Michaelmas Term

[2017] UKSC 63

On appeal from: [2015] NIQB 33

JUDGMENT

In the matter of an application by Jason Loughlin for Judicial Review (Northern Ireland)

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Carnwath

Lord Hughes

JUDGMENT GIVEN ON

18 October 2017

Heard on 20 June 2017

Appellant	Respondent (Loughlin)
Tony McGleenan QC	David A Scoffield QC
Peter Coll QC	Donal Sayers
(Instructed by Public Prosecution Service)	(Instructed by Reavey & Company Solicitors)

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(Stewart
Ronan Laver
Andrew
McGuinnes
(Instructed by
Law)

LORD KERR: (with whom Lady Hale, Lord Wilson, Lord Carnwath and Lord Hughes agree)

Introduction

1.
This case concerns the circumstances in which sentences passed on assisting offenders (that is, offenders who have given assistance to prosecuting authorities) should be referred back to the

sentencing court under section 74 of the Serious Organised Crime and Police Act 2005. The Divisional Court in Northern Ireland ([2015] NIQB 33, Morgan LCJ, Weir J and Treacy J) concluded that the decision of a member of the Public Prosecution Service (PPS) not to refer to the original sentencing court the sentences passed on Robert and David Stewart should be quashed. PPS appeals that decision.

The relevant facts

2.
Robert and David Stewart are brothers. They had been, by their own admission, members of a loyalist paramilitary organisation in Northern Ireland for several years. On 4 August 2008, they went to a station of the Police Service of Northern Ireland (PSNI) in Antrim. There they admitted having been involved in the murder of a man called Thomas English. Mr English had been killed on 30 October 2000. After many interviews with police officers, the Stewart brothers entered into agreements with a specified prosecutor, Mr Raymond Kitson. A specified prosecutor is a person nominated in section 71(4) of the 2005 Act or a person designated for the purposes of the section by one of the nominated individuals. Mr Kitson, who was a member of the PPS, was duly designated as a specified prosecutor under this provision.

3.
The agreements were made on 15 October 2008. Among other things, they required the Stewarts to "assist … in … the investigation being conducted by the Police Service of Northern Ireland into offences relating to the murder of Thomas English on 31 October 2000 ... and into other offences connected and unconnected with [that] incident …". The agreements also required that the Stewarts participate in a debriefing process, that they should provide all information available to them and give a truthful account of the activities of all others involved. It was further stipulated that the Stewarts plead guilty to the offences to which they had admitted. It was also required that they maintain continuous and complete co-operation throughout the investigation and any consequent court proceedings and that they give truthful evidence in any court proceedings arising from the investigation. The agreements stated that failure to comply with their terms could result in any sentence the Stewarts might receive being referred back to the court for review pursuant to section 74 of the 2005 Act.

4.
On 10 February 2010, the Stewarts duly pleaded guilty to various offences, including murder, and on 5 March 2010, they were sentenced to life imprisonment. Hart J, a very experienced criminal judge, stated that, in normal circumstances, the tariff for these offences would be 22 years. He applied a 75% reduction on that notional tariff, taking account of the Stewarts' assistance under the 2005 Act. The judge then further reduced the period to be served in light of their guilty pleas and personal circumstances. The final effect was that the Stewarts were required to serve a minimum term of three years before they could be considered for release on licence. Taking into account the period that they had served on remand, they were both released on life licence on 18 August 2011.

5.
As a result of the interviews with the Stewarts, a number of persons were charged with various offences. Following a lengthy trial before Gillen J, all but one were acquitted of the charges. The single defendant to be convicted was found guilty on the basis of evidence other than that given by the Stewarts. The respondent, Jason Loughlin, was one of the accused who was acquitted. He applied for

judicial review of the decision not to refer the case of the Stewarts back to the sentencing court and it was his application which succeeded before the Divisional Court.

6.
A number of observations can be made about the trial:

(i)
There were 14 defendants and 37 counts on the indictment comprising five episodes or instances of alleged criminal behaviour. By any standards, this was a case of considerable complexity which would have presented substantial challenges to all involved in it, including the principal witnesses;

(ii)
The Stewarts gave evidence over 26 and 30 days respectively. They were each subject to cross-examination by no fewer than 14 sets of counsel for the accused; clearly, the opportunity to exploit even minor differences in evidence and recollection will increase as testimony about a significant number of historical events is repeatedly - albeit entirely properly - challenged and scrutinised;

(iii)
An application for a direction of no case to answer on all counts was made to the trial judge at the end of the Crown case. Gillen J held that the proper test to be applied was that outlined in R v Courtney [2007] NICA 6, which had applied the principles set out in R v Galbraith 73 Cr App R 124, R v Shippey (1998) Crim LR 767 and Chief Constable v Lo [2006] NICA 3. The judge therefore held that he must "look at all the evidence whether supportive of the Stewart brothers or otherwise and ask myself whether that evidence is not so weak or so discredited that it could not conceivably support a guilty verdict" - para 15 of the judgment on the application for a direction [2012] NICC 3. He refused an application on all but two counts.

(iv)
None of the accused gave evidence on their trial;

(v)
The judge expressed himself as not having "the slightest difficulty [in] accepting in general terms" the statement by the Stewarts throughout their evidence that a variety of circumstances had contributed to faulty recollections on their part - para 252 of his principal judgment [2012] NICC 5;

(vi)
The judge concluded that the Stewarts had lied to the police and to the court. He conducted a wide-ranging, painstaking examination of their evidence. Frequently, in his judgment, he acknowledged the extreme difficulty in reaching conclusions about whether accounts he found to be unreliable were the product of imperfect memory, the ravages that alcohol and drug consumption had wrought on both witnesses, the circumstance that both had been engaged in long careers of criminal offending, a natural inclination to understate their own role and to exaggerate that of others, or plain fabrication. But it is unquestionably true that in a number of instances, the judge found that the Stewarts had not been truthful.

The 2005 Act

7.
The background to the 2005 Act is well explained in the judgment of the Court of Appeal in R v P and Blackburn [2007] EWCA Crim 2290. At para 22 the court said this:

“There never has been, and never will be, much enthusiasm about a process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence against those who participated in the same or linked crimes, or in relation to crimes in which they had no personal involvement, but about which they have provided useful information to the investigating authorities. However, like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention. The stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would escape justice. Moreover, the very existence of this process, and the risk that an individual for his own selfish motives may provide incriminating evidence, provides something of a check against the belief, deliberately fostered to increase their power, that gangs of criminals, and in particular the leaders of such gangs, are untouchable and beyond the reach of justice. The greatest disincentive to the provision of assistance to the authorities is an understandable fear of consequent reprisals. Those who do assist the prosecution are liable to violent ill-treatment by fellow prisoners generally, but quite apart from the inevitable pressures on them while they are serving their sentences, the stark reality is that those who betray major criminals face torture and execution. The solitary incentive to encourage co-operation is provided by a reduced sentence, and the common law, and now statute, have accepted that this is a price worth paying to achieve the overwhelming and recurring public interest that major criminals, in particular, should be caught and prosecuted to conviction.”

8.
The 2005 Act placed the common-law position on a statutory footing. In its material parts, section 73 of the Act, dealing with reductions in sentences which may be passed on assisting offenders provides:

“73. **Assistance by defendant: reduction in sentence**

(1) This section applies if a defendant -

(a) following a plea of guilty is either convicted of an offence in proceedings in the Crown Court or is committed to the Crown Court for sentence, and

(b) has, pursuant to a written agreement made with a specified prosecutor, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence.

(2) In determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered.

(3) If the court passes a sentence which is less than it would have passed but for the assistance given or offered, it must state in open court -

(a) that it has passed a lesser sentence than it would otherwise have passed, and

(b) what the greater sentence would have been …”

9.
As the facts of this case illustrate, substantial reductions in sentences, even for the most serious crimes, may be achieved under this section. Indeed, as the Divisional Court pointed out, section 73(5) of the 2005 Act permits the sentencing court to decide on a reduction which would have the effect of imposing a sentence of less than the minimum term that is otherwise prescribed by law.

10.

Since sentences passed on those who have entered agreements under section 74 will, at least usually, be imposed before any assessment of their adherence to the terms of the agreement can be made, it is unsurprising that the 2005 Act provides for possible review of the sentences passed. The circumstances in which such a review may take place are provided for in section 74 which, so far as is material, provides:

"74. **Assistance by defendant: review of sentence**

(1) This section applies if -

(a) the Crown Court has passed a sentence on a person in respect of an offence, and

(b) the person falls within subsection (2).

(2) A person falls within this subsection if -

(a) he receives a discounted sentence in consequence of his having offered in pursuance of a written agreement to give assistance to the prosecutor or investigator of an offence but he knowingly fails to any extent to give assistance in accordance with the agreement …

(3) A specified prosecutor may at any time refer the case back to the court by which the sentence was passed if -

(a) the person is still serving his sentence, and

(b) the specified prosecutor thinks it is in the interests of justice to do so.

(4) A case so referred must, if possible, be heard by the judge who passed the sentence to which the referral relates.

(5) If the court is satisfied that a person who falls within subsection (2)(a) knowingly failed to give the assistance it may substitute for the sentence to which the referral relates such greater sentence (not exceeding that which it would have passed but for the agreement to give assistance) as it thinks appropriate …"

11.
Two aspects of this section deserve special mention. First, so far as the Stewarts are concerned, it was a prerequisite of consideration whether to refer their sentences that they knowingly failed to give assistance in accordance with the agreement. (Sub-paragraphs (b) and (c) of section 74(2) prescribe other circumstances in which a referral may be made but they are not relevant here.) Unless, therefore, it is concluded that the Stewarts had knowingly failed to comply with the agreements, they do not come within section 74(2) and the section does not apply to them.

12.
The second feature of the section which should be noted is that, even when it is concluded that assisting offenders such as the Stewarts have knowingly failed to give the assistance in accordance with the agreement, the specified prosecutor must address the question whether it is in the interests of justice to make the reference. It is only when she or he thinks that it is in the interests of justice that this should happen, that the reference may be made.

13.
Before the Divisional Court, some debate was engaged about whether the test was that the interests of justice required that the sentences be referred. For reasons that I will give presently, I do not

consider that it is useful to approach the question of what is in the interests of justice as one of necessity. But it is equally undesirable, in my view, to constrain the specified prosecutor's consideration of whether the interests of justice indicate one course or the other, by reference to a test which has not been referred to in the statute, such as whether the circumstances have changed from those in which the original sentences were passed. Again, I will give my reasons for that conclusion later in this judgment.

The specified prosecutor's consideration of whether to refer

14.
Pamela Atchison was the deputy Director of Public Prosecutions for Northern Ireland at the time that consideration was undertaken as to whether the sentences passed on the Stewarts should be referred to the original sentencing court. She was designated as the specified prosecutor to consider whether such a reference should be made. Mrs Atchison took the advice of experienced senior counsel on some aspects of her decision but she has stated that the conclusion that she reached was hers alone.

15.
The reasons she decided not to refer the Stewarts' case were outlined by Mrs Atchison in a lengthy document of some 260 paragraphs. In it, she explained that she had concluded that both Stewarts had knowingly failed on a number of occasions to give the assistance which they had undertaken to provide. Her conclusions broadly reflected those in which Gillen J had decided that the witnesses' evidence was deliberately mendacious. The respondent has claimed that this fell impermissibly short of the proper examination of this issue. In effect, the respondent argued that the specified prosecutor was required to examine minutely every conceivable aspect of the Stewarts' accounts, both during their evidence in court and in their interviews before the trial. The Divisional Court did not accept that argument. Nor do I.

16.
Quite apart from the impossible logistical burden which this would have imposed on the specified prosecutor, the respondent's argument rested mainly on the proposition that, because the trial judge had referred in general terms at various points in his judgment to the Stewarts having lied, this should have prompted the specified prosecutor to examine their accounts intensely to decide whether there were instances of a failure to comply with the agreements into which they had entered and which had not been referred to by the judge. The lack of realism of this submission is exposed when one considers that Gillen J's judgment on the application for a direction of no case to answer consisted of 85 paragraphs and his final judgment ran to 556 paragraphs. Both judgments were carefully considered by Mrs Atchison and every specific instance in which the judge found that the Stewarts had lied was analysed by her in detail. It was entirely reasonable for her to conclude that the judge had examined meticulously all the evidence on the question of whether the Stewarts had lied. The specified prosecutor was therefore perfectly entitled to concentrate on those passages of the judgments which dealt directly with that issue.

17.
On the question of whether it was in the interests of justice that the case be referred to the sentencing court, the specified prosecutor outlined a number of reasons which led her to the conclusion that it should not be. Of the five breaches by David Stewart of the undertakings that he had given, she said that these either did not attribute criminal conduct to the accused (beyond that which had otherwise been alleged) or were self-serving lies which undermined his credibility rather

than imputing criminal conduct to an innocent individual. To put the significance of Stewart's lies further in context, Mrs Atchison at para 247 of her decision document said this:

"… the issue of lies was only one of several issues that impacted negatively upon the credibility of [David Stewart]. Further issues, all of which were significant, included his previous bad character, his abuse of alcohol and drugs, the possibility of contamination, his difficulties with memory, and his tendency to confuse incidents and the details of those participating in them. In these circumstances, I do not consider it possible to conclude that the breaches per se were in any way determinative of the outcome of the trial."

In other words, even if David Stewart had not told lies about these incidents, the other frailties in his testimony were just as likely to lead to the same result. In a word, it was impossible to conclude that the fact of lying was in any way pivotal.

18.
Mrs Atchison identified five factors which, she said, were of primary importance in deciding not to refer David Stewart's case to the court which had sentenced him. These were:

a. The nature and extent of the assistance provided.

She concluded that David Stewart had given very significant evidence to the police and that this was a factor in his favour.

b. The time which had elapsed since the original sentence had been passed.

The duration of any return to custody, if ordered, was likely to be short, in her estimation, given the nature and materiality of the breaches and the fact that more than 18 months had elapsed between his release from prison and her consideration of whether to refer the case back to the sentencing court. (Her report was prepared in April 2013.)

c. Whether the imposition of a revised sentence might be considered oppressive.

In this context, medical evidence suggested that, if he was returned to prison, there was a risk to David Stewart's life. While Mrs Atchison accepted that this consideration was not determinative of whether the case should be referred, it was a factor of some weight against taking that course.

d. The potential damage to public confidence in the justice system if a referral was not made.

The specified prosecutor accepted that public confidence might be undermined if it was perceived that an assisting offender had failed to comply with undertakings on which a discounted sentence was based. But this was offset by the consideration that the failure to comply did not result per se in the acquittal of the defendants. Moreover, in light of the risk that a referral would not result in an increase in the sentences, there was a chance that, so far from increasing confidence in the 2005 Act regime, it would have the opposite effect.

e. The prospects of a successful application to the reviewing court.

Mrs Atchison pointed out that, section 74(5) invests the reviewing court with a discretion as to what, if any, sentence it should substitute where there had been a breach of the section 73 agreement. The court was likely to have regard to the same or similar factors which had influenced her decision. The prospects of a referral resulting in a change in sentence were low, therefore, in her view.

19.

The specified prosecutor carried out a similar analysis in relation to Robert Stewart. In his case, only two instances of deliberate untruths were identified. For similar reasons to those expressed in relation to his brother, Mrs Atchison decided that his case should not be referred.

The Divisional Court's judgment

20.
Central to the Divisional Court's decision was its consideration of R v P and Blackburn [2007] EWCA Crim 2290. The court considered that the critical passage from the Court of Appeal's judgment was para 33. This is what Morgan LCJ said about it in para 56 of his judgment:

"At para 33 the court indicated that a review under section 74 is a fresh process which takes place in new circumstances. We consider that this analysis is helpful in understanding how the prosecutor should approach the interests of justice test in section 74(3)(b) of the 2005 Act. If the prosecutor concludes that the failure to give assistance is such that the court could not conclude that the circumstances had altered as a result, the interests of justice would rarely require referral. If, as is generally likely to be the case where there has been a failure or refusal to provide assistance, the court could take the view that the circumstances had changed the interests of justice would point towards a referral unless there were countervailing considerations. It is with those principles in mind that we examine the approach of the prosecutor in this case."

This statement suggests that, absent "countervailing considerations", where there had been a "change in circumstances", a referral to the original sentencing court should occur. That proposition, if correct, would involve a radical circumscription of the specified prosecutor's consideration of where the interests of justice lay. A close examination of what the Court of Appeal in fact said in P and Blackburn is therefore necessary.

21.
Before conducting that examination, it should be observed that passages from the Divisional Court's judgment put beyond doubt that the critical question for that court was whether circumstances had changed. At paras 63 and 64 of his judgment, the Lord Chief Justice said that "… the first task of the prosecutor is to determine whether the court [to which the sentence might be referred] could conclude that the circumstances had changed" and "[t]he prosecutor did not ask whether the court could conclude that the circumstances had changed".

22.
These statements suggest (i) that the specified prosecutor, in deciding where the interests of justice lay, must first address the question whether it was possible that the sentencing court might conclude that there had been a change in circumstances from those which obtained when the original discounted sentence had been passed; and (ii) that if she decided that such a possibility existed, unless there were countervailing circumstances, she was bound to conclude that it was in the interests of justice that the cases be referred to the original sentencing court. For reasons that I will give later, I do not consider that either of these propositions is right.

R v P and Blackburn

23.
In the case of P, he had been charged with offences arising from the importation of controlled drugs. While awaiting trial, he instructed his solicitor to contact police officers investigating a murder, which had occurred some years earlier. A meeting was arranged between the applicant and a senior

investigating police officer. During the meeting, P provided information relating to the murder. He also told police about unrelated criminal activity by a major drug dealer. In due course, he pleaded guilty to various charges. All of this took place before the coming into force of the 2005 Act and, although the trial judge was informed of P's co-operation, it was clear that this had not led to any police investigation of the crimes which P had told the police about nor to any particular risk to him. A sentence of 17 years was imposed.

24.
After he had been sentenced, P contacted the police again. He provided information relating to a current murder investigation and agreed to give evidence against those persons alleged to be responsible for the murder, as well as detailing the criminal offences which he had personally committed. The led to a document being prepared by a senior police officer for the purposes of P's appeal against sentence. As a result his sentence was reduced to 15 years' imprisonment. Again, this took place before the coming into force of the 2005 Act.

25.
After that Act came into force in April 2006, P entered an agreement with a specified prosecutor. This was in similar terms to the agreements made with the Stewart brothers in this case. P not only supplied information about the criminal activity of others, he admitted to a series of offences which had not been involved in his earlier appearances before the courts. He and his family were considered to be at serious risk as a consequence of the information which he supplied about crimes committed by others.

26.
P came before the criminal courts again, firstly, to be sentenced in relation to the offences that he had lately admitted but also on a reference back under section 74(3) of SOCPA by the specified prosecutor for a review of the sentence of 15 years' imprisonment, as substituted by the Court of Appeal for the original sentence. This, then, was the converse of the situation in which a reference back to the original sentencing court in the case of the Stewarts was considered. As a result of the further co-operation given by P, plainly the specified prosecutor considered that a reduction of the sentence of 15 years should be considered. The judge agreed. As well as sentencing P for the newly admitted offences, he reviewed the sentence of 15 years and substituted for this one of five years' imprisonment. The Court of Appeal did not disturb this sentence but it reduced the sentence for the offences to which P had been required to admit as a result of his involvement in the agreement made under the 2005 Act.

27.
Blackburn's case is less directly relevant to the issues which arise in this appeal. He had entered an agreement under the 2005 Act with a specified prosecutor before he appeared before Simon J. He was sentenced to four years' imprisonment and his appeal was, essentially, confined to the argument that this did not entirely reflect the appropriate discount for the assistance which he had given and that the overall starting point was too high. The Court of Appeal accepted those arguments and reduced the sentence to two and a half years' imprisonment.

28.
A clear insight into the circumstances in which the Court of Appeal considered that it should review the substituted sentence is critical to the outcome of this appeal. Did it suggest that a change in circumstances from those which existed at the time that the originally discounted sentence was

passed would normally call for a reference back to the sentencing court? The answer to that question must begin with an examination of what the Court of Appeal actually said in para 33:

“33. P’s appeal raises a specific question relating to the involvement of this court. The original 17-year sentence was reduced to 15 years when this court exercised its powers under section 9 of the Criminal Appeal Act 1968. The jurisdiction to conduct a review of sentence on the basis of post-sentence assistance is vested in the Crown Court. Its decision on the review is subject to appeal to this court. Therefore, the review itself is not an appeal against sentence, whether imposed in the Crown Court or this Court. It is a fresh process which takes place in new circumstances. Accordingly, the process of review is not inhibited by the fact that this court has already heard and decided an appeal against the original sentence, whether the sentence is varied on appeal or not. This Court may be required to address either a sentence imposed in the light of the written section 73 agreement, or a review conducted in accordance with section 74, or, as here in the case of P, where the assistance provided may impinge on both decisions.”

29.
From this passage, it is clear that the Court of Appeal was referring to the “fresh process” in order to distinguish it from a conventional appeal against sentence and to make the point that the review could proceed, unconstrained by the fact that an earlier appeal had taken place. The court did not suggest that a change in circumstances should normally precipitate a referral to the sentencing court. In fact, of course, in the case of P there was a change in circumstances in that he had latterly decided to give useful information to the police and had agreed to testify against former colleagues. It was this which had prompted the decision to refer. Clearly, P’s change of heart and his willingness to assist in the police operation against serious criminals was considered to warrant the referral. But it is wrong to extrapolate from this that, where a change in circumstances (such as a failure to comply fully with an agreement made with a specified prosecutor) occurs, this will inevitably, or even usually, lead to a decision to refer.

30.
As I have said earlier, P’s case was the obverse of the Stewarts. The enhanced level of his co-operation prompted a referral in order to secure a greater discount on his sentence. In the case of the Stewarts, the question was whether their failure to live up to the expectations generated by the agreement required a referral “in the interests of justice”. In a case such as the Stewarts, it is difficult to think of a situation in which a referral back to the sentencing court would be contemplated unless circumstances had changed. Indeed, from the statements contained in paras 63 and 64 of the Divisional Court (referred to in para 20 above) it is clear that the court considered that, if the specified prosecutor believed that there was a possibility that the sentencing court might consider that the circumstances had changed, it was her duty to refer. In effect, any lapse from the co-operation expected of an assisting offender would require the specified prosecutor to refer. How otherwise could she conclude that there was no possibility that the sentencing court would conclude that circumstances had not changed? If the Divisional Court’s formulation was correct, the decision of the specified prosecutor as to whether it was in the interests of justice to refer the case back to the sentencing court would have no meaningful content. If there was the merest deviation by the assisting offender from the agreement made with the specified prosecutor, the case would have to be referred.

Discussion

31.

The Divisional Court's view that the predominant factor in deciding where the interests of justice lay was whether a change in circumstances had occurred between those which obtained at the time that the agreement with the specified prosecutor was made and the time at which consideration of whether to refer the case back to the original sentencing court took place cannot be upheld. Consideration of the interests of justice in this context involves an open-ended deliberation. Section 74(3) imposes no explicit constraint on how the specified prosecutor should approach the question and there is no warrant, in my opinion, for implying a fetter on the exercise of the unrestricted discretion for which the statute clearly provides.

32.
It is not difficult to envisage a wide range of factors beyond the question of whether circumstances had changed which might be pivotal in deciding if the original sentence should be referred back to the court which imposed it. Reasons for a failure to strictly adhere to the terms of the agreement with the specified prosecutor could range over a broad spectrum of possibilities. If a change of circumstances is considered to occur when the assisting offender gives testimony which is at odds with the account that he originally gave to the police, what if, despite this, a number of the accused were convicted on the basis of his evidence? Could it be said that the interests of justice inevitably require referral back to the sentencing court? Or, if the witness, because of a well-established fear of attack on his family, recants on the evidence that he had agreed to give, is that to be left out of account in deciding whether the interests of justice demand that there be a referral to the original sentencing court?

33.
It is not suggested that the factors which Mrs Atchison took into account were irrelevant to a consideration of where the interests of justice lay, provided that consideration is untrammelled by the precondition which the Divisional Court believed should apply. Hers was an open examination of that question. In my view, she was not only entitled to approach the issue in that way, she was obliged to do so. I consider that her report demonstrates a careful, perfectly legitimate investigation of the question of the interests of justice in these particular cases and that her conclusions cannot be impeached.

Other incidental arguments

34.
The appellant submitted that the challenge in this case was to a species of prosecutorial decision, analogous to that as to whether to instigate criminal proceedings. Mr McGleenan QC argued that cases such as R v Director of Public Prosecutions, Ex p Manning [2001] QB 330; Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20; [2006] 1 WLR 3343; In re Lawrence Kincaid [2007] NlQB 26; Sharma v Brown-Antoine [2007] 1 WLR 870; McCabe [2010] NIQB 58; and In re Mooney's Application [2014] NIQB 48 all impelled reticence on the part of a court in reviewing any prosecutorial decision. I do not feel it necessary to address this argument. The decision under challenge here is certainly one taken by a prosecutor. Whether it is truly analogous with a decision whether to instigate criminal proceedings (as in the cited cases) is significantly less clear. Many considerations which touch on the question of whether proceedings should be instituted are not relevant in the present context.

35.
For the respondent, Mr Scoffield QC submitted that the overweening consideration in the interests of justice consideration was that an "appropriate sentence" be passed on the Stewarts for their admitted egregious crimes and that this should be primarily a matter for a court, rather than the specified

prosecutor, to decide. I reject this argument principally because of its implicit premise which replicates the approach of the Divisional Court that the specified prosecutor should defer to the sentencing court's possible view that a different sentence would be appropriate. The specified prosecutor may well have to consider many factors which would not be directly relevant to a conventional sentencing exercise. Factors quite extraneous to the personal circumstances of the individuals who might be subject to a referral might properly influence the specified prosecutor's decision. It might well be relevant, for instance, that a decision to refer could affect the possibility of others offering the type of assistance which assisting offenders such as the Stewarts said that they were prepared to provide.

36.
It was argued that, at various points in the document in which Mrs Atchison explained why she had decided not to refer the Stewarts' case, she had stated that the interests of justice did not "require" that the cases be referred. It was suggested that this betokened a view that unless the interests of justice positively required a referral, it should not take place. The specified prosecutor repudiated that suggestion. She explained that this was merely a form of words which she customarily used when reaching a decision as to where the interests of justice lay. There is no reason to invest the use of these words with the significance that the respondent has sought to ascribe to them.

Conclusion

37.
I would allow the appeal and dismiss the respondent's application for judicial review.