting in the submission of a file to the DPP. On 17 July 1973 the DPP directed that the file be marked 'no prosecution' on the basis that there was no reasonable prospect that the defence of self-defence could be disproved;
- An inquest was held on 16 October 1973. Soldier B was not a compellable witness at the inquest and his RMP statement was read. An open verdict was recorded;
- The Historical Enquiries Team ("HET") conducted a review in 2006. A statement from Soldier B was submitted in which he denied any recollection of his original 1972 statement and indicated that he could not comment upon its accuracy (Soldier A has not been identified or located). On 19 December 2006 the HET submitted an advice file to the PPS because the HET review had disclosed additional factors "….notably the additional statement from Soldier B, which had not been available to the [DPP] when the first consideration of the issues was made in 1972";
- On 28 March 2008 the PPS wrote to the applicant and confirmed that it had "… reviewed the decision of no prosecution taken in 1973 following the further investigation by the HET [and] … concluded that the original decision of no prosecution taken in 1973 should stand".

The Attorney General's Referral and the 2011 Inquest

In 2011 the Attorney General directed that a fresh inquest be undertaken. The Coroner commissioned a ballistics expert, Leo Rossi, to provide a report. The inquest took place between 5 and 9 December 2011. Soldier B was unfit to attend but his 1972 account to the RMP and his 2006 account to the HET were both placed before the jury. The jury also received relevant civilian, ballistics and other evidence. Among its key findings were:

- The findings of Leo Rossi contradict Soldiers B and A's statements regarding the positioning of the gun and the proximity of Daniel and Christopher to the discharged weapon;
- Daniel, Christopher and Thomas Hegarty posed no threat to anyone;
- "We believe no soldier shouted sufficient warnings" and "contrary to the statements from Soldiers A and B we do not believe soldier B provided sufficient warnings before opening fire, therefore warnings should have been given."

In view of the verdict and it appearing that an offence may have been committed, the Coroner referred the matter to the DPP on 19 December 2011 for reconsideration pursuant to Section 35(3) of the Justice (NI) Act 2002 which provides that "where the circumstances of any death which has been investigated by a coroner *appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland*, the coroner must as soon as practicable send to the Director a written report of the circumstances".

The DPP's duty, on receipt of the referral from the Coroner, was to review the file and decide whether or not there was sufficient credible evidence available to commence a prosecution of Soldier B. Such decisions must be made on the basis of the Prosecution Test. This test is met if the evidence which can be presented in court is sufficient to provide a *reasonable prospect of conviction* ("the Evidential Test") and prosecution is required in the public interest ("the Public Interest Test"). This is a two stage test and each stage of the test must be considered separately and passed before a decision to prosecute can be taken. The

Evidential Test must be passed first before the Public Interest Test is considered. If this is also passed, the Test for Prosecution is met.

Delay

The initial decision not to prosecute was made in 1973. Following Soldier B's 2006 statement and the HET referral a second decision not to prosecute was made in 2008. By the time of the Coroner's referral to the DPP in December 2011, 39 years had passed since the killing of Daniel Hegarty. The Divisional Court said it was incumbent on the DPP to promptly consider, on the available evidence, whether the Test for Prosecution was met. The DPP, however, did not issue his impugned decision until 9 March 2016, over four years from the date of the Coroner's referral.

The applicant's solicitor wrote to the PPS on a number of occasions in an attempt to elicit a decision but to no avail. The Court said that, "somewhat troublingly" by letter dated 16 June 2015, an Assistant Director in the PPS raised a completely new consideration stating one enquiry was still outstanding: "The [DPP] has had sight of a medical report on Soldier B dated September 2013 and has requested his solicitors to provide an up to date report so that he may be fully informed of all public interest considerations before making his decision. I have reminded Soldier B's solicitor of the urgency of this matter on 1 June and again today."

The Divisional Court said this correspondence demonstrated that the DPP was considering public interest considerations which presupposed that the Evidential Test had been met: "This demonstrated that the Director misapplied the test for prosecution". The Court did not have an affidavit from the former DPP, even though he was the actual decision maker, and the affidavit filed on behalf of the current DPP did not address this point. This point was also not raised by the applicant. The Court considered that the correspondence revealed that the legal representatives of the potential defendant, Soldier B, were involved in making representations and this further indicated that the consideration of B's evidence related at least to public interest at a time before the DPP issued his decision on the evidential test.

The DPP's letter did not explain the delay in issuing the decision, and this was not addressed in the evidence presented to the court. The Divisional Court said it was satisfied that the four year delay between the referral from the Senior Coroner to the promulgation of the March 2016 decision was "manifestly excessive, inexplicable, unjustified and unlawful".

Decision not to prosecute

The ballistics expert, Mr Rossi's evidence played an important part in the inquest jury's findings. The jury found his evidence contradicted the 1972 statements of Soldiers B and A regarding the positioning of the gun and the proximity of Daniel and Christopher Hegarty to the discharged weapon. Soldier A's statement was that, at his instructions, Soldier B had set up the machine gun on the pavement and was in a kneeling position when he fired. Soldier B in his original statement made no reference to the position of the weapon. Mr Rossi ruled out the possibility that the gun was fired from the tripod on the ground. The clear implication from this was that the accounts given by Soldier A and B were unreliable.

The applicant drew attention to the fact that Senior Counsel on 9 November 2012 provided an opinion to the PPS concluding that, in principle, the prosecutorial test *was* met. On 23 November 2012 a consultation took place between Mr Rossi, an Assistant Director in the PPS and Senior Counsel. Mr Rossi claimed the Assistant Director asked him whether his findings were inconsistent with the account given by Soldier B in his statement made in October 2006 or "whether there were any circumstances in which his findings and his account could be consistent with each other." Mr Rossi concluded that "the version of events in the 2006 statement is inconsistent" with the ballistic evidence. On 4 December 2012 a second consultation took place at which Mr Rossi was directed to conduct further ballistic testing in relation to some of the contents of the 2006 statement. The Divisional Court commented that it was not obvious why the DPP did not take a decision on the available evidence following either of the meetings on 23 November or 4 December 2012.

On 23 January 2013 Senior Counsel issued a second opinion setting out his provisional view that the prosecutorial test *would continue to be satisfied* unless the new ballistic testing established that there was a reasonable possibility that the deceased could have been shot in the manner described by the soldier. Additional ballistics testing was conducted on 15 March 2013 by Mr Rossi and a second expert. The results established that some of the contents of the 2006 statement could not be correct. On 9 June 2014, Senior Counsel provided a further written advice. This was not exhibited to the DPP's affidavit but at this stage counsel's view had changed and he did *not* consider that the test for prosecution was met. The Divisional Court was not provided with an explanation for this. On 14 October 2014 a report was received from a third ballistics expert (Mr Mastaglio) which confirmed in substance the evidence of Mr Rossi. A further meeting was held on 30 November 2014 which was followed by further opinion from Senior Counsel confirming that he did *not* think the prosecution test was met.

The DPP acknowledged that if a defendant in a criminal case made a positive and unequivocal case to police that he acted in a specific way, at trial the prosecution can hold them to account. The Divisional Court commented that if, as here, evidence can be adduced to undermine that account that would be useful evidence for the prosecution to use to attack the credibility of the defendant. The DPP submitted that the position is different '*where*' the suspect gives an account that is uncertain, vague or contains specific caveats about accuracy because even if the prosecution can adduce evidence which tends to undermine the account of the accused, the damage to their credibility "is less than in the first situation because the defendant had not fully committed to their earlier statement".

The Divisional Court commented that the problem with the DPP's analysis, which reflected his reasoning so far as the positioning of the gun was concerned, was that there was no material uncertainty, vagueness or caveat in the 2006 account:

> "Simply put Soldier B never made the case that he fired the [gun] from a raised position. His case was that the weapon was discharged from ground level. In our view there is no material uncertainty in [Soldier B's] account. Accordingly the Director is in error in holding that "it is reasonable and proper for the prosecuting authority to consider variations in the account given". The damage to Soldier B's credibility is not lessened by the postulation of a scenario by a ballistic expert which is wholly inconsistent with the Soldier B's account. In fairness to the DPP they do not seek to

> make that case but instead put an unrealistic and untenable construction on Soldier B's damaging 2006 account."

On 8 March 2016, the DPP issued his first decision letter which indicated that, given the significance of the forensic evidence and its potential for challenging the account given by Soldiers A and B, the PPS had decided to seek a further opinion from Mr Mastaglio. The letter set out the conclusions of Mr Mastaglio and in particular the following two paragraphs which were underlined in the decision letter:

> "It would be an easy task for a fit young solder to lift and discharge a GPMG whilst kneeling. The weapon could be discharged from the shoulder or any position from there to the hip. Aimed fire would be possible from the shoulder.
>
> If Soldier B was approximately 10 feet from the decedent when he opened fire, the weapon could had [sic] been discharged with its muzzle at the same level as the decedent un-tilted head, or if the muzzle was pointing upwards, with the weapon being discharged from an aiming position, with the decedent's head tilted downwards a few degrees at the same angle as the muzzle's elevation, the observed bullet tracks would have resulted."

The Director placed particular reliance on these two passages. The Divisional Court, however, agreed with the applicant that the first paragraph was a pointless hypothesis to consider given that Soldier B not only said this is not what happened, but also that the gun would have been too heavy to lift to his shoulder. The second underlined paragraph appeared to test this hypothesis and the DPP concluded that these paragraphs explain the circumstances in which the weapon could, on the postulated hypothesis, have been discharged causing the fatal wounds with the observed bullet trajectories. The Divisional Court commented:

> "Whilst they may indeed explain how this *could* take place they also demonstrate that Soldier B's 2006 account is inconsistent with the hypothesis which could further undermine his credibility. Unless the Director is specifically dealing with a hypothesis that Soldier B's account was *untruthful* and he in fact raised the gun for the purposes of aimed fire, why would this scenario be considered? We fail to understand how on a basis that is entirely different from the account given by Soldier B or by anyone else the Director could rationally conclude, as he did, that the ballistics evidence is not as compelling as it appeared at the inquest."

The DPP submitted that there were two fundamental problems with the applicant's challenge to the rationality of his decision, namely that Solder B had not definitively committed himself to his 2006 account on firing position and it was therefore appropriate for the Director to consider other firing position scenarios not specifically raised by him. It was also submitted that the applicant's argument appeared to mistakenly presuppose that a

finding by a jury on the accuracy or inaccuracy of Soldier B's 2006 description of the firing position would, of itself, determine the guilty or not guilty verdict. The Divisional Court said these arguments were presumably intended to reflect the Director's thinking in making the impugned decisions:

> "It is plain that the approach adopted is not consistent with the test for prosecution. The test for prosecution requires the prosecutor to address the question whether there is credible evidence upon which the tribunal of fact may reasonably be expected to find the offence proved to the criminal standard. In other words *could* a properly directed jury be reasonably expected to find the offence proved. The test is not whether the evidence would "automatically lead to conviction". That is the criminal test which the jury applies and not the evidential test which is mandated by the Code for Prosecutors. In approaching the matter in this way the decision maker has improperly raised the threshold of the evidential test."

The Court commented that the circumstances in December 2011 when the DPP was asked by the Coroner to reconsider the matter were already such as to indicate that the 'available evidence' was ***likely*** to be credible evidence which the prosecution could adduce before the tribunal of fact. This evidence had been tested in a four-day inquest and the findings of the jury showed that it had believed the civilian accounts and the ballistics evidence and that it had disbelieved the soldiers' accounts. The Court said it was the duty of the DPP to satisfy himself that the evidential test was met before he commenced any prosecution. It noted that the Director sought counsel's opinion on the issue of whether or not the prosecutorial test was met. On 9 November 2012 Senior Counsel provided his initial opinion to the effect that it *was* met. The Divisional Court commented that the treatment of the evidence from this point on caused concern:

> "The PPS, having received clear advice from an experienced QC does not act on that advice. Instead it meets with the ballistics expert and asks whether 'there are **any circumstances**' in which his findings and Soldier B's account '**could be consistent** with each other. However, for a period of two years and seven months the DPP was being advised by everyone he had consulted on the matter that the evidence of Soldier B was inconsistent with the ballistic findings and that the evidential test was met yet he did not issue a decision to that effect."

Conclusion

The Divisional Court noted that there is an important distinction between decisions to prosecute and decisions not to prosecute. Decisions to prosecute are attended with a range of safeguards. They are subject to *continuing review* by the PPS so that if, at any stage, the evidential test for prosecution is no longer satisfied the prosecution must withdraw the charge(s). In addition those who are prosecuted have a variety of other public and transparent safeguards. Further, if convicted he can exercise his right to seek to *appeal* the matter. The Court said that, on the other hand, a decision that there should be no prosecution is effectively final in a case such as the present and devoid of such safeguards other than the possibility of making representations and the limited jurisdiction of the court on judicial review to quash a no prosecution decision: "It goes without saying that the decision to prosecute or not to prosecute is one of immense significance for those affected".

The Divisional Court concluded:

- The prolonged four year delay between the referral from the Coroner to the promulgation of the decision not to prosecute in March 2016 was manifestly excessive, inexplicable, unjustified and unlawful.
- The DPP was in a position to take a prosecutorial decision promptly following the receipt of Mr Rossi's conclusions and failed to do so: "Had the decision been taken at that time it seems inevitable in light of the scientific evidence and the legal advice that the DPP must have concluded that the test for prosecution was then satisfied";
- There are good grounds for considering that the DPP misapplied the test for prosecution. The Court declined to express a final view on this point as it was not raised in argument and said that any decision on this point would not affect its other conclusions;
- The DPP imposed too stringent a test when considering whether the evidential test was satisfied; and
- The reasoning leading to the impugned decision not to prosecute was irredeemably flawed. In particular the DPP's decision was founded on an unreasonable and rationally unsustainable hypothesis which was inconsistent with the case made by Soldier B.

The Divisional Court allowed the judicial review. It quashed the decision not to prosecute and said it would hear the parties as to what further, if any, relief is required.

Today's judgment

Following a short hearing on 21 May 2018, the Divisional Court considered an amended Claim in which the applicant asserted that by giving consideration to the public interest test before he had made a determination on the evidential test, the DPP had acted contrary to the Code and had thereby misapplied the test for prosecution.

The DPP, however, averred that his reason for seeking the up to date medical evidence on Soldier B was that "once alerted to the existence of a health issue, which may have been relevant to the application of the evidential test, it was open to me to ensure that up to date medical evidence was available before reaching any conclusion on whether there was a reasonable prospect of a conviction". He claimed he was not aware of the letter written by the Assistant Director dated 16 June 2015 which stated that "The [DPP] has had sight of a medical report …" and only became aware of it upon reading the draft judgment of the Divisional Court. He added that, as matters developed, Soldier B's health issues played no part in the final determination of the evidential test which was focused upon the validity of the defence of self-defence.

The Assistant Director submitted evidence that, in referring in his letter to the DPP's request for an up to date medical report, he "did not mean to imply that the DPP would take into account any public interest considerations when applying the evidential test".

The Divisional Court said it was "less than satisfactory" that two different reasons have been advanced for obtaining the medical evidence:

> "The Director's reason that the material might be relevant to the application of the evidential test and the Assistant Director's reason that the material was requested to enable a decision on public interest should the need arise. Counsel for the applicant and the PPS both agree that Soldier B's health was not relevant to the application of the evidential test."

The Court noted, however, that the DPP averred that he did not take Soldier B's health into account when determining the evidential test and that there was no breach of the sequential nature of the prosecution test. It concluded that the ground that the DPP had misapplied the test for prosecution had not been made out.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk