CASE REFERENCE: 2013CM-00744

REGINA

-V-

SERGEANT DANNY HAROLD NIGHTINGALE

Preliminary Hearing
Ruling on application by the Defendant to stay proceedings

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1. I am very grateful to both Counsel for the clarity with which they have argued their case both in their written skeleton arguments submitted before today and their oral submissions this morning.

2. Mr McKay has submitted that the Crown's decision to prosecute the Defendant a second time is not in the public interest. He says that the Director of Service Prosecution's decision to prosecute was both improper and oppressive and is therefore an abuse of process. In those circumstances the Defendant asks me to stay the proceedings against him. The Crown says that it is not the function of this Court to review its decision to prosecute; and that on confirmation from the Crown that the decision to prosecute has been under continuous review, which has involved careful consideration of the evidential and public and service interest tests, the Defendant's application should be dismissed. Further, the Crown says that there is no evidential basis upon which to infer any impropriety by the DSP.

3. All parties agree that the decision by the Crown to prosecute a case is not susceptible to judicial review unless there is dishonesty or bad faith or other exceptional circumstances. Lord Justice Thomas reflected the current state of the law when he said in *R (on the application of Pepushi) v Crown Prosecution Service*[1]: "The circumstances in which a challenge is made to the bringing of a prosecution should be very rare indeed as the speeches in *Kebiline* made clear." In *R v A*[2] the Lord Chief Justice said: "the decision whether to prosecute or not must always be made by the Crown Prosecution Service and not the court. The court does not make prosecutorial decisions."

4. The test for me then is not whether a reasonable prosecutor properly directing his mind to the non-exhaustive list would conclude that a re-trial ought not to be held as the defence suggest. This would be a judicial review by the back door in the wrong court and would have the potential to undermine the independence of the Service Prosecuting Authority. In fact it would be wrong in law for me to apply that test. Instead the test that I should apply is whether the decision in this case to prosecute a second time would amount to an abuse of process. Mr McKay submits that it would be an abuse because first the DSP sought advice from the chain of command about prosecution and second it is oppressive in any event to subject this defendant to a further trial.

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[1] [2004] All ER (D) 129
[2] [2012] EWCA Crim 434

5. The starting point for my consideration is the ruling of the Court Martial Appeal Court[3] which considered Sergeant Nightingale's appeal against conviction following his first trial. It decided that the conviction should be quashed as the defendant pleaded guilty because his freedom of choice was improperly narrowed following an uninvited indication from the judge about possible sentences. The Lord Chief Justice (presiding) said (at paragraph 17 et seq):

> "Accordingly, the plea of guilty is in effect a nullity. It will be set aside. The conviction based on the plea will be quashed." He continued: "There is sufficient material here to require the issue to be considered fully. Accordingly, we shall order a trial to take place before a Court Martial on the basis of the present indictment, which may or may not be subject to amendment in due course when the Court Martial is convened."

6. The Court Martial Appeal Court may only authorise a retrial when it appears to the court that in is in the interests of justice that an order should be made.[4] Mr McKay acknowledges that to be the case but submitted that the Defendant did not have the opportunity, for procedural reasons, to make any submissions about a retrial. Mr Cray noted that the Lord Chief Justice was perfectly capable of seeking those submissions if he needed them. I agree with Mr Cray and am satisfied that the Court Martial Appeal Court determined having regard to all of the relevant circumstances that a retrial in this case is in the interests of justice.

7. Once the Court Martial Appeal Court has authorised a retrial it is a matter for the Director of Service Prosecutions to decide whether to prosecute. He must apply the evidential, public and service interest tests and then keep them under continuous review. The Crown has confirmed that he has done this and that confirmation must satisfy the Defendant and the Court that it has been done.

8. There are essentially two limbs to the Defendant's submission. First that there was impropriety on behalf of the DSP when reaching his decision and second that the decision was oppressive. I will address those limbs in turn.

<u>First whether the DSP has acted improperly.</u>

9. This morning the Defendant disclosed to the court a copy of an email dated 15 January between the Director of Service Prosecutions and the office of the Adjutant General in advance of a proposed meeting. That email and subsequent meeting took place before the Defendant's appeal hearing in March. In it the DSP said he would like to discuss three matters – two of which were unrelated to this trial – which he felt represented current and future political storms. The first point of discussion was framed in the following terms:

> DSP would like to discuss: "AG's view on a retrial of Sgt Nightingale if the CMAC decide to direct a retrial. If they do it would be my choice as to whether to prosecute. I intend that it should be well, and officially, informed from the point of view of the service/public interest test. The CMAC's powers are either to quash the conviction and order a retrial, to quash only (likely, but in which case it is at an end), or dismiss the appeal in which case the conviction and amended sentence simply stands".

[3] R v Nightingale No. 2012/06575/D5
[4] Court Martial Appeals Act 1968, s19

10. There is no suggestion of bad faith or dishonesty in any communication between the DSP and the AG and Mr McKay has not suggested that the AG gave any direction to the DSP about whether or not to prosecute. Mr McKay says that the mischief is in DSP seeking this view at all and there is a perception that his independence is thereby undermined. He has referred me to a Privy Council case *Sharma v Browne Antoine and others*[5] in which Lord Bingham set out what he described as Governing Principles in relation to deciding to prosecute. He said:

> "It is the duty of police officers and prosecutors engaged in investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective, professional judgment on the facts of each case.....It is a grave violation of their professional and legal duty to allow their judgement to be swayed by extraneous considerations such as political pressure."

11. Mr McKay has also referred me to a passage from *Moss & Son v Crown Prosecution Service*[6] in which Lord Justice Thomas, the President of the Queen's Bench division, said (at para 24):

> A failure to follow prosecution policy "would not in itself give rise to a stay on the grounds of abuse of process. More had to be proved. That concession was rightly made, particularly in the light of the decision in *R v A*. Lord Judge CJ there made clear that, provided that the exercise of a prosecutorial discretion has been conscientiously undertaken, the only question for the court is whether the offence has been committed or not."

12. In short, Mr McKay says that by seeking the views of the Adjutant General on the retrial of the Defendant he had failed to act independently, or at least given that perception, and that his discretion to prosecute was not undertaken conscientiously.

13. Mr Cray rejects these submissions. He also referred to *Moss* and in particular to Lord Justice Thomas's observation that:

> "the decision whether or not to prosecute in most cases requires a judgment to be made about a multiplicity of interlocking circumstances. Therefore, even if it can be shown that, in one respect or another, part or parts of the relevant guidance or policy have not been adhered to, it does not follow that there was an abuse of process. Indeed, it remains open to the prosecution in an individual case, for good reason, to disapply its own policy or guidance."

14. He also referred to Lord Bingham's comments in *Sharma* under his Governing Principles where he said that the courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

(i) The great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits;

[5] [2006] UKPC 57
[6] (2013) 177 JP 221

(ii) The wide range of factors relating to available evidence, the public interest and perhaps other matters which the prosecutor may properly take into account.

15. He submitted that it was perfectly proper to seek the views of the AG in relation to the public and service interest before making an independent decision about whether to prosecute. That would fit squarely within the "polycentric character of official decision-making". He noted that the email and any meeting were before the appeal hearing and that there is no suggestion that the AG was giving direction or seeking to interfere with the decision to prosecute.

16. In the Service Justice System it is the DSP who decides to prosecute and nobody else. The email from the DSP to the AG on 15 January makes that absolutely clear – DSP tells the AG that it is his (DSP's) choice whether to prosecute. In deciding whether to prosecute in the Service Justice System he considers the public interest test (in the same way as the DPP will do) but he also must decide whether it is in the Service interest to prosecute. It seems to me that it is quite proper that he should seek an official view on the service interest if he feels the need to do so before making his independent decision from the official responsible for discipline within the Army. He may take that view into account or disregard it, but there can be no criticism of him seeking that view. This will be done routinely through policy guidance but as this case was so significant and had attracted so much publicity it was a perfectly reasonable course for the DSP to take. I agree with the Crown's submission that such a course could properly be part of the great width of his discretion and the polycentric character of official decision-making.

17. I am therefore satisfied that the DSP has not acted improperly in exercising his discretion to prosecute in this case. He has done no more than seek an official view to help inform himself of the service interest test and that ultimately he, independently, made the decision to prosecute.

<u>Second, is the decision to prosecute an abuse of process because it is oppressive?</u>

18. The Defendant submits that nevertheless this prosecution is an abuse of process because it is oppressive. He rightly says that there is little authority from which any principles can be derived but has helpfully referred me to *R (Barons) v Staines Magistrates Court*[7]. In that case the President of the Queen's Bench division commented *obiter* on the issue of oppression in a case where a Council had decided to prosecute the owners of a public house for breaches of EU Regulations relating to hygiene. He said (para 46 et seq):

> "[The respondent] contended that oppression over and above that caused by any decision to prosecute did not have to be shown. If a Council should not have prosecuted, it was, in his submission, plainly oppressive to begin a prosecution. The defendant was placed in peril of a conviction and put to the expense and trouble of defending his position. That was self evidently oppressive."
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> Lord Justice Thomas continued:
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> "We cannot accept the broad terms of that submission. It is clear from the decisions in *R v DPP ex parte Kebeline, ex parte Bennett, R v A(AJ) and Moss,* that proof of oppression in the sense described in *Bennett* and other

[7] [2013] EWHC 898 (Admin)

> cases is essential if an abuse of process application is to succeed. In a case where a policy has been considered but wrongly applied, we consider that oppression above and beyond the ordinary consequences of initiating a prosecution would have to be shown.....in determining whether to grant a remedy, the court would consider whether, if it was told by the prosecutor that the prosecutor wished to continue with the case, it would allow the prosecutor to do so unless it was oppressive."
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> Finally he said:
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> "..there may be cases.....where the decision to prosecute has been made in circumstances that could be described as entirely arbitrary. The court could conclude in such circumstances that, having regard to all the circumstances, it would be oppressive to continue the prosecution."

19. In this case there is no suggestion that the decision to prosecute is arbitrary and I have already ruled that there was no impropriety on behalf of the DSP. Nor has there been excessive delay, there is no issue of lost or destroyed evidence, entrapment, going back on a promise not to prosecute, manipulation of procedure or immunity from prosecution. Nor can it be said that the Crown has acted in bad faith or dishonestly. There is a prima facie case against the defendant for two offences of unlawful possession of a firearm and unlawful possession of ammunition. The defendant has been properly investigated and then charged and the Crown has confirmed that it has kept the decision to prosecute under continuous review. In other words, oppression above and beyond the ordinary consequences of initiating a prosecution has not been shown. All of the factors suggested by the defence relating to the Defendant's health, his future employment, the cost of defending himself or the risk of conviction reflect the personal impact upon the Defendant but they do not amount to oppression by the Crown. As Mr Cray observed all of these points are premised on the Defendant being found guilty. The true remedy is for him to mount his defence in the Court Martial.

20. In short, it is not my function to review the decision to prosecute. Provided I am satisfied that there has been no bad faith or dishonesty and that the exercise of a prosecutorial discretion has been conscientiously undertaken, I should direct that the matter proceeds to trial.

21. I am so satisfied. There is no abuse of process and I dismiss the defendant's application to stay these proceedings.

HHJ Jeff Blackett
Judge Advocate General 1 May 2013