March 25, 2010 sineadmaryring Leave a comment Go to comments

Last week the Supreme Court issued an important decision on the right of the DPP to reverse a previous decision not to prosecute. The decision in *Carlin v DPP* confirms the partial immunity from judicial review enjoyed by the DPP in relation to the decision to prosecute.

Up until the 1980s, the DPP enjoyed a practically absolute immunity from judicial review of his discretion, however that position has been modified some what to conclude that a "special protection" attaches to his decisions to prosecute or not. In *Eviston v DPP* [2002] 3 I.R. 260 the Supreme Court affirmed the application of fair procedures to the decision making processes of the DPP. Without going into the details of *Eviston* (see Micheal O'Higgins SC's incisive analysis here) the Supreme Court held that the Director was entitled to review an earlier decision not to prosecute and to arrive at a different decision even in the absence of new evidence and was not obliged in either instance to give reasons. Stress caused to the applicant by the initiating of the prosecution following the communication to her of a decision not to prosecute would not, of itself, afford her legal grounds for an order halting the prosecution. The Court also found that the DPP was required to apply fair procedures in the exercise of his statutory functions in particular circumstances and that, on the facts of this particular case, the DPP had failed to accord the applicant fair procedures and on that basis the prosecution should be stopped. An important part of the Court's finding in this regard was the communication to Mrs Eviston of the decision not to prosecute.

In Carlin v DPP [2010] IESC 14 (reported in the Irish Times here) the applicant was charged in July 2001 with assault causing harm. Proceedings in Letterkenny District Court were adjourned as he was serving a prison sentence in Northern Ireland, and a file was sent to the DPP in December 2001. Mr Carlin was released from prison in 2003 and made

inquiries about the assault charges. In November 2003 he was informed by the gardaí that the DPP had directed that no prosecution be brought. In November 2003 the DPP received a letter on behalf of the alleged victim, whose family had met with gardaí to discuss the decision not to prosecute. A review followed and in April 2004 the DPP directed that a prosecution be brought. Mr Carlin was arrested in Northern Ireland in May 2006. He began judicial review proceedings to prohibit the prosecution. The High Court rejected that application in May 2007, and he appealed to the Supreme Court.

The Supreme Court (Denham, Fennelly, Macken JJ) refused Mr Carlin's appeal and confirmed the DPP's right to review a decision not to prosecute. Fennelly J. held that the decision to prosecute and the right to review such a decision were exercises of executive power and the courts could not interfere with such decisions, absent a showing of mala fides. The DPP was also entitled to review decisions even after representations by the alleged victim or his or her family. Fennelly J. found that the demonstration of prejudice due to stress and anxiety fell far below the standard required to prohibit the prosecution. All that Mr Carlin could show was "a degree of annoyance and inconvenience" and he was not entitled to an order of prohibition.

Denham J. held that it was entirely appropriate that the Director have a process for reviewing an earlier decision and that fact that he can do so is a matter in the public domain. Denham J. distinguished G.E. v. DPP, [2009] I.R.801 (it is mistakenly cited as 2000 IR in the judgment) where the applicant's appeal against a refusal of prohibition was allowed on the grounds that the applicant was at the risk of an unfair trial because the DPP had substituted a charge of rape for the original charge of attempted unlawful carnal knowledge.

Denham J. stressed that in spite of the importance of the DPP's independence, he is still subject to constitutional fair procedures. Denham J. did not go into further detail about the meaning of fairness in this context, beyond commenting that each case is dependent on its own facts, and then citing the *Eviston* principles, discussed above. Interestingly, however Denham J. also cited the decision of McGuinness J in *Eviston*, which emphasises the decision by the DPP to "unequivocally and without any caveat" inform Mrs. Eviston that no prosecution would be taken. While Fennelly J. was convinced that the Court's decision was based on the exacerbation of the stress and anxiety suffered by Mrs Eviston, brought on by the decision to prosecute, Denham J. seems to be hinting at the differences in the assurances given to Mrs Eviston and those communicated to Mr Carlin. Perhaps had Mr Carlin received a more official notification of the original decision not to prosecute, such as a letter (instead of being informed by the gardaí) he might have had more success?

Carlin raises a number of interesting questions that intersect with broader issues of justice in the criminal process, not least whether the review and subsequent U-turn by the DPP is indicative of a prosecution (and therefore, a State) in tune with the concerns of victims and the public. The symbolic importance of a prosecutorial service that is seen to respond to ordinary victims' fears and concerns is not to be underestimated in an era where the crime rate is perceived as an intractable and ever worsening problem. Conversely, however, it is the semiotic value of discretion that provokes Denham J.'s reminder of the importance of public confidence in the DPP's decision making process. While Denham J. was clear that there was no reason in law to question the decision in Mr Carlin's case, she was at pains to point out the importance of the public's confidence in the independence of the prosecutor:

> The Director is an important independent office in the State and independent in the performance of his functions: Prosecution of Offences Act, 1974. A clear policy of non-intervention by the courts in the exercise of the discretion of the prosecutor, except in particular circumstances, has been stated in cases over the last few decades. An independent prosecutor is an important part of the fabric of a fair justice system. *The prosecutor must not only be independent but be seen to be independent. I*f the Director is seen to change his decision where there are no new factors but simply after representations by a victim or his family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is important that a prosecutor retain the confidence of society in his process of decision making. [my emphasis]

The danger is of course one of 'seepage' – that once questions are raised about the fairness of such processes, there is a risk that confidence in other areas of prosecutorial discretion, broadly speaking, will be undermined – like, for example issues involving discovery or the duty to seek out and preserve evidence. *Carlin* inhabits a space beyond traditional concerns about due process and or the public's interest in prosecution. It points to a need to articulate and explore the reflexive relationship between fair trial rights and the public or community interest in criminal justice.

Denham J. invokes the public's confidence in the justice system in order to convey the message that there are values intrinsic to the criminal justice system that cannot be simply labeled as defendant's rights or public interest in a prosecution. Instead, broader, fundamental interests relating to the legitimacy of verdicts (and by extension the authenticity of complainants' suffering) are at stake. We would do well to remember this when considering popular debates about the search for 'balance' in the criminal justice system and the supposed binary opposition between defendants rights and the public interest in prosecutions (analysed by Liz Campbell here). Indeed, Denham J.'s comments cohere with Ian Dennis's idea of the overarching concern for legitimacy in the criminal process, where "the factual accuracy of the decision ceases to be the primary goal of the adjudicative process." Since we cannot ever guarantee the substantive truth of the verdict in a criminal trial we put in place safeguards to ensure that the manner in which the verdict is arrived at is as accurate and as fair as possible. This includes the application of fair procedures in the exercise of prosecutorial discretion.
Categories: Criminal Justice Tags: Carlin v DPP
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1. vconway
March 25, 2010 at 3:53 pm
Reply

I was of the view that the key issue in Eviston was that no only was the individual told they would not be prosecuted, but the communication did not state that this decision could be subject to review. Because this possibility was a policy of the DPP's office, and not a legislative provision, the individual could not be said to be aware of this possibility and so it was unfair to reverse the decision without having advised of the possibility of review.
A number of cases subsequently (Hobson and M v. DPP – both High Court) indicated the view that since Supreme Court decision in Eviston the possibility of review by the DPP was the law and so the problem that arose in Eviston was overcome. In both those cases they declined the relieft sought by the applicant.
To my mind, Carlin ignores this solid point developed in the High Court and provides a re-interpretation of Eviston, placing all the focus on stress and anxiety caused.

- sineadmaryring
March 25, 2010 at 7:43 pm
Reply

Correct, the fact of not making clear that the decision was reviewable was taken as being a breach of fair procedures. I suppose I am identifying as critical, the strong causative link between this failure to tell her of the possibility of review and the exacerbation of stress and anxiety suffered by Mrs Eviston. I agree that the Court in Carlin sidestepped this issue, apart from Denham J's comment that the right to review is a matter of public record and Fennelly J.'s recitation of counsels' arguments. For me, the emphasis in Eviston (leaving aside McGuinness' judgment) still seems to be on the fact of

the exacerbation of stress, which comes in at the very end to justify the granting of relief- this is a very subjective, consequentialist approach and renders the test far too permeable for my liking. Also O'Higgins had a point in relation to Hobson (which, unlike Eviston or Carlin, was a fresh evidence case)- while lawyers may be aware of the reviewability of procedures, non lawyers may not. However that argument is somewhat diluted by the publication of "The Role of the DPP" (2009) on the DPP's website. Further issues may arise in relation to the pilot scheme where the DPP may give reasons for his decision not to prosecute in cases resulting in death. It is at least possible that a suspect might become aware of the reasons for a decision not to prosecute, through for example, in a small town, communication with the victim's lawyers or doctor. If the reasons provided give any kind of analysis or rationale (as presumably they must do, if they are to be reasons) why the prosecution has decided, for example, that a piece of evidence is not probative or that there is insufficient evidence to prosecute, then perhaps the Eviston analysis of fair procedures requiring notice of the possibility of review might be resurrected… ? This is all speculation obviously, but surely there is an issue around notice when the prosecution itself says and gives reasons to support the contention, that the case is a non runner?? While Eviston allows for review following representations by victims, is there an issue for the defence to say that by issuing reasons on a decision not to prosecute fair procedures are violated by a reversal- particularly if the defence can show that the accused moved on with his or her life upon learning of the reasons, and that the subsequent stress and anxiety suffered by the reversal were thereby exacerbated..? Would Eviston kick in? Just a thought!