Case No: CO/1245/2017

Neutral Citation Number: [2018] EWHC 795 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

The Combined Court Centre, Oxford Row, Leeds

Date: 30 April 2018

Before:

HIS HONOUR JUDGE GOSNELL
Sitting as a Deputy Judge of the High Court

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Between:

The Queen on the application of SY (by her Litigation Friend SP)	**Claimant**
- and –	
The Director of Public Prosecutions	**Defendant**
-and-	
Ahmed Baig	**Interested Party**

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Gerry Facenna QC and Conor McCarthy (instructed by Ison Harrison Limited) for the Claimant
Louis Mably QC (instructed by Appeals Unit CPS) for the Defendant
Ahmed Baig in person

Hearing dates: 28th March 2018

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Judgment

His Honour Judge Gosnell:

1. The Claimant in this case has been granted anonymity by order of Mr Justice Kerr on 4th May 2017. She seeks, through her Litigation Friend, to challenge the Defendant's decision expressed in a letter dated 13th December 2016 ("the decision letter") to refuse to institute criminal proceedings against Ahmed Baig for offences of rape contrary to section 1(1) of the Sexual Offences Act 2003. The Defendant resists the challenge and contends that the decision was both legally correct and reasonably made for the reasons set out in the letter. Permission was granted by Mr Justice Kerr on 20th October 2017 and I heard helpful submissions from Leading Counsel for both parties at the substantive hearing after which I reserved judgment.

2. **Factual Background**

   The Claimant is now 41 years old. She has learning disabilities and physical disabilities arising out of a childhood road traffic accident in Pakistan when she was seven years old. She has been examined by a number of clinicians over the years who all agree she has learning difficulties of moderate severity. It is thought her functioning IQ is in the 55-65 range. She lacks capacity to litigate which is why she proceeds in this case through a Litigation Friend. There has been a debate over time whether she has capacity to consent to sexual intercourse. Recent evidence from Dr Tyrie suggests that she has such capacity in that she has a basic understanding of the sexual act, that it can lead to pregnancy and that the cessation of her periods may indicate pregnancy. Dr Tyrie felt that if she were put into a situation where she was subject to barely veiled threats, her vulnerability to exploitation, as a result of her learning disability, would be such that she would not be able to freely consent.

3. The Claimant lost her parents in early life and moved to the United Kingdom in 2000 to live with her sister who is now her Litigation Friend. Her sister enrolled the Claimant on a course at Huddersfield Technical College (as it was then known) to help improve her English. Given her vulnerability and intellectual disability the College, in conjunction with Kirklees Council, arranged for the Claimant to be collected by a local taxi firm Mount Taxis and one of their regular drivers was Ahmed Baig, the Interested Party. At some point between 2004 and 2006 the Claimant and Mr Baig had sexual relations the circumstances of which are disputed. In 2006 the Claimant became pregnant and was diagnosed with an ectopic pregnancy and taken to hospital. The pregnancy was terminated but the Claimant did not tell her sister who only discovered this fact about a year later when she accompanied the Claimant to her GP.

4. The Litigation Friend made a complaint to the police and the Claimant was interviewed by the police with an interpreter in February 2008 and alleged that she had not wanted a sexual relationship with Mr Baig. She alleged that she had both protested and resisted on occasions but that Mr Baig had made various threats against her family by suggesting he had been in prison and could kill them. When interviewed Mr Baig said the sexual activity was consensual and he was not aware the Claimant suffered from any disability.

5. **The original criminal proceedings**

Mr Baig was charged with five counts of sexual activity with a person with a mental disorder impeding choice between 1st September 2004 and 30th April 2006 contrary to section 30(1) of the Sexual Offences Act 2003. He pleaded not guilty and the case was listed for trial at Bradford Crown Court on 8th February 2010. Although she had been interviewed by the police no-one from the Crown Prosecution Service ("CPS") met with the Claimant or her family prior to the trial. Even on the day of trial there was no conversation with the Crown Prosecutor until she saw the Claimant and her sister to advise them that she he had decided to offer no evidence and Mr Baig was acquitted on the direction of the Judge. It transpired that shortly before the trial the defence had served on the prosecution a report from a consultant psychologist contending that the Claimant did in fact have capacity to choose to engage in sexual activity. Whilst the Crown had expert evidence to contradict this view it was sufficient to persuade the Crown Prosecutor that there was no longer a good prospect of securing a conviction on the counts on the indictment.

6. **The meeting on 22nd July 2010**

A meeting took place on this date between the Claimant and her sister and brother-in-law with the officer in the case and the Crown Prosecutor Heather Gilmore. Minutes of the meeting were prepared and are in the trial bundle [D1]. Ms Gilmore explained that the arrival of the expert report cast doubt on whether the Claimant had capacity to consent to sex and that this, together with other factors had led her to conclude that there was no longer a realistic prospect of securing a conviction of Mr Baig from the jury. She said she felt that the Claimant had already been through so much and it was not in her interests to have to go through the experience of having to give evidence. The Litigation Friend pointed out that Mr Baig had allegedly threatened the Claimant's family but Ms Gilmore said that issues of capacity and consent were legal issues. It does not appear from the record of the meeting that there was any mention that there had been any consideration to amending the charges to rape based not on an absence of capacity but an absence of consent.

7. **The complaints to the CPS and DPP**

Following the introduction by the CPS of the *Victim's Right to Review Scheme* on 6th August 2013 the Claimant's solicitors wrote to the CPS seeking a review of the decision to discontinue the prosecution of Mr Baig. The CPS declined to review as the scheme did not have retrospective effect. The Claimant's family then wrote to the Director of Public Prosecutions ("DPP") and correspondence followed with the CPS which culminated in meeting between the Claimant and her family and two Senior Lawyers with Yorkshire and Humberside CPS Jan Lamping and Andrew Penhale. No minutes were produced but a summary of what was discussed was confirmed in a letter dated 26th May 2015 [D37]. The letter records the views of the two senior lawyers expressed at the meeting.

8. They confirmed that it would not be possible to reinstitute proceedings against Mr Baig on the same facts without compelling new evidence, of which there was none.

Secondly, the medical evidence served before trial relying on the Claimant's admitted consent to medical treatment cast doubt on the assertion that she did not have capacity to choose to have sexual intercourse and that they agreed with the assessment of the Crown Prosecutor that the case could not proceed as it was indicted. The suggestion that the case could have proceeded as an allegation of rape had not been discussed with the family at the meeting in July 2010 but it was conceded that the indictment could have been amended to plead rape, which would not have been affected by the capability point. The letter continued:

> *"Amending the indictment in this way does not appear to have been fully considered by the lawyers in the case. I have spoken to the barrister who dealt with the case when it came to trial and she confirmed that amending the indictment was not considered because that would have fundamentally altered the way that the prosecution was putting its case. She also expressed the view that there would no longer have been a realistic prospect of conviction for offences of rape because of the impact of some of the unused material in the case".*

9. In the light of this letter the Claimant's solicitors asked that amended charges of rape should be considered but the CPS refused to do so. After a letter before action threatening judicial review was sent the CPS agreed to reconsider the decision not to prosecute Mr Baig for rape and to conduct a full evidential review.

10. **The decision**

The outcome of the review was confirmed by Martin Goldman, Chief Crown Prosecutor for Yorkshire and Humberside in a letter dated 13th December 2016. The letter runs to some six pages and contains both analysis and legal argument which, although relevant to the Claimant's family may not all be strictly relevant to this legal challenge. The essential points made in the decision letter are as follows:

i) On review of all the evidence now there was sufficient evidence for a realistic prospect of conviction and the public interest test was also satisfied;

ii) Proceedings could not be reinstituted against Mr Baig for any offences arising out of the circumstances of the original allegations because of the principles laid down in *Connelly v DPP* [1964] AC 1254 and *R v Beedie (Thomas Sim)* [1998] QB 356. In particular, any prosecution would be founded on the same facts and could therefore only go ahead if there were special circumstances justifying allowing it to proceed;

iii) There were no such special circumstances in this case because the offences of rape were "fully considered" by both the initial reviewing prosecutor and the barrister attending the trial. In essence the current position was a "simple disagreement" with the previous decisions made not to proceed with the rape allegations, and that could not be a special circumstance justifying a further prosecution.

11. The suggestion that the CPS had considered a charge of rape at the initial review stage and reconsidered it again when deciding to abandon the s 30 offence appears to be a

factual assertion first made in the decision letter which appears to contradict the assertion in the letter of 26th May 2015 referred to in paragraph eight above.

12. The decision also provided an "Advice" from Ms Gilmore who prosecuted the original trial which was dated 7th November 2016. The advice deals mainly with the decision to and the reasons for offering no evidence in the original trial but makes the following points in relation to a potential trial of the offence of rape. Firstly, the alternative of a rape allegation had been previously considered and discounted by the reviewing lawyer and it was something that counsel considered and dismissed during the course of preparing the case. Secondly, she did not discuss the question of amending the charge to rape on the day of the trial or with the family at the subsequent conference because it was not something they asked about and because:

> "*The issue was the same in each case though expressed differently-i.e.in relation to the charges on the indictment, the question was whether the complainant had a mental disorder impeding choice; in relation to rape it was whether she consented and whether D reasonably believed she consented.*
>
> *Capacity to make a choice and capacity to consent are essentially the same things; in order to consent one has to have capacity …The question of whether the complainant had the capacity to choose whether to have sex with the Defendant or whether she had the capacity to consent to have sex with him amounted to the same thing.*
>
> *The rationale behind this reflected the view taken by [the reviewing lawyer] when he initially reviewed this case and decided that there was no reasonable prospect of conviction in relation to the rape…"*

I have set this extract out in some detail as Leading Counsel for the Claimant contends that it shows that the Crown Prosecutor displayed a flawed analysis of the evidential requirements necessary to prove an allegation of rape. It is only fair to record however that this is not strictly part of the decision letter although the contents were relied on as part of the overall analysis.

13. **The law in relation to judicial review of decisions not to prosecute**

A decision not to prosecute an individual is, in principle, amenable to judicial review (*R. (Da Silva) v DPP* [2006] EWHC 3204 (Admin) and *R. v DPP Ex p. Manning* [2001] Q.B. 330). The review function will not, however, be lightly exercised by the courts. Lord Bingham LCJ said in *R. v Director of Public Prosecutions, ex parte Manning* [2001] QB 330, 343, at [22]:

> *"It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and*

if the test were too exacting an effective remedy would be denied."

14. As regards the grounds on which review may be sought it is also plain that a failure by the CPS to apply prosecutorial policy which bears on a decision on whether to prosecute gives rise to grounds for judicial review of a decision not to prosecute. After reviewing authority on the question, in *R. v DPP Ex p. Chaudhary* [1995] 1 Cr. App. R the Court held [at 140]:

> *"It seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:*
>
> *(1) because of some unlawful policy; or*
>
> *(2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or*
>
> *(3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived."*

15. In *R. v. Director of Public Prosecutions ex parte Jones*, unreported, 23rd March 2000 (CO/3008/99), Buxton LJ said, [at 26]:

> *"...none of the statements in earlier authorities can have been intended to exclude from this Court's consideration other fundamental aspects of the judicial review jurisdiction, for instance, as at least potentially relevant to our present case: (1) has the decision-maker properly understood and applied the law? (2) has he explained the reasons for his conclusions in terms that the court can understand and act upon? (iii) has he taken into account an irrelevant matter or is there a danger that he may have done so?"*

I agree with the submission made by Leading Counsel for the Claimant that the power to review a decision not to prosecute may be conducted on the orthodox principles of administrative review, namely irrationality, illegality and/or procedural impropriety.

16. **The Law in relation to autrefoit acquit and abuse of process**

Both Leading Counsel agreed that the principle of *autrefoit acquit* is narrow in application and only applies where an accused is charged on a second indictment with a charge which is the same in both fact and law to a charge in respect of which he had been previously acquitted. It was also agreed that the principle would not apply in this case as Mr Baig had been acquitted of offences under s 30 of the Sexual Offences Act 2003 whereas the contemplated new charges would be of rape under s 1 (1) of the same Act. There is however a related principle which was perhaps first identified in

the decision of the House of Lords in *Connelly v Director of Public Prosecutions* (1964) 48 Cr. App.R 183 at 274 when Lord Devlin explained the principle as follows:

> "*The result of this will, I think be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges on a previous indictment on which the accused has been tried , or form or are part of a series of offences of the same or similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive for the accused for the prosecution to use rule 3 where it can be properly used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The Judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule"*

[Rule 3 of Schedule one of the Indictments Act 1915 permitted charges for different offences to be joined in the same indictment if they were founded on similar facts]

17. This principle was applied by the Divisional Court in *R (Guest) v Director of Public Prosecutions* [2009] EWHC 594 (Admin). In this case following some abusive texts from Mr Guest to Mr Watts, Mr Watts went round to the Claimant's home at night and assaulted him, punching him and kicking him causing severe bruising and a cut requiring stitches. A caseworker at the CPS decided that Mr Watts should be given a conditional caution and pay £200 compensation. The Claimant complained about this decision but the CPS, whilst accepting that the decision was wrong refused to recharge Mr Watts on the basis that it would be an abuse of process. The Claimant sought judicial review of the decision. The court found that the decision not to prosecute for assault occasioning actual bodily harm was flawed and contrary to the Code for Crown Prosecutors. It was also contrary to the code not to consult with the victim. Lord Justice Goldring opined as follows:

> "50. *Judicial review is a discretionary remedy. The court has a discretion as to whether or not it makes a quashing order. It will not if to do so would merely be academic. In the context of this case, that means that if an order quashing the decision not to prosecute and to administer the conditional caution were to be academic, because any subsequent decision would be not to prosecute on the basis that there would no reasonable prospect of success on the grounds of abuse of process, no quashing order should be made.*
>
> *51. Speaking for myself, I am far from convinced that such would be the case. Criminal litigation is not a game. Whether in any given situation it can be proved by a defendant that the court's process has been abused is a matter for that court in the light of the facts of that case. All the authorities have to be considered in that light. Mr Watts accepted he was guilty. The*

caution could not otherwise have been administered. He was given the chance to pay a negligible sum to reflect the offence he admitted he had committed. If the conditional caution were quashed, the sum would be repaid. His admission in the context of the procedure would not stand. He would be in no worse position than had the decision not to prosecute never been taken.

52.It does not seem to me that, in those circumstances, a further prosecution would necessarily amount to an affront to public justice as referred to in some of the authorities. Indeed, many might think that what so far has happened deserves that description."

18. As to the prospects of success of an abuse of process defence Mr Justice Sweeney said as follows:

> *"The Director of Public Prosecutions rightly concedes that the decision of the Crown Prosecutor is, in law, indefensible. However, the stance of the Director as to the consequences which should flow is, in my judgment, surprising. Abuse of process involves a judgment by a court, based on well-defined principles, on the particular facts of a case. A decision to stay proceedings is a rare outcome. In a case in which, in accordance with the Code for Crown Prosecutors, the evidential and public interest tests are otherwise met, it will thus be in only the most exceptional case, where the Prosecutor can say with a high degree of certainty that a court will rule that a prosecution is proved to be an abuse of its process, that a decision not to prosecute is likely to be valid."*

19. The law in relation to abuse of process was given a thorough examination by Mrs Justice Thirwall as she then was in *R v Antoine (Jordan)* [2014] EWCA Crim 1971. Mr Jordan had pleaded guilty in the Magistrates Court on 30th July 2013 to offences of possession of a firearm and ammunition without a certificate and sentenced to four months imprisonment. Shortly after his sentence, he was charged with possession of a prohibited firearm and possession of a firearm following a detention and training order. He sought to persuade the court that this was an abuse of process but the Judge disagreed and he sentenced to a total of 56 months detention. The Court of Appeal first sought to identify the categories of cases where it was appropriate to stay a case for abuse of process. Counsel for the Appellant had identified two categories of case and the court found:

> *"In the years since the decision in Beckford (and indeed in a decision of the House of Lords the same year – see R v Latif **[1996] 2 Cr App R 92** at 100) the second category has been developed and refined. It is well established that a stay for an abuse of the process of the court may be imposed in either of the following circumstances:-*
> *i) that a fair trial is impossible*
> *ii) that the continued prosecution offends the court's sense of*

*justice and propriety or public confidence in the criminal justice system would be undermined by the trial - see the judgment of Lord Dyson sitting in the Privy Council in Curtis Warren v HM Attorney General of the Bailiwick of Jersey **[2011] 2 Cr App R 29** at paragraph 25."*

20. The trial Judge had dealt with the issue in the following way:

> *"23. In this case HHJ Farrell QC formulated the question to be asked thus: "Have the prosecution satisfied me that in this particular case there are special circumstances which make it neither oppressive nor unjust to try this defendant on the charges set out in this indictment?" Mr Storey did not submit that the judge asked the wrong question. He submits that he came to the wrong conclusion in the light of the decisions of this court in **Connelly**, **Beedie** and **Dwyer**"*

I have read the decisions in *Beedie* and *Dwyer* but do not intend to set them out in this Judgment. They are merely examples of the application of the principle set out above to other factual matrices.

21. Thirwall J supported the decision of the trial Judge to refuse to grant a stay for the following reasons:

> *"30. Mr Storey says that the second set of charges in the appellant's case was brought before the Crown Court because the prosecution were dissatisfied with the sentence (as HHJ Farrell observed in his ruling). It follows, Mr Storey submits, that there are no special circumstances here either.*
>
> *31. We cannot agree. True it is that the sentence was the catalyst for the prosecution reviewing this case, but here, unlike in **Beedie** and **Dwyer,** no one with the responsibility for prosecuting this case correctly applied their minds to the appropriate charges and how they should be prosecuted. This was not an escalation from minor charges to more serious charges, contrary to the general rule described in **Elrington**, but a move from misconceived charges to correct charges.*
>
> *32.There is this further consideration. This appellant was carrying a loaded revolver through the streets of Luton. He was subject to a detention and training order. He knew the risk he was taking of being sentenced to a long custodial term. He was expecting to go to the Crown Court. He was expecting a term measured in many years. The sentence of 4 months' detention was an unexpected, astonishing and undeserved windfall. Leaving aside the misguided attempt to have the sentence revisited by the Magistrates, the appellant was aware that appropriate charges were to be brought 9 days after the sentence was imposed and only 19 days after arrest. The facts are quite different from those in **R v Beedie** and **R v Dwyer.***

> *33.We have no hesitation in concluding that the judge was justified in finding that there were special circumstances here which required that the prosecution continue. The court's sense of justice and propriety was not offended nor was public confidence in the criminal justice system undermined. On the contrary, a stay would have brought the criminal justice system into disrepute."*

22. Legal guidance on the correct approach to abuse of process arguments is contained in published Legal Guidance on Abuse of Process which states as follows:

> *'It would, however, be wholly exceptional to refuse to prosecute because of an **alleged** abuse; [the prosecutor] must be satisfied that the abuse argument would inevitably succeed. Usually a court will be able to ensure that there is some other method of remedying any prejudice to a defendant…Where potential abuse of process issues arise in any case, prosecutors should adopt a robust approach and examine the issues critically. Defence assertions of prejudice should not be accepted at face value; they must be carefully analysed and challenged where they cannot be sustained in law.'*

23. This was the policy which the Defendant was applying when considering whether to charge Mr Baig with rape notwithstanding his previous acquittal for offences under s 30 of the Sexual Offences Act 2003. Was the decision maker correct in concluding that an abuse of process argument on the facts of this case would inevitably succeed?

24. **The Claimant's submissions**

I had the benefit of reading a skeleton argument from Mr Facenna QC and Mr McCarthy and also hearing helpful oral submissions from Mr Facenna QC. What follows is a brief summary of the submissions made but I have taken all submissions into account both written and oral. The Claimant's overarching submission is that this is not a case where the Defendant could lawfully reach the conclusion that a trial judge would inevitably halt a second prosecution for rape as an abuse of process.

25. The Claimant's primary position is that there was no, or no proper consideration given at the relevant time to amending the charge to rape, as the CPS now accepts would have been appropriate. The Claimant submits that this would place the present case in the same category as *Antoine* where *"no one with the responsibility for prosecuting this case correctly applied their minds to the appropriate charges and how they should be prosecuted"*. There is no evidence now that the original reviewing lawyer gave consideration to rape charges at the outset and similarly there is no evidence that the prosecutor at the trial gave it any thought as it was not mentioned to the family then or at the meeting on 22nd July 2010. This view appears to have been shared by Mr Penhale in his letter of 26th May 2015 who confirmed that amending the indictment "*does not appear to have been fully considered by the lawyers in the case"*. Even in the recent Advice prepared by trial counsel she does not contend that she considered rape charges as an alternative, merely that she had considered the matter when preparing for trial. It is argued that the fact that two senior prosecutors now say that the evidence passes both the evidential and public interest tests required

by the Code for Crown Prosecutors supports the contention that the charge of rape was never properly considered.

26. The alternative submission is that if there was consideration of rape charges after the late service of the accused's expert report then such consideration was inadequate and failed to comply with the requirements for a lawful prosecutorial decision. The two major complaints are the failure by the prosecutor to request an adjournment and the failure to consult or otherwise discuss the matter with the Claimant and her family before making a decision. The Defendant has accepted that these were errors which should not have occurred. It is submitted that the prosecutor should meet a complainant to form a view whether or not her evidence is likely to be credible before making a decision whether the evidential aspect of the Code test is met. It is also submitted that the prosecutor made inaccurate and unfair assumptions about the Claimant due to her disability which led to a flawed decision-making process.

27. The third submission is based on an assertion that the prosecutor misdirected herself on the law on the basis of the contents of her advice that I have set out in full in paragraph 12 of this judgment. The issue in relation to the alternative charges was quite different. On the original charges the issue was whether the Claimant had the capacity to consent, on the rape charges the issue would have been whether she did in fact consent and whether Mr Baig reasonably believed she did. Her expressed view that "*the issue was the same in each case*" was therefore incorrect in law. It is submitted that this is another example of no one correctly applying their minds to the appropriate charges.

28. It is submitted that a further prosecution would not be unjust and oppressive towards Mr Baig. It was Mr Baig who challenged the contention that the Claimant did not have capacity to consent and by doing so he ran the risk that a rape charge might follow. It is submitted he has had a wholly undeserved windfall like the defendant *Antoine*. It is submitted that justice would be offended if the account of the victim could not be put before a jury and properly considered on the evidence in circumstances where it is now conceded that both the public interest and evidential tests under the code are met. The trial judge would have other tools to remediate any injustice arising from the delay in bringing the second set of proceedings.

29. It was somewhat diffidently argued that it is not inevitable that a judge would find a charge of rape to be sufficiently similar in fact and law to a charge of sex with a person unable to consent by reason of mental impairment as to trigger the application of the abuse of process doctrine in those circumstances.

30. **The Defendant's submissions**

I have carefully considered the written and oral submission of Mr Mably QC for the Defendant and what follows is a brief summary of the totality which I have fully taken into account. The Defendant submits that this is not a case which involves the court deciding whether the decision maker was right in law but a question of whether or not the decision was reasonable. It required the exercise of prosecutorial judgment which the Defendant says was reasonably exercised and, in any event, correct.

31. The Defendant submits that on the facts of this case a court would inevitably find that the abuse of process jurisdiction was engaged as the new allegation of rape is based

on the same, or substantially the same facts as the original allegations. The court would then have to find special circumstances in order to avoid staying the prosecution as an abuse of process.

32. The Defendant disputes the submission made by the Claimant that there was no consideration or no proper consideration of the possibility of pursuing rape charges against the Interested Party. The Defendant relies on the advice prepared by trial counsel that she did consider the matter and that the decision maker spoke to trial counsel who confirmed that she had in fact considered whether an allegation of rape could pass the evidential test in the code. It also relies on the fact that the decision maker appears to have seen the original notes in relation to the charging decision which confirms that an allegation of rape was considered at the outset.

33. Leading counsel for the Defendant submits that the court should not consider what is in issue between the Claimant and Defendant in this case but what the evidential position would be between the Crown and Mr Baig as defendant during an abuse of process application in the Crown Court in any subsequent criminal proceedings. The Crown would be under a duty to disclose the underlying material to the defence and would be bound to concede that detailed consideration was given at the time to prosecuting Mr Baig for rape. On the Defendant's case this would distinguish the case significantly from *Antoine* as it could not be said that no one had applied their minds to the correct charges.

34. The Defendant concedes that the failure to seek an adjournment and the failure to consult with the Claimant and her family were regrettable. She argues however that this does not make the decision not to proceed with rape charges unlawful. It is submitted that the decision not to proceed with the s 30 charges was legally correct even if inappropriate assumptions were made about whether the Claimant was prepared to continue to give evidence. Similarly, the decision not to amend the indictment to charges of rape was made on the basis that the evidential test could not be satisfied because there was material which would have undermined an allegation based on an absence of consent to sex. This was the basis of the original charging decision not to charge rape. The fact that two senior prosecutors now have reached a different decision does not make the original prosecutor's decision automatically wrong. The decision whether, in any case, there is sufficient evidence to pass the evidential threshold is a matter of acute difficult prosecutorial judgment and two competent prosecutors can sometimes reach different decisions. A second prosecution would not be an attempt to rectify a clear cut and obvious error as in *Antoine*, it was no more than a prosecutorial change of mind as to the balance of the evidence in a difficult case where more than one conclusion is reasonably open to the prosecutor.

35. The Defendant submits that Mr Baig may well be able to assert that a second prosecution would be unjust and oppressive. Unlike the defendants in *Antoine, Beedie* and *Dwyer* he can properly argue he has a good defence to the allegations and that he had no involvement in the decision not to amend the indictment to one of rape. He can also pray in aid the considerable delay between the original decision in 2010 and when any second set of proceedings are brought. Properly analysed, it is argued that there are no special circumstances which would militate against a stay of a second set of proceedings.

36. **Analysis**

This is a sad and unusual case. On any view the Claimant has not been treated fairly by the criminal justice system and the delays which have occurred until this judicial review case was brought are clearly not her fault. My task however is not to right the wrongs which have occurred in the past but to decide whether Martin Goldman was correct in law when he concluded that if a second set of proceedings based on an allegation of rape were brought against Mr Baig they would be met by an abuse of process argument which would inevitably be successful. In my view this is not strictly a challenge to the exercise of a discretion. Whilst there were discretionary elements in the decision-making process, which I will return to later, his conclusion as set out above, which is the essence of his decision, was either right in law or wrong.

37. The major difficulty in this case is that the Claimant does not accept the factual basis on which Mr Goldman has predicated his decision. The decision was made on the basis that the Crown Prosecutors fully considered whether Mr Baig could be charged with rape both when the charging decision was made and when the s 30 allegation was abandoned and concluded that it would not pass the evidential test of the Code for Crown Prosecutors that there would be a realistic prospect of conviction before a jury. The Claimant contends that no, or no proper consideration was ever given to an allegation of rape for the reasons I have alluded to in the preceding paragraphs. This is a very difficult issue for the court to resolve in judicial review proceedings where no oral evidence is heard.

38. It is a long-standing principle of public law that questions of fact are primarily for the relevant public body and not the courts to resolve. As Lord Bingham said in *Pulhofer v Hillingdon LBC* [1986] 1 AC 484:

> *"Were the existence or non-existence of a fact is left to the Judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously are acting perversely"*

However, since the decision in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 it has been clear that, where a public body makes a finding of fact which is unsupported by any evidence or which is based upon a view of the evidence which could not reasonably be held, it will have erred in law.

39. With that in mind, I intend to address the various challenges made by the Claimant to the factual basis on which the decision was made and ultimately, the conclusion which was reached.

40. The most straightforward issue is perhaps the last issue raised by the Claimant, namely whether the autrefois acquit / abuse of process principle is actually engaged on the facts of this case. I find that it is. The question is whether the two offences are founded on the same, or substantially the same facts. I fully accept that in a case under s 30 of the Sexual Offences Act 2003 it is necessary to prove some sexual activity and a lack of capacity on the part of the victim. In an offence of rape there must be penetration and an absence of consent. To that extent the factual matrix for each

offence is different. The facts relied on by the prosecution in terms of the physical sexual activity are likely to be exactly the same in relation to each offence. The mischief behind the principle of both autrefois acquit and this aspect of abuse of process is that the Crown should be encouraged to bring one set of proceedings against the accused arising from the facts of a particular incident and should not ordinarily be allowed a second bite at the cherry if the first set of proceedings do not produce the desired result. It is clear from an examination of the facts of the most relevant cases of *Beedie, Dwyer* and *Antoine* that the proposed second charges would involve a slightly different factual matrix from the first (in particular *Beedie*) but they have in common that they arose from the same set of circumstances which gave rise to the need for criminal proceedings. In this case the same principles are clearly engaged.

41. The Claimant challenges the factual finding made by the decision maker that the charge of rape was fully considered by the relevant Crown Prosecutors. It is perhaps convenient to deal with this in two stages. Firstly, whether it was considered initially by the reviewing lawyer and secondly whether it was considered by Ms Gilmore when deciding to offer no evidence on the section 30 charge. The Claimant is correct to point out that there is no evidence now that a charge of rape was actually considered by the reviewing lawyer. This is because, somewhat surprisingly the CPS file has been destroyed sometime between the decision under challenge and these judicial review proceedings. It does appear however, from the contents of the decision letter, that when conducting his detailed review of the case Mr Goldman saw a record made at the time of the charging decision which persuaded him that the original prosecutor had considered the charge of rape:

> *"I have confirmed that as part of the original review of the case the offence of rape was considered but the prosecutor decided that section 30 was more appropriate. The original prosecutor considered the undermining material to be significant enough that the offences of rape did not pass the evidential stage of the code but that offences under section 30 did pass the evidential stage"*

42. Mr Goldman also makes specific reference to the notes from the reviewing prosecutor [A6] which adds weight to the suggestion that he reached his conclusion on the basis of contemporaneous records on the CPS file. There is further support for this in paragraph 17 of the advice of Ms Gilmore [C23] where she says:

> *"The rationale behind this reflected the view taken by Paul Nicholson when he initially reviewed the case and decided that there was no RPOC in relation to rape".*

In the light of this evidence it seems to me that Mr Goldman was entitled to reach the conclusion that the question of whether to charge Mr Baig with rape was fully considered by Mr Nicholson, the reviewing lawyer, when the initial charging decision was made and it was determined that there was no realistic prospect of a conviction on a charge of rape.

43. A more difficult question is whether Mr Goldman was also entitled to conclude on the evidence before him that the issue was revisited again by Ms Gilmore after the service

of expert evidence from Mr Baig suggesting that the Claimant had capacity to consent to sex. The evidence in favour of this factual finding is not strong. It appears to be accepted by both parties that the possibility of amending the indictment to charges of rape was not mentioned to the Claimant and her family either on the day of trial or at the meeting on 22nd July 2010 by Ms Gilmore. There is no real support for the proposition in the letter from Mr Penhale dated 26th May 2015 either, which is set out in paragraph eight above. Whilst conceding in terms that amending the indictment in this way did not appear to have been fully considered by the lawyers in the case he went on to deal with the conversation he had with Ms Gilmore. He records her recollection that amending the indictment was not considered because it would have fundamentally altered the way the prosecution was putting its case. This suggests not that the issue was not considered, but that it was considered and dismissed for the reasons set out above. If it was not considered at all (i.e. overlooked) no reasoning for the decision would need to be expressed. Mr Penhale also records her view that there would have been no realistic prospect of a conviction on the charges of rape but it is not clear whether she was expressing her view at the time or her ex post facto view at the time she discussed it with Mr Penhale. When dealing with Mr Penhale's letter Mr Goldman records:

> *"Therefore, second, he then went to speak personally with the barrister and she confirmed that she had considered rape, had rejected it on the grounds there was insufficient evidence to satisfy the code test and that therefore the indictment could not be amended"*

I cannot say that this is a fair or logical summary of what is contained in Mr Penhale's letter. Mr Goldman has however spoken to Mr Penhale and no doubt he might say that the sentence referred to above accurately reflects Mr Penhale's recollection even if an objective reading of his letter may not support it.

44. Mr Goldman also had the benefit of the written advice from Ms Gilmore which appears to summarise her recollection of the case. She says that an allegation of rape had been considered and discounted by the reviewing lawyer Paul Nicholson and nothing had changed between then and trial. She says it was something she considered and dismissed during the course of preparing the case due to the undermining evidence which is why she did not raise it in the conference with the family on 22nd July 2010. She alludes to the undermining evidence in paragraph 9 of her advice [C22] but she does not specifically say that she actually considered the possibility of amending the indictment to an allegation for rape before deciding to offer no evidence. She contends that she agreed with Mr Nicholson that such a charge would have no realistic prospect of a conviction but does not say in terms that she specifically considered this on the morning of trial. Mr Goldman however has specifically spoken to Ms Gilmore and it would appear that she has been able to convince him that she did specifically consider and discounted replacing the section 30 offences with rape at the time [A3].

45. I can understand why those who act for the Claimant might be sceptical as the contemporaneous recollections and records are more consistent with the Claimant's concern that no, or no adequate consideration was given to the issue of amending the indictment. An objective reading of the letter of 26th May 2015 might be said to give some support to this conclusion. If this were a professional negligence claim much

would turn on how convincing Ms Gilmore was in her evidence about what she considered and when, and why she did not record her views at the time. Similarly, Mr Penhale would have the opportunity to explain what he meant in his rather badly worded letter of 26th May 2015. As this is a judicial review claim I have not heard from either but it seems Mr Goldman has, as his decision letter expressly says he has spoken to both of them. It would be difficult to say it would be unreasonable of Mr Goldman to accept the assertions which both of his colleagues appear to have made to him as to find otherwise would be to conclude that they were untruthful. This is not a case where I can make an independent finding of fact but one where I have to consider whether it was open to him to reach the factual conclusion he did on the material before him. It is a conclusion which I would only have reached with considerable trepidation but I cannot say there was no evidence on which he could reach such a finding.

46. The Claimant alleges that if, contrary to her primary case, there was consideration of rape charges after the defence served their expert report, such decision not to amend the indictment was flawed. I fully accept, as does the Defendant that it was wrong not to seek an adjournment to fully consider the expert evidence, it was wrong not to discuss the issue with the Claimant and her family before the decision was taken and it was wrong to make assumptions about the Claimant's willingness and ability to give evidence despite her learning difficulties. I do not accept that the barrister prosecuting the case should have had a meeting with the Claimant to assess her potential credibility as this would not be usual but the officer in the case would normally have been able to provide an assessment of the Claimant's ability to deal with the undermining evidence in the witness box. The Claimant alleges that this decision was therefore flawed but of course this decision is not the one under review, it is Mr Goldman's decision which is under review.

47. Whilst I fully accept the Claimant's criticisms expressed in the preceding paragraph I also accept the Defendant's argument that whilst the family were treated disrespectfully and unfairly the admitted failures are unlikely to have had any effect on the overall decisions made. I accept that the decision not to proceed with the section 30 charges was one which the prosecutor was entitled to make and was founded in the concern that a jury might well accept the Claimant did have capacity to consent to sex. If the decision not to proceed with the rape charges was based on a view that such a charge had no realistic prospect of a conviction then, even after all proper delay and consultation the same decision would have been made.

48. The decision that the rape charges had no realistic prospect of conviction was not a capricious decision despite the fact that in 2016 Mr Goldman expressed disagreement with it. This was a case where the Claimant had not complained at the time the events happened, had sought to hide her pregnancy from her sister, had lied about who the father of the child was and had provided inaccurate evidence about the Interested Party having sexual relations with two other people who were clearly innocent. This does not mean that she was incapable of explaining away this undermining evidence or that she would not have been believed by a jury but it is an example of the type of prosecutorial judgment which Lord Bingham said in *ex parte Manning* was impossible to stigmatise as wrong even if one disagrees with it.

49. The Claimant also contends that the prosecutor misdirected herself on the law in particular as to the difference between the original charges and the proposed amended

charges of rape. This is based on the contents of her written advice which was dated 7th November 2016. I have set out the offending three paragraphs in paragraph 12 above. In the first paragraph her summary of the difference between the offences of rape and the section 30 offence is entirely accurate and legally correct. Her analysis of the capacity to make a choice and the capacity to consent being obverse sides of the same coin is also apposite. She perhaps falls into error when she said:

> *"The question of whether the complainant had the capacity to choose whether to have sex with the Defendant or whether she had the capacity to consent to having sex with him amounted to the same thing"*

Without perhaps adding that if she had capacity she was entitled to refuse to consent and there would then be an issue whether Mr Baig had a reasonable belief that she did consent. I think this is more of an example of an infelicitously worded advice than evidence that the prosecutor did not understand the difference between the two potential charges. It should be borne in mind that this advice was written over six years after the events it relates to.

50. The final issue is in relation to any prejudice to Mr Baig and whether a further prosecution would be unfair and oppressive towards him. Whilst the parties disagree about how this should be weighed in the balance the following considerations appear to me to be relevant:

i) When Mr Baig sought to challenge the assertion made by the Crown that the Claimant did not have the capacity to choose to have sex he might have reasonably anticipated (or his lawyers might) that the Crown would consider whether to charge him with rape;

ii) Whether Mr Baig would achieve a "wholly undeserved windfall" as referred to in *Antoine* is perhaps a moot point given that he contends he has a defence to the allegation of rape;

iii) Unlike the decision in *Antoine* over eight years have passed since the original proceedings ended;

iv) This delay is neither the fault of the Claimant or the Interested Party.

v) The serious allegations made by the Claimant have never been tried.

51. This brings me to an assessment of whether the decision maker was right to contend that a court faced with an abuse of process argument would inevitably rule that the prosecution should be stayed. The decision letter records the conclusion of the decision maker that no exceptional circumstances exist that could allow a Judge to exercise his or her discretion to allow the prosecution to proceed (although he later refers to special circumstances). He is clearly attempting to apply the test in Connelly v DPP expressed earlier in this Judgment. As Ms Justice Thirwall said in *Antoine*:

> *"It would be surprising, we think, were the requirement to prove special circumstances to lead to a different conclusion from the one reached where the question is whether to permit*

the case to continue would offend the court's sense of justice and propriety."

52. The reasoning behind these principles can be found in the Judgment of Sir John Thomas in R v J [2013] EWCA Crim 569:

> "There is no doubt about the fundamental principle that underpins the decision on this issue - a person is not to be harassed or prosecuted twice for a crime. Thus, if a person has been convicted of the crime previously, he cannot be tried again (*autrefois convict);* similarly, if he has been acquitted of a crime, he cannot be tried again for the crime (*autrefois acquit).* A well-known expression of the principle is that of Black J in the Supreme Court of the United States in *Green v United States* 355 U.S. 184, 188 (1957)
>
> *"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."*

In my view this applies equally to this category of abuse of process cases where autrefois acquit does not technically apply because the charge is different when the facts are substantially the same.

53. The assessment of whether an application for a stay for abuse of process will inevitably succeed involves a prospective assessment on the facts of the case how the Judge will choose to exercise his discretion. In doing so it is correct, in my view, not to look at the opposing submissions of the Claimant and Defendant as I have done in this judgment but to consider what evidence and submissions are likely to be before the Crown Court Judge who hears the application for a stay. Leading Counsel for the Claimant sought to argue that the Judge was obliged to consider all the evidence and consider whether it was likely that the decision not to pursue a charge of rape was ever made and if so was made after due consideration. He also submitted that the Judge would make his own assessment of Ms Gilmore and Mr Penhale and that the evidence they gave could not be predicted by this court. I have to bear in mind that a criminal prosecution is an adversarial process. I would expect that the Crown in responding to the abuse of process argument would have to give full disclosure to the Interested Party which would include the decision letter I assume. I can only expect them to put a case before the Crown Court which is consistent with what Mr Goldman says Ms Gilmore told him about the decision not to charge Mr Baig with rape, namely that it was fully considered and not pursued because it was thought that the evidential test under the Code could not be passed. Counsel for Mr Baig is not likely to challenge this assertion because it makes his abuse argument all the stronger to agree with it. In those circumstances I cannot see how the Judge is going to be likely to go behind that factual assertion at all as it is essentially agreed evidence. It would be entirely wrong for the Crown now to adopt the Claimant's position that no proper

consideration was given to the issue at all at the time just because that might suggest a special circumstance which would prevent a stay being granted when that does not accord with their official record as to what in fact occurred.

54. Leading Counsel for the Claimant criticises this point as self- serving and, to an extent, he is right. It would only be improper however if Mr Goldman had irrationally reached the conclusion that the charge of rape was fully considered at the time just to support an argument that no special circumstances existed. There is no evidence at all to suggest he had done this and, if he were minded to find an easy way to refuse to re-prosecute it would have been much simpler to record that he agreed that the evidence did not meet the evidential test in the code. This decision would have been almost impossible to challenge on a judicial review for the reasons I have outlined. So, whilst the argument is to an extent self-serving it is properly made as it is clearly necessary to consider what evidence and submissions are likely to be made to the Crown Court Judge to assess the likely prospects of success of an abuse application.

55. The Crown will therefore not be able to argue, as they did in *Antoine* that *"no one with the responsibility for prosecuting this case correctly applied their minds to the appropriate charges and how they should be prosecuted.*" Nor can they argue that "*The decision of the Crown Prosecutor in law is indefensible*" as in *Guest.* They can only say that a decision was taken by the reviewing lawyer that on his assessment there was no realistic prospect of a rape conviction but that more senior lawyers, more recently, have reached a different conclusion. I have found, that whilst I might not have concluded that Ms Gilmore revisited this issue before offering no evidence on the s 30 allegation, Mr Goldman was not acting irrationally or without any evidential foundation in accepting her assurance that she did. Even if I am wrong about that, I doubt it would make the case any stronger where rape was at least considered at the charging stage and found not to meet the evidential threshold.

56. The reason why it is sought to proceed with the allegation now when it was not done originally is of course key to the abuse of process argument. The general rule appears to be that the Crown are not allowed to pursue new charges arising out of substantially the same facts as in previous proceedings unless there are special circumstances which allow them to do so. As HHJ Farrell QC posed at first instance in Antoine:

> " *Have the prosecution satisfied me that in this particular case there are special circumstances which make it neither oppressive nor unjust to try this defendant on the charges set out in this indictment?"*

Another way of putting it would be whether allowing the prosecution to proceed would offend the court's sense of justice and propriety or undermine public confidence in the criminal justice system.

57. Taking into account of the other circumstances relevant to this case, the fact that Mr Baig denies the offence probably makes his claim for a stay on grounds of abuse of process stronger. It is difficult to conclude that Mr Baig has so far had an *"unexpected astonishing and underserved windfall"* in having not to date faced rape charges as of course he may not be convicted at the end of a trial.

58. In my view the delay between the decision not to proceed and any further charges over eight years later is similarly an argument which adds weight to the case for a stay on grounds of abuse of process. I fully accept that prosecutions are regularly brought in relation to offences which occurred decades ago and the court has to do its best to ensure a fair trial. The Claimant relies on *R V S (SP)* [2006] EWCA Crim 756 as authority for the proposition that even unjustifiable delay would not normally justify a stay on the grounds of abuse of process. This was however an example of the first category of abuse of process, where it is contended that a fair trial is not possible. The Judge could regulate the trial process to remediate any disadvantage to the Defendant. In this case I am concerned with the second category of abuse of process where it is contended it is *unfair* to try the accused at all. It is significant in my view that the delay in both *Antoine* and *Guest* where special circumstances were found, the issue was raised within a maximum of four weeks in both cases. In *Beedie* there was a substantial delay which was considered a relevant issue when the decision was reviewed by Thirwall J in *Antoine* (paragraph 27):

> *"We note the delay between the death of the young woman and the inquest, the circumstances in which the appellant had given evidence and the further delay before charge"*

This contrasted with *Antoine* where new charges were brought 9 days after sentence for the first offence.

59. In *Beedie* Lord Justice Rose confirmed that the two matters there relied on by the Crown, namely the public interest in the prosecution of cases where death occurs and the wishes of the victim's family, whilst good reasons to permit the prosecution to continue did not give rise to special circumstances.

60. On my assessment the only factual issue which the Crown could possibly pray in aid whilst resisting an abuse argument would be the fact that the original proceedings were abandoned without any consultation with the victim or her family, there was then no consultation with them about alternative charges and that inaccurate and unfair assumptions were made about the Claimant's willingness and capability of giving evidence. It is difficult to see how such an argument could be persuasive where the CPS will say that at the time it was thought there was no realistic prospect of a conviction on the charge of rape. If that is right the CPS would not have amended the indictment to plead rape even after full, fair and proper consultation with the victim.

61. This category of abuse of process decisions is clearly unusual, probably because the Crown rarely attempts to retry a Defendant for a different offence arising out of the same facts as a previous prosecution. The cases where they have successfully done so are few, and appear to arise out of exceptional cases where admitted serious errors in charging decisions are made, against guilty defendants where efforts are made to right the wrong in the interests of justice very promptly. It is not surprising in these cases that the court finds that the court's sense of justice and propriety is not offended by the new proceedings. In this case a genuine decision appears to have been made that there was no realistic prospect of a conviction for rape about which there is now a genuine disagreement with a current Crown Prosecutor. The accused maintains his innocence and is likely to resist a further prosecution on the understandable grounds that the Crown should have tried him for this offence in 2010 had they considered they had the evidence. He may properly argue that it is unfair and oppressive for him

to be tried again for a different offence arising out of the same facts some eight years later or more. I conclude, like Mr Goldman, that a Crown Court Judge would inevitably grant a stay of the subsequent proceedings on grounds of abuse of process.

62. **Conclusion**

It follows from this finding that the claim for judicial review is dismissed.