



CPS

**FINDINGS OF THE INDEPENDENT SCRUTINY INTO CPS
HANDLING OF
THE RELATED PROSECUTION IN
R (ON THE APPLICATION OF B) v DPP (2009) EWHC 106 (ADMIN)**

1. INTRODUCTION

- 1.1 In January 2009 the Administrative Court gave judgment in the case of **R (on the application of B) v DPP (2009) EWHC**. A copy of the judgment is attached to this report at **Annex A**.
- 1.2 The case in the Administrative Court concerned a prosecution that was stopped by the Crown Prosecution Service (CPS) at the Crown Court against a defendant “HR”¹. The complainant in that case, “FB” who had a history of mental illness, challenged the CPS decision to stop the case. The Administrative Court concluded that the CPS decision was unlawful and in breach of the complainant’s Article 3 rights². Although the decision to stop the case could not be reversed the Administrative Court made an award in favour of FB because even though a trial would not have necessarily resulted in the conviction of any person, FB was deprived inappropriately of the opportunity to participate in proceedings. In addition, his self respect was damaged because he was made to feel that he was beyond the protection of the law.
- 1.3 In view of the judgment of the Administrative Court, the Chief Crown Prosecutor (CCP) for London asked a member of London’s Hate Crime Scrutiny Panel (HCSP), Mari Taber, the Director of MIND in Kingston, to examine the circumstances of the case to see what lessons could be learned. The independent members of the HCSP regularly examine prosecution files in serious cases to identify good practice and areas for improvement for CPS London. Ms. Taber, in view of her expertise in the area of mental health and experience on the HCSP was therefore particularly well placed to conduct a review. The review is set out in paragraph 4 and Ms. Taber has supervised the production of this report.
- 1.4 The terms of reference adopted for this review were:

“ To consider what lessons can be learnt by the CPS from the decision to offer no evidence in criminal proceedings that were subject to the judgment of the Administrative Court in **R(on the application of B) v DPP (2009) EWHC 106 (Admin)**, with particular reference to the treatment of complainants with mental health issues.”

- 1.5 There is no doubt that the Administrative Court judgment highlighted a number of issues that have fed into wider policy

¹ In order to protect identities of those involved in the criminal case which gave rise to the Administrative Court hearing, this report has used the initials adopted by the Administrative Court when referring to particular individuals.

² Article 3 of the Human Rights Convention provides: “No-one should be subject to torture or to inhuman or degrading treatment or punishment.”

considerations. The recent publication of national CPS policy on “Supporting victims and witnesses with mental health issues”³ sets out the approach adopted by the CPS when dealing with victims and witnesses with mental health issues. It was not the intention of this review to provide policy guidance but to provide some assistance to prosecutors who are required to deal with many cases on a day to day basis.

2. SUMMARY OF FACTS

2.1 In short, the prosecution involved an allegation against HR that he bit off part of FB’s ear on Boxing Day 2005 and threatened FB and his family if he reported the incident to the police. HR was charged with wounding with intent to cause grievous bodily harm and witness intimidation. The prosecution was stopped by the CPS when it received a medical report from Dr C, a consultant psychiatrist, because prosecution lawyers formed the opinion that FB was not a reliable witness. Without FB there was insufficient evidence to put before a jury and the defendant was acquitted.

2.2 The events surrounding the prosecution of the case against HR are fully set out in the judgment of the Administrative Court. Paragraph 40 of that judgment provides a summary account and is repeated here for ease of reference:

- i. *FB suffered a serious assault on Boxing Day 2005 in which part of his ear was bitten off.*
- ii. *Whoever may have been responsible for the first use of violence, no one could plausibly suggest that the biting of FB’s ear could have been an act done in lawful self defence, so the only real issue in relation to the assault was the identity of the ear biter.*
- iii. *FB gave a coherent and, on its face, credible account of events at a time when they were still fresh in his mind, in which he identified HR as the ear biter. He later identified HR, whom he knew, at an identification parade.*
- iv. *There was no doubt that FB was right in identification of the time and place of the incident, the number of people present and (subject to one possible exception) who they were. Whether or not FB was right in his identification of HR as the ear biter, his general account of the episode was not an imaginary account of something which had never taken place.*

³ This can be found on the CPS website at www.cps.gov.uk

- v. *FB had a history of psychotic illness in which he at times held paranoid beliefs about certain people and suffered auditory and visionary hallucinations.*
- vi. *He had insight into his condition in that he recognised that such beliefs and experiences were abnormal but they appeared normal to him.*
- vii. *There was no evidence that FB had shown previous hostility towards HR or held paranoid beliefs about him.*
- viii. *Dr C concluded that all material times FB suffered from a mental condition which might affect his perception and recollection of events so as to make his account unreliable. Dr C did not suggest that FB was incapable of giving reliable evidence. His opinion was expressed in general terms. He was not asked, for example, to comment on whether there was any medical reason to think that FB's identification of HR as the ear biter, in the context described above, might suggest that he was hallucinating or be explicable on that basis. Although no attempt had been made to explore such matters with Dr C, he was due to attend the trial when further questions could be put to him.*
- ix. *No attempt was made to discuss Dr C's report with FB or his solicitors, or to explore with FB his ability to discern when his beliefs and auditory or visual experiences were abnormal, although he was expected at court at the time when the decision to offer no evidence was being taken (and arrived shortly after the decision had been carried out).*

3. THE DECISION MAKING PROCESS

- 3.1 The CPS decides which cases to prosecute by applying the Code for Crown Prosecutors – the Code⁴. The Code has two stages. Both stages must be passed before a case can be prosecuted. First there must be sufficient evidence to provide a realistic prospect of conviction and second, it must be in the public interest to prosecute. The CPS does not act for the victims of crime in the same way as solicitors act for their clients. The CPS acts on behalf of the public.
- 3.2 When prosecutors are deciding whether there is sufficient evidence for a case to continue, they have to consider whether the evidence is reliable and credible. This is part of the Code. The starting point for prosecutors should be that the witness is credible and reliable. It should never be assumed that someone is not credible or capable of giving evidence just because they have a mental health issue.

⁴ A full copy of the most recent edition of the Code can be viewed on the CPS website at www.cps.gov.uk

3.3 Each case must also be reviewed to take account of any change of circumstances. Review is a continuing process. This means that Crown Prosecutors must take decisions about prosecution throughout a life of a case.

3.4 Although the Code was applied correctly in the initial stages of the case in that the evidential and public interest tests were satisfied, it was the decision to drop the case at a later stage on the grounds of FB's unreliability that was wrong.

4. METHODOLOGY

4.1 The methodology adopted for this review followed the HCSP process for examining prosecution files. This process involves a number of questions:

No.	Monitoring Criteria	Yes	No	Other Comments
1.	<i>At key stage review was there sufficient evidence in accordance with the Code Evidential Test?</i>	Yes		
2.	<i>If the case needed strengthening, was appropriate advice given to the police?</i>	Yes (at first)		<i>Extra evidence was obtained but a decision was taken too soon.</i>
3.	<i>Was the review decision in accordance with the Code Public Interest Test?</i>	Yes (at first)		
4.	<i>Was CPS policy in relation to this category of case applied (including charging standard?).</i>			?
5.	<i>Did the charging lawyer record her/his consideration of victim and witness needs on the MG3?</i>			N/A
6.	<i>If pleas were accepted to lesser offences, was this justified</i>			N/A
7.	<i>If the case was dropped/discontinued, was the decision in accordance with the code?</i>		No	
8.	<i>If an acquittal was foreseeable, did the CPS take appropriate action to strengthen the case or drop it</i>		No	

	<i>sooner?</i>			
9.	<i>If the charge was substantially altered or dropped, was an appropriate letter sent to the victims?</i>		<i>No</i>	
10.	<i>If the case was substantially altered or dropped was the victim offered a meeting with the prosecutor? (Except in DV cases when it is not required due to volume.)</i>			<i>An offer of a meeting would not usually follow in a case such as this.</i>
11.	<i>If a meeting was requested by the victim, did it take place?</i>			<i>A meeting was not requested at the stage at which the case was dropped.</i>
12.	<i>Was the communication to victims of charges being substantially altered or dropped in accordance with timescales set out in the Victims Code of Practice?</i>			<i>N/A (A letter not having been sent, the timescales were not met.)</i>
13.	<i>If there is an avoidable delay, was appropriate action taken to avoid or reduce the delay.</i>			<i>N/A</i>

5. FINDINGS

- 5.1 The negative results and the failures to act, particularly as reflected in questions 9 to 12 suggest a lack of awareness of mental health issues by prosecutors and the importance of ensuring that decisions are effectively communicated. Having said that, any communication however sensitive to the effect that the case was being dropped would merely have cemented the erroneous decision. What it shows, however, is that the focus of prosecutors was not attuned to the implications of FB's mental health issues not only in relation to the merits of the case but the treatment that he was entitled to expect.
- 5.2 Whilst this review has concentrated on the work of prosecutors it also identified awareness issues across the criminal justice system. That having been said, it is the role of CPS to challenge any lack of awareness wherever it manifests itself in the criminal trial process and to take appropriate action.

- 5.3 It is vitally important that those involved in preparing cases for prosecution are aware of the issues that may affect the ability of a witness to give evidence; the support structures in place that enable witnesses to give of their best; and the processes in place for ensuring that the right action is taken at the right time so that the victim or witness is kept informed and that key decisions are explained in a timely way. In particular, prosecutors, when reviewing cases where a victim or witness may be affected by mental health issues, must ensure that case decisions are properly informed, where necessary by considering material supplied by experts and that no decisions are made about the competence or capacity of a witness to give evidence without careful consideration of all the relevant issues.
- 5.4 It is clear that there are structures and processes in place that support victims and witnesses in the criminal justice system. From a prosecutor's perspective these include special measures (the means by which a witness may give evidence through different media such as a live TV link or an intermediary) and CPS guidance that sets out standards of communication and information that a witness ought to receive. It goes without saying that the active and sensitive support of victims and witnesses involved in criminal justice will improve public confidence and more specifically, improve the experience of those victims and witnesses who might otherwise feel cut off from the services that the criminal justice system has to offer.
- 5.5 In order to implement existing measures and apply the relevant guidance, however, it is important that prosecutors are aware at an early stage of the mental health issues that may affect witnesses so that the necessary action is taken in a timely way. Identifying the right measures to support victims and witnesses and apply existing guidance rigorously will have the effect of raising awareness but more needs to be done to raise levels of understanding about mental health and the implications of mental health issues in the criminal trial process.
- 5.6 The importance of an early identification of a victim or witness with mental health issues cannot be overestimated. Early identification enables decision takers and the victim and witness to make informed choices about the support that may be needed in the criminal trial process. Late identification may impede progress and as a result cause unnecessary distress to the victim or witness.
- 5.7 The system of keeping victims informed of the progress of a criminal case is well documented. From the CPS perspective, the Victims Code including the Direct Communication with Victims Scheme "DCV" set out clear standards of service. This scheme has already done much to improve the way in which CPS communicates with victims and witnesses, but it must be applied rigorously.

6 RECOMMENDATIONS

6.1 The first recommendation:

Awareness training on mental health issues must be designed and delivered to prosecutors to raise levels of understanding so that appropriate decisions are made and communicated throughout the progress of a case.

6.2 The second recommendation:

Guidance should be issued to prosecutors on how best to progress criminal prosecutions involving a victim or witness with mental health issues to include information about the instruction of psychiatrists (and other relevant experts) and subsequent use of experts' reports when making case decisions and considering the presentation of prosecution evidence in the case.

6.3 The third recommendation:

The CPS should consider a pilot exercise with police colleagues in which information about the mental health issues affecting victims and witnesses is given greater prominence in case preparation. The best practice learning derived from such a pilot should be adopted more generally across London.

6.4 The fourth recommendation:

Existing guidance should be reinforced so that victims and witnesses with mental health issues receive high quality communications in compliance with the DCV scheme.