Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Tommy English Murder Trial: Director of Public Prosecutions

22 March 2012

NORTHERN IRELAND ASSEMBLY

Committee for Justice

Tommy English Murder Trial: Director of Public Prosecutions

22 March 2012

Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Barra McGrory	Public Prosecution Service
Miss Marianne O'Kane	Public Prosecution Service

The Chairperson: I welcome the director of the Public Prosecution Service (PPS), Barra McGrory QC, to the meeting. I advise you that this session will be recorded for Hansard and that a transcript will be published on the Committee's webpage. Initially, Mr McGrory, I will hand over to you to make some opening comments, and I am sure that members will want to have some exchanges with you thereafter.

Mr Barra McGrory (Public Prosecution Service): Thank you very much, Mr Chairman and members of the Committee. I introduce Marianne O'Kane, director of policy in the Public Prosecution Service, who is here with me today.

I will start by giving the immediate background on why I am here. It has resulted from a chance meeting with Mr Givan at an event in the immediate aftermath of evidence that the Minister of Justice, Mr Ford, gave to the Committee on the recent acquittals of a number of people in the case of R v Haddock. I watched that submission with interest and agreed with everything that the Minister said about the processes and the legislation. However, I thought that there might be an opportunity for you to hear from me directly about the processes that are involved in this type of case; that is, a case involving the use of accomplice evidence. It would also give me an opportunity to talk to you about the role of the prosecutor as opposed to the role of the court and to put everything into a general context. Of course, I am sure that you understand that I am constrained by legislation to speak only in more general terms and cannot go into the detail of cases, particularly this one. There is a procedure that I will refer to that is ongoing and that is re-examining the consequences of the acquittals in what might

now happen to the two witnesses. So, that is the general context in which I am here, and I hope that I can be of some help.

The case of Haddock and others was a major and very important case in recent years, not least because it dealt with the loss of a human life. This was a murder case. I think that anybody who watched the 'Spotlight' programme that was on in recent weeks could not help but be struck by the dignity with which Doreen English and her children spoke about the events of the night that Mr English was murdered. That is the background against which the case came to court. The issue was not just that individual murder case either; it was a background of 12 years of criminality to which the Stewart brothers confessed. That was criminality of the most extreme kind, which could be described as nothing but a litany of terror visited upon the community in which the Stewarts lived and by others around them.

When the Stewarts walked into a police station in August 2008, they began their account of the events over 12 years. It was immediately apparent to the police that those events happened because they matched police reports. These were real events, and it became apparent very quickly that very serious consideration had to be given to what the Stewarts were saying. From that point on, they entered into the arrangement that is described in the Serious Organised Crime and Police Act 2005 (SOCPA). I will speak about that arrangement in some detail, if you wish to hear about it.

When such an event happens, the authorities are obliged to sit up and listen. Certainly, from a prosecutor's point of view, you are obliged to examine what has been said to see whether it can be used to bring about a prosecution in the public interest. They then entered the framework that is set out in fairly short composites in section 71 to section 74 of the Act. The first power given to the Director of Public Prosecutions (DPP) under the Act in section 71 is the power to grant an individual immunity from prosecution. The second power is to give an undertaking that what the person has told you will not be used against them. That is, in essence, another way of saying the same thing. That is a very considerable power that is given to the director, but it is not what was done in this case. I know of no case in recent history where immunity from prosecution has been given in an agreement of this kind. The Director of Public Prosecutions at that time considered that it was not an appropriate power in this case. The legislation, however, allows for an indication that the court will consider a reduction in sentence if the witness or the person giving the information has been of assistance.

The Act sets out a framework, the purpose of which is to make open and transparent the procedure by which a reduction in sentence can be given. It requires the court, when passing sentence, to do so in open court where at all possible. It requires the court to say what the sentence would have been had there been no such agreement or assistance and to set out the steps that it has taken in reaching the lower figure. So, that offers a degree of transparency, which, to my knowledge, was not in any way available in the historical accomplice cases that we know of from the 1980s. That is a significant step forward where transparency is concerned.

Section 74 also provides a power for the director to seek a review of the reduced sentence. If the court is satisfied that the person "knowingly failed" to give assistance, it may substitute another sentence. When the Minister was here, I observed some discussion on the question of whether the witnesses had knowingly told lies. I think that that is where this comes from. Section 74(5) sets out that the person must have "knowingly failed" to give assistance. Obviously, you do not tell a lie without knowing that you have told a lie; it is the essence of a lie. That is what the failure to give assistance might be. On this occasion, the court has found that the Stewart brothers lied to the court and to the authorities. Therefore, that would trigger serious consideration of a review of the sentence.

What I have done on that is appoint a specified prosecutor for the purpose of considering whether there should be a review and how it should be conducted. Unfortunately, the legislation is silent on the nature of the due process that those who are subjected to the review would have. Therefore, I have checked with the Director of Public Prosecutions in England and Wales and his senior legal adviser, and they have never referred one of these cases back under that provision. It is only seven years old, so that might be the reason. However, in their experience, a number of similar cases in England and Wales have failed to secure convictions, yet they have not sought to initiate that procedure. Therefore, nobody yet knows the precise procedure. The Public Prosecution Service is seeking an opinion from

specialist chambers in London on what the correct procedure would be, and we will visit that as soon as practicable. That is under way at the moment.

So, that is the legislation. I am unsure how much detail you want on this, but it occurred to me that we should set out that there is a difference between the statutory framework and the common law framework on what the actual sentence should be. The legislation is silent on that. It simply advises the court of the transparency of the procedures. There is case law through which a matrix has been formed, and that is applied to calculate the reduction. If you want to hear what that matrix is, I am happy to tell you, but I may be going into too much detail for you.

In very short form, the court must set out what the sentence would be at full value, and it would have to consider what mitigating circumstances would apply. Obviously, in a case such as the Stewarts', there is very little that one could say in mitigation, so there would not be much there. The next calculation — this is the significant one — is the percentage reduction in the sentence measured against the value of assistance that is given. To give you an example of how that applies, in a case where someone has given a lot of intelligence that may be used to detect crime but they refuse to give evidence, cases suggest that the area of discount would be in the region of 25% of the sentence. However, in cases where the witness has signed up to give evidence, the discount could be considerably higher — as much as 66%. On very rare occasions, it could be even higher than that.

According to the law, after that reduction has been made, the next calculation is the standard 33% — or one third — discount that the court gives in return for a guilty plea. That is a fairly standard yardstick by which sentences are reduced in return for guilty pleas.

I think that that may assist with an understanding of how significantly the sentences in such cases are reduced for those who have signed up for assistance. That matrix is not set out in the legislation. It has been developed in the common law over centuries and is fairly cast in stone in the way in which the common law forms through the doctrine of precedent, and so forth.

So, that is the legal background to the procedure. I hope that that has been some assistance to you, Mr Chairman, and to the members of the Committee.

I want to take the opportunity to say a couple of brief things about the role of the prosecutor as opposed to the role of the court. The prosecutor is charged with what can be described as a quasi-judicial function, and is a minister for justice who determines whether to prosecute a case. In the exercise of that quasi-judicial function, prosecutors go by a code that sets two significant tests: first, whether there is sufficient evidence and a reasonable prospect of conviction, which we call the evidential test; and secondly, whether it is in the public interest to take the prosecution. Generally speaking, if the evidential test is met, it is in the public interest for there to be a prosecution unless there is some very significant factor in the public interest against taking the case. In this case, one would have expected that the public interest would have determined that there would be a case once the evidential test was passed or had been met.

In a case such as this, the entirety of the evidence is, by and large, the accomplice's evidence. On one hand, there is perhaps no better person to give an accurate account of the commission of a crime than the person who was present and a participant in that crime. However, on the other hand, weighed against that would be some of the issues that the trial judge eloquently articulated in his judgement. He expressed his concern about the reliability of that evidence and the incentives that the witnesses had to embellish or reduce the narrative to suit their other interests, which were, perhaps, hidden from view. It is the job of the authorities to weigh up the evidence and to evaluate it. After the initial scoping exercise and having found out the broad range of information that the witness can give, the police go through a debriefing exercise to thoroughly test that information and in which it is expected that witnesses would divulge the entirety of their criminality. That material is then weighed up and evaluated by the police and given to the Public Prosecution Service to weigh up whether it is sufficient to ground a prosecution. At that stage, the evidence can be tested to a certain degree, but this is where the philosophical questions about the extent of the role of the prosecutor and where the balance has to be struck come in. I think that the prosecutor has an obligation to test the evidence and to consider how it might be challenged and whether it might withstand a challenge. However, as talented and dedicated as prosecutors may be, they are not blessed with clairvoyance. There has to be a

margin of appreciation of the evidence and the extent to which a prediction can be made on whether it will withstand challenge at trial. That is the role of the prosecutor.

In these circumstances, the prosecutor was faced with the fact that two gentlemen had walked into a police station and had, on the face of it, given extensive and reasonably accurate accounts of events that were historically known to have occurred and that, by and large, matched the other information that the police had on the incidents. There is a reasonable argument that the evidential test was met. Indeed, in his evaluation of the evidence after cross-examination by 12 QCs over a protracted period of weeks, the trial judge took the view that he could still convict and that there was a credible basis on which there could be convictions at that stage and so did not stop the case at what we call the halfway stage. That would ground a reasonable argument that there was considerable justification for taking the prosecution in the first place. Certainly, as a prosecutor, I could hear the howls of protest if it were known that information of that kind were made available to the prosecuting agency and a case were not taken. So, that was the context in which the case was taken and in which the role of the prosecutor was engaged.

The role of the trial judge is different altogether. The trial judge has to make a determination on the basis of each crime or incident, on the evidence available, beyond a reasonable doubt. He has to be able to exclude all the areas of reasonable doubt about that evidence before he can come to a conclusion of a conviction. It is a very high test that has been set, but it has been set for centuries. It is generally accepted as the right test upon which to convict in a trial court of law.

So, that is the role that the court plays. Along with my senior colleagues and others, and as we do generally, I have given considerable thought in recent weeks to the extent to which the prosecution should seek, in a situation such as this, to predetermine the result of a trial court. I do not think that it would be in the public interest that the prosecution would overstep the traditional boundaries of the prosecutor in seeking to go too far to predetermine what the result would be. The result might be that we win every single case. I use that word carefully — a better way to put it is that we would achieve convictions in every single case. However, the question would then arise as to how we managed that. Did we manage it by circumventing the trial process, and are we taking decisions on cases that really should be left to the court?

Those are some of the difficulties that prosecutors face and the context in which a case such as this would be addressed. I do not know whether there is anything else to say about that. That is the background. I am happy to answer any questions and to be of any assistance that I can.

The Chairperson: Thank you very much, Barra. It is all very technical and legalistic, obviously; that is the nature of the business. However, the broad headline that came out of this trial was that millions of pounds were spent, and that, apart from one conviction at a lesser degree, there was a failure to get a conviction for two individuals whom the judge said were proven liars. Nobody won out of that case; certainly not the English family, the PPS or the police. The two people who got convictions got off with it very lightly. Given that the assisting offender legislation was used — I know that you have some very high-profile cases coming up on which you will have to decide — do you not think that the PPS was damaged as a result of the outworkings of this case, particularly when you need to decide whether to prosecute on the cases that are coming forward?

Mr McGrory: On the contrary; when the next one comes to be determined, which will, obviously, be on my watch, I will have the benefit of a very well-reasoned and considered judgement from Mr Justice Gillen that addresses many of these significant issues on accomplice evidence. I have analysed that judgement, as have others with me in the organisation, and we would seek to apply the principles that are set out therein to the future cases. So, in a way, there is a silver lining to the cloud, in the sense that, at least there is a framework that we can use to apply to our considerations in other cases.

You touched on the cost. I am conscious that the public are very concerned about the cost of these cases. The problem for the prosecutor is that, once we start putting the potential cost of any case into our considerations about whether the case should be taken, we are in danger of bringing ourselves away from the crucial tests, which are the evidential test and the public interest test. It would be wrong for a prosecutor to determine, on balance, whether or not to take a case because it might be too

costly. I do not think that that is really justice. So, that is something that I think that we have to resist.

The Chairperson: OK, we will move to the evidential test. You said that the role of the PPS includes a challenge function. I accept that you did not decide in this case and that a previous director made the decision, but it is your view that a reasonable argument can be made that the test was met. Given that a judge needs to be convinced beyond reasonable doubt and that these provisions are a form of legislation that depends on assisting offenders, meaning that it is clear that their character is questionable because of the very nature of who they are, does a higher evidential test not need to be met when you are going to prosecute using that legislative vehicle?

Mr McGrory: The same evidential test is applied to every case, but you apply it in the context of the nature of the evidence. I agree that one would have to be particularly cautious about evidence of that nature. I think that there was a careful evaluation of the evidence in this case. The position now is that we have a very clear set of guidelines from Mr Justice Gillen about the sort of area that one might be very wary of when considering evidence of that kind. So, we have hard and clear examples from the court on the type of evidential concern that you would have. That is of some assistance.

The Chairperson: Apart from transparency, which is what you say differentiates that type of assisting offender legislation from the supergrass trials of the '80s, are there any other distinctions between the current legislation and what was used in the past?

Mr McGrory: The legal framework on certain safety nets around accomplice evidence has changed. In 1996 the requirement for corroboration, which is independent evidence to verify the evidence that is given by the accomplice, was abolished, but, as a consequence of a particular common law case it was, in a sense, reinstated. The law may have abolished the requirement for corroboration, but the greater the extent of the criminality of the accomplice giving the evidence, the greater the need for caution on the part of the court and the prosecutor and the greater the need to look for independent evidence in any event. That principle has evolved and will be applied in future cases. That is not to say that it was not applied in this case, but perhaps we are a bit better informed on how to look for those matters.

The Chairperson: Was the current legislation, SOCPA, designed in 2005 to deal with those types of cases that are of a more historical nature and that are connected to the Troubles? Is it the appropriate vehicle to be using, or are you stretching it?

Mr McGrory: As I hope I set out, the legislation is designed to create a framework of transparency so that there could no longer be accusations that those who benefited from the giving of evidence did so as a consequence of a secret deal that was done behind closed doors. There had to be a process and a mechanism established whereby, if there were evidence that the witness had misled the court and had knowingly failed to honour the agreement, there could be redress. That is what the legislation achieved. Obviously, it is designed to deal with serious and organised crime, so it had major cases in mind. It was designed for that level of criminality. Whether or not it had historical or contemporary criminality in mind is another question. It was constructed around the potential scenario of accomplices giving evidence about a broad range of crime as opposed to individual incidents.

The Chairperson: The legislation is silent on how you review accomplice evidence if, as happened in this case, the judge says that the people concerned are liars. Tell me what that means. Does that mean that you now need to design a framework, or, even though it was found that they were liars, does it mean that will there be no recourse because the legislation is silent?

Mr McGrory: If there is to be a review of the sentence, I think that there is an obligation on the prosecutor to assist the court in how it might go about it. A range of legal issues that arise in that context are simply not addressed by the legislation, and, in respect of that, it is incumbent on us, who would be the moving party in the context of any such review, to assist the court. For example, in this case, the Stewarts were witnesses. They were not represented at the hearing. The purpose of the hearing was to determine whether the guilt of those accused could be established beyond a reasonable doubt. In that context, the court made certain damning comments about its view of the

Stewarts' evidence. However, any review in court would immediately ask itself, or would be asked, whether that is an appropriate process to determine whether the liberty of the Stewarts should now be removed in the context of a review. So, those are questions that a court would expect the moving party, in this case Public Prosecution Service, to be in a position to answer if we did so.

The Chairperson: Will you need legislation for that? If SOCPA is silent on it, will the Assembly need to legislate on it?

Mr McGrory: I do not think that that is necessary, because the court can determine its own process. However, it will need advice on what that process should be. The legislation is silent on the mechanism by which the sentence might be reduced; that is left to the common law to determine. I think that the court will probably be able to form its own procedure to allow fairness to all parties in the context of any review.

The Chairperson: Surely you need to have that dealt with before you can prosecute any further cases. If the PPS has failed to establish that the individuals were not credible witnesses, what is to say that that will not happen again in future cases? You need to have the consequences established for someone who could be found to be a liar.

Mr McGrory: That is why I am moving with all due speed to determine that process. However, I would not like it to hold up any other case unnecessarily. We have not reached the point where one is delaying the other. If it does, that will have to be taken account of.

The Chairperson: I am nearly finished, and, after that, I will bring in other members. The police carried out 330 interviews, and the PPS had to review them to establish whether there was sufficient evidence to proceed with the prosecution. Given the judgement about the individuals, how did the police or the PPS not come to the same conclusion as the judge? Or was it only in the courtroom that they were liars?

Mr McGrory: As I hoped I set out, they are two very different processes. You have to understand that the judge was able to come to those conclusions after the witnesses had been cross-examined by 12 different QCs over a period of two months. So —

The Chairperson: What about the 330 interviews and all the cross-examination that should have been taking place at that point? Surely there is the ability in the police and the PPS to identify the bona fides of the individuals concerned. Obviously, that did not happen.

Mr McGrory: You have to factor in the two very different tests that are applied. The court applies a test that asks itself whether it can convict an individual of a certain crime beyond a reasonable doubt. It found that it could not do that. That is a very different test to the broad evidential test that the prosecutor must apply. Nevertheless, I accept that a considerable degree of caution and analysis is required of the police and the prosecutor in coming to a view about whether that evidence is likely to be reliable. I am very aware of those principles, and they will be applied.

The Chairperson: I want to ask about the difference between this case and future, similar cases connected to Operation Stafford. The Historical Enquiries Team (HET) carried out the work on this particular case and the PSNI did all the debriefing and interviews, but I understand that the trial that is coming up is different from that case. Does that give any assurance about the way in which the future trial could be conducted?

Mr McGrory: I would not want to personalise it or individualise it in respect of the various branches of the investigative agencies. The important thing is that the exercises be carried out thoroughly by seasoned investigators who are able to give an accurate and reasoned opinion to the prosecutor to help us with our task. I have every reason to believe that that is how it is being done.

The Chairperson: I am probably asking you things that are not within your remit to answer, such as why the HET handled this case but the PSNI is handling all the other cases associated with Operation Stafford.

Mr McGrory: I do not think that it is within my remit. You will have to ask the Chief Constable about that.

The Chairperson: Did the independent oversight panel — the panel that was established for the police investigation — have any engagement with the PPS?

Mr McGrory: Again, that panel was not established in the context of the Stewart/Haddock cases, as far as I understand it. I think that that was a different operation. However, my understanding is that they are two different processes, but, again, that is not within my remit.

The Chairperson: The 'Spotlight' programme made it clear to me that the independent oversight panel was involved in the Haddock case.

Mr McGrory: That is in the context of different issues surrounding Mr Haddock that would not be for consideration by the prosecutor in the context of whether to rely on the evidence of the Stewarts. I am not comfortable with those areas.

The Chairperson: However, on that specific question, has the independent oversight panel had any engagement with the Public Prosecution Service on this or any other cases connected with Operation Stafford?

Mr McGrory: I cannot answer for this case, because it had started by the time that I came into office. I cannot deal with the question because I would not have been there whenever those considerations were being made. I do not know to what extent the oversight panel was involved.

The Chairperson: However, you are dealing with the current cases connected to Operation Stafford?

Mr McGrory: I am.

The Chairperson: Has the independent oversight panel had any engagement with you or the PPS?

Mr McGrory: Not as yet. However, we would not have reached a point at which it would need to be involved, if that were deemed necessary.

The Chairperson: Has it requested engagement?

Mr McGrory: Not as yet, but, as I said, we are not anywhere near the point at which that would yet be an issue. Those cases, or one of them at least, have a considerable way to go.

Again, I do not want to get into the details of cases and where they are at. I do not think that it is appropriate. I hope that you respect that, Mr Chairman.

Mr Wells: If you had known then what you now know about the character of the witnesses, had you been the Director of Public Prosecutions, would you have recommended that the case proceed?

The Chairperson: That is a loaded question, Mr Wells.

Mr Wells: It is.

Mr McGrory: With the benefit of hindsight, none of us would do an awful lot of things that we have done in our lives. The question is not as simple as that either. You start from a point of people of bad character when you start with the evidence of an accomplice. That is everybody's starting point. What has to be weighed up is the extent to which, albeit that this is a person of bad character because he has confessed to involvement in a crime, you can or cannot still rely on what it is that he has to say. There may be circumstances in which that makes accomplices all the more reliable, but there may be other circumstances in which it makes them unreliable. It is a very complex situation and has to be

judged on the individual circumstances. It is a question that would be impossible to answer in simple form.

Mr Wells: Any reasonable person, having read the media reports of the court case, having heard about the witnesses' character, the details of which were revealed in court, and knowing that you knew about their character long before the case got to court, would be staggered to learn that you or, rather, your predecessor — I do not mean you, because you were not in control at that stage — thought that there was any chance of that evidence standing up in court, not because of its factual content but because of their character. How did that happen?

Mr McGrory: As I said, all accomplices are witnesses of bad character. They are witnesses of bad character because they have been accomplices in a crime, which is why they are of value to the authorities or the prosecution in the first place. That is your starting point. What you have to do is look at their evidence to see whether it is supported by other types of evidence and whether you can seek to rely on it.

Mr Wells: It was not just bad character; it was bad character with a capital B and a capital C. No reasonable person on this earth, having read what happened in court and what your Department knew in advance, would think that the witnesses' evidence stood up, given the nature of what they were involved in, their past and the fact that they were totally unreliable witnesses.

Mr McGrory: I understand your frustration and that of the public, because I have heard that view expressed. It is not constructive to look back from where I am at the moment and raise questions as to who might have done what then, now that I have the benefit of hindsight now the case is over. What I want to do is to look at the reasons that the prosecution did not achieve any convictions, take some value from the fact that we have a clear, reasoned, well-set-out judgment and apply the principles that arise from that to future cases. That is all that I can do.

Mr Wells: I do not know what age you are, Mr McGrory, but you are probably a fair bit younger than me.

Mr McGrory: I was actually in your year at Queen's.

Mr Wells: Were you? *[Laughter.]*

Mr McCartney: Consult your solicitor.

Mr Wells: That puts you in your early forties.

Mr McGrory: Are you not surprised that our paths did not cross?

Mr Wells: We were perhaps coming at things from a different angle when we were at Queen's. Therefore, you have as clear memories as I have of the collapse of the supergrass trials in the 1980s.

Mr McGrory: I do.

Mr Wells: Therefore, it is not the case that this trial was run without the knowledge that case after case had fallen, not because of the evidence but because of the character of the people giving the evidence. I remember hugely expensive cases coming out of Chichester Street in those days collapsing on that basis time after time. Did the DPP go back and analyse — I accept that the legislation is different — the problems that arose in the 1980s before taking the decision, or did you just go in blind and not take history into account?

Mr McGrory: I can answer only for myself. I am very conscious of those cases, not least because I was a young apprentice lawyer during some of them. I am acutely aware of those judgments and the principles enunciated therein. Those principles are the ones that I will apply to future cases. I can do no more than that.

Mr Wells: Did you sit down and analyse the dozens of cases that collapsed in the 1980s? Did you go down and look at the transcript to see what had happened?

Mr McGrory: I have done, yes.

Mr Wells: I have to say that when I heard about the case coming up, I thought to myself, "Uh-oh, there will be problems here." The reason for that was that it was brought on exactly the same basis as the many others that had collapsed. Do you accept that the collapse of yet another very high-profile case has undermined public confidence in the system?

Mr McGrory: Of course I do. That is one of the reasons that I am here, as well as for the reason that I have an obligation to inform the Committee, where I can, about matters relevant to criminal justice, in broad terms. I raised the issue of my attending with Mr Givan because I am aware of the concerns. I think that it is important that the complexity of situations be articulated and that the public be assured that there is an awareness of the principles that emanated from those cases and this one and that those principles will be applied when considering future cases.

Mr A Maginness: I welcome the director and his colleague. Last week, we had the Lord Chief Justice, and now we have the director. We are running out of star witnesses.

Mr McGrory: If you are not careful, Mr Maginness, it will be called the Star Chamber.

Mr A Maginness: In any event, you are very welcome, and I think it important that we hear from you and that you give us this opportunity to discuss matters that are current.

I will focus on the whole issue of the public interest. I represent North Belfast and am very aware of the circumstances surrounding the activities of a paramilitary group in north Belfast. That group gave rise to great fear and public concern there. What I will say to you, and to the Committee, is this: had you appeared before the Committee and told it that two accomplices walked into a police station and said that they had been involved in certain activities in relation to a paramilitary organisation in North Belfast, and you decided that you were not going to offer any of that evidence to a court and go through due process, I think that the public interest would not have been served and that many people in north Belfast would have been outraged. I put it to you that the public interest is, I believe, served by the PPS taking the view that, if there is evidence available of sufficient standing and quality, it should be presented to a court.

Mr McGrory: I am grateful for that. I hope that I have already alluded in my initial submission to the fact that what we had was two individuals who came into a police station and gave an account of 12 years of systematic terrorisation of people in their own community by them and a group of others. Therefore, there was a responsibility on the part of the police and the Public Prosecution Service to view that as potentially valuable evidence to ground a trial in a court of law. I have asked myself with others many times since this judgement to what extent we should test the evidence without allowing it to be aired in a court of law, where there is a very high standard required to be met. This is a difficult question, but it is my responsibility and that of the Public Prosecution Service to get the balance right in future cases. I would not want to take any fixed or dogmatic views as to whether evidence of this kind will ever be used again. There is a responsibility in the public interest to evaluate the evidence if it is available.

Mr A Maginness: Can I probe you further on that point? Mr Wells put forward the view that in all situations in which accomplice evidence is to be given, you are dealing with bad characters with a capital B and a capital C, and you have to make an assessment of the value of their testimony or proposed testimony to a court. You could say that all those cases are messy and involve bad characters and, therefore, you do not prosecute. Do you think that that would be in the public interest?

Mr McGrory: Frankly, it would be the easy way out for me to say that we will not bother with any more of those cases, but I do not think that that would be in the public interest. I think that it would be an abdication of my duty as a prosecutor. Therefore, I will seek to discharge that duty in the independent evaluation of each of the cases as they come before me.

Mr A Maginness: With respect to the trial, there were applications to the judge to have the cases dismissed halfway through; in other words, that there was no case to answer. I presume that that was the basis of the application. At that point, the judge rejected those applications and said that there was a case to answer and that the trial would therefore proceed. Does that represent an acceptance by the judge, at least at that point, that there was sufficient evidence for the trial to proceed and for further consideration of the evidence to be taken?

Mr McGrory: I think that that is worth examining in a little more detail, because the test that the judge has to apply at that stage is whether the court could convict on the evidence, taken at its height, at that stage. At that stage, the court had already heard the lengthy cross-examinations of those two witnesses, yet, at that point in the case, the court still took the view that there was still the possibility of the judge convicting on the evidence. That is applying that test after the cross-examinations.

The determining prosecutors apply a not dissimilar test before the cross-examinations. If that is where the court felt the evidence was at the conclusion of the prosecution case — after it had been subjected to rigorous testing over a lengthy period — I think that that is a reasonable basis for arguing that it supports the test to bring the prosecution in the first place. I said that in the opinion piece that I wrote in the papers. That gave me some comfort.

Mr A Maginness: I have one final point. You mentioned this matter going back to the court, if the review of the two accomplice witnesses, which is being conducted by the PPS, concludes that it should go back to court. You say that it goes back to court. Obviously, it goes back to the Crown Court, but does it go back to the judge who carried out the sentencing at first instance?

Mr McGrory: The thrust of the legislation is that it would be the sentencing judge.

Mr A Maginness: Would he then review that sentence in accordance with the information that he would receive about the trial?

Mr McGrory: Yes, and, as I have said, I anticipate that an additional issue would arise at that stage with which the court would expect the prosecution to give it some assistance. That is the process in which we are engaged at the moment. I have appointed a specified prosecutor at very senior level within the Public Prosecution Service to address that particular question.

Mr Lynch: You are welcome to the Committee, Barra. At the outset, you mentioned scope and debriefing exercises. Are they conducted and overseen solely by the PSNI?

Mr McGrory: Yes. The Public Prosecution Service has no involvement.

Mr Lynch: Therefore, the PSNI approves the reliability of the offender.

Mr McGrory: The police will form a view of the reliability of the witnesses in the context of the debriefing exercise.

Mr Lynch: Does the PPS have any role in the debriefing exercise?

Mr McGrory: None whatsoever; it is purely an investigative process. In a sense, the police are obliged to investigate the witnesses to determine the extent to which they are telling the truth.

Mr Lynch: I want to follow up on that, mostly around the processes. Are all those interviews carried out within PACE codes?

Mr McGrory: Yes, and they are recorded. In fact, that is part of the transparency of the process now. In this case, the defendants got the benefit of having the entirety of those debriefing interviews disclosed to them.

Mr Lynch: Who in the PSNI oversees those?

Mr McGrory: That is a matter for the PSNI.

Mr Lynch: As a crime Department, you do not know?

Mr McGrory: There were issues touched on earlier as to whether it is the HET or mainstream PSNI, but it is something that the PSNI is going to have to tell you.

Mr Lynch: I presume that it would be conducted by C2. Would that be right?

Mr McGrory: I do not know. In any event, it would be done by very senior police.

Mr Lynch: At what stage is your office brought into the loop in the process?

Mr McGrory: We are kept apprised of the developing debriefing process, but full consideration of the decision to prosecute will not take place until after that is complete, because it will depend on the outcome of the process.

The Chairperson: The PPS must be involved in that exchange. You get information and are debriefed by the police, and they liaise with you. You are saying, "We need more on this and that area", and it goes back to the police for them to do the questioning. Is it fair to say that the PPS is involved throughout the debriefing stage?

Mr McGrory: The PPS is kept informed of how the debriefing process is going. However, it is an investigative process, and you could not begin the evaluation of the evidence until it was complete, because something significant might arise in a debriefing exchange subsequent to the previous briefing. Although you will be kept informed and will be aware of what stage the process is at and what degree of information the police have at any particular point, you could not begin your deliberations until the police have told you that the debriefing process is finished, because that process not only requires the witnesses to purge themselves of the entirety of their wrongdoing but the police then have to cross-check the information that they have against the other evidence that is available and carry out an investigative process. I can think of countless examples of information that might be given. The police will then have to look at their intelligence and at the other available witness evidence to see whether what they are being told is accurate or whether anything is substantially different. They would then have to go back to the witnesses. It is a process during which we are made aware of developments, but it is, essentially, investigative.

Mr McCartney: Thank you, Barra, for your presentation. I preface my remarks by saying that our party has publicly stated that we believe that this is flawed legislation that leads to flawed outcomes. I want to put that on the record. I was a bit surprised when you said that there does not appear to be a clear process now that those two people have not lived up to their side of the bargain. Can I assume that, no one, when a case that has collapsed in England, has ever had their —

Mr McGrory: No. I have asked the most senior criminal legal adviser in England and Wales about that, and that person knows of no occasion on which the provision of review has had to be invoked.

Mr McCartney: Did that concern you?

Mr McGrory: I get no guidance on how somebody else might have gone about it. That is why I am seeking detailed independent opinion.

Mr McCartney: When the Minister was before the Committee, he said:

> *"The legislation makes it quite clear that, if they do not comply with their side of the bargain, they can be returned to court to have their sentences increased."*

Part of the public commentary said that that was one of the safeguards, yet we are being told that the model that has been implanted here has not, on any occasion, sought to go back and say, "These people have failed to live to up to their side of the bargain, and now the law must take its course."

Mr McGrory: It is a problem with the legislation that has become apparent in that context. There is a difference between England and Wales and here, in that, in England and Wales, the tribunals that determine the guilt or innocence are decided on by a jury, and juries do not give reasons. It is arguably easier for us than it is for those in England and Wales, because, in this jurisdiction, the case was trial by judge alone. It was a reasoned judgement in which the judge set out precisely why he felt that he could not rely on the evidence. However, that is only part of the issue. The other part is whether that is sufficient process for the sentencing judge to make determinations on the increase of sentence. I feel that I need some expert guidance on that.

Mr McCartney: When the Minister was here, I put it to him that perhaps it was an appropriate time to review the legislation. In the light of what you have said today, there are differences between what pertains in England and Wales and here, particularly given the presence of a jury in England and Wales. Do you agree that this is an appropriate time for us to review the legislation?

Mr McGrory: That is a matter for you as politicians to determine. All that I can do as a prosecutor is interpret the legislation for you from my perspective. In that context, I have set out how the legal landscape in which these cases are taken is mixed between legislation and common law. Often perhaps publicly misunderstood is the fact that the admissibility of accomplice evidence is not a matter for this legislation but a matter for each court to determine within common law. It has been the case for centuries that accomplice evidence has been admitted by courts as evidence on which they can rely in criminal cases. The legislation seeks to make that process more transparent and to create a fairer landscape for the accused, from which, arguably, these accused benefited. If there is a concern about a potential unfairness to accused persons by the use of accomplice evidence, there is an argument that a considerable number of those concerns are, in fact, met by the legislation. That is a matter for society and politicians to determine, and it is over to the legislators in that regard.

Mr McCartney: As Jim Wells said and as you accepted, the case has dented public confidence. I may be making a big assumption, but most people will be surprised that there is no clear procedure that will address the issue of whether those people knowingly told lies, which, I think, is the way that it has been put.

Mr McGrory: The legislation states that, if a person knowingly breaches the agreement, the matter should be referred back to the sentencing judge. The context in which that has occurred in this case is that a judge sitting alone has articulated that the reason for the acquittals is that, in his view, lies have been told by the witnesses. That, arguably, breaches the agreement, because the witnesses signed up to an agreement that they would tell the truth to the court. That is the basis for the referral. The basic procedure is there, but, as a seasoned criminal lawyer, I foresee other difficulties that are not catered for in the legislation when it comes to due process, by which that determination will be made. At this stage, all that I am seeking to do is to fulfil my obligation to the court to have available to it some advice on the nature of the correct procedure. I cannot get away from the fact that the legislation does not spell it out, so it is more complicated than the legislation had envisaged. There are other problems with the legislation, in that there was a slight amendment made to it by the Coroners and Justice Act 2009 to clarify whether these witnesses could deal with non-indictable cases, and they cannot. There are issues around the legislation that are yet to be clarified.

Mr McCartney: When we tabled a motion, which will be debated next week in the Assembly, suggesting that the Minister review the legislation, we did not even have that gem of wisdom to assist us. The case for the need to review the legislation is becoming increasingly stronger, particularly on how it pertains to the North and given the history of accomplice evidence. In most of those cases, people were convicted on the standard of beyond reasonable doubt. The cases then went to the Court of Appeal, and people speculate that the reason that the cases collapsed is because trials based on accomplice evidence were abused so much and that their collapse had nothing to do with the law or because of expediency at the time. The fear here is that people are viewing this as expedient, and that, therefore, damages the fabric of the judicial system.

Mr McGrory: I understand what you are saying. However, the concern that I raised is a very discrete one based on the process that would be required by a court to raise the sentence from the lowered sentence. In so far as the transparency is concerned, the trial judge made it very clear that, as far he was concerned, the construction of the legislation was fine. So all the processes defined by the legislation up to the point of the process that might be deployed to determine whether or not to increase the sentence have been found by a court to be in reasonably good order.

Mr McCartney: The judge would not express the view if he thought the legislation was flawed. He can interpret the legislation only as it is in front of him.

Mr McGrory: Yes. He said:

> *"Parliament has passed the legislation and that it was for the courts to interpret and implement it faithfully".*

Mr McCartney: We have had this discussion about judicial independence, but I do not suspect that a judge would ever say, "This is bad legislation. You should not have taken this case in the first instance."

Mr McGrory: As the judge said, it is for the courts to interpret and implement it. It is for me as a prosecutor to make the decisions that I have to make within the confines of the legislation. I have just identified where I perceive there to be a problem with it at a certain stage. However, I reiterate that the principle of the admissibility of accomplice evidence is not a creature of legislation; it is something that has evolved in the common law. In fact, the 1996 legislation that I referred to removed one of the hurdles that must be overcome in determining whether or not there could be convictions on accomplice evidence. So, if anything, the courts have moved away, or the legislators have moved away, from implementing barriers for the use of accomplice evidence. Arguably, what the legislators sought to do in constructing this legislation was to say, "This is a well-established principle in the law of evidence, but here is a way in which those principles can be applied in a transparent way." That was the purpose of the legislation. So it is always done from the basis that, evidentially, accomplice evidence is evidence that a court can receive and rely upon. As a prosecutor, I must make my decisions within that evidential framework.

Mr McCartney: I want to turn to the process. Jim Wells referred to bad character, which you gave some terminology for.

Mr McGrory: Yes.

Mr McCartney: Yet, at the end of the process with the PSNI, these two people were signed off as "witnesses of truth". I think that that was the terminology that was used. So they went from "bad character" to "witness of truth".

Mr McGrory: The issue of whether or not a witness is a witness of truth is, again, a more complex issue than it might at first appear. Without getting too detailed about this, it is for the prosecutor to be satisfied that the witness is telling the truth about something upon which the prosecutor seeks to rely. It is perfectly acceptable for a prosecutor to put up a witness as a witness of truth on one thing with the knowledge that the witness may not be telling the truth about other things. What would be incorrect would be for the prosecution to seek to rely on something about which it knows the witness not to be telling the truth. So it is not as simple and straightforward as it might at first appear. If you were to apply a blanket principle to the prosecution of cases that you should rely only on witnesses who tell the truth about everything, a lot of prosecutions that are taken would not be taken. So, again, it is incumbent upon me, as a responsible prosecutor, to apply the discretion that has been bestowed upon me and the prosecutors with whom I work to make the decisions as to when to rely on a witness and when not to.

Mr McCartney: I can understand that. This might be straying into the case again, but would it be a fair assumption to say that, if they had not got reduced sentences, they would not have been turned into witnesses of truth?

Mr McGrory: I do not see how the two correlate.

Mr McCartney: I am trying to say that inducement led them into the process. They could not concoct between themselves an explanation of how they presented to become accomplice witnesses.

Mr McGrory: I would say that that is a principle that could be applied to every accomplice. It is unlikely that most accomplices would offer themselves up to give evidence without getting something in return. That is a recognised aspect of human nature that the legislation acknowledges. It is also why the court and, indeed, prosecutors have to be very wary of that type of evidence.

One of the problems that Mr Justice Gillen had with these witnesses, which he articulated, was that he felt that they were not forthcoming to the court about the true reason. The irony is that a witness is made all the more credible if they come and say, "Look. I am making it very clear that I am here only because there is an advantage for me to be here, which is a reduced sentence." With respect, Mr McCartney, that is not a basis for not relying on them.

Mr McCartney: It is not solely a matter of that. We have in front of us the summary of the judgement from the Courts and Tribunals Service. The trial judge lists seven different reasons, one of which was demeanour in the witness box. Yet, that was not detected. Part of the sign-off process is that an:

> *"ACC, Crime Operations will sign off the Assisting Offender as a witness of truth."*

I accept that I am a layperson and not a prosecutor, and I am not under the pressures that the prosecution service might find itself under. However, it is difficult to know how, in these circumstances, these people were signed off as witnesses of truth, with the courts being held up to ridicule as a result. In my opinion, someone failed. We have the procedure in front of us, which includes terminology such as:

> *"such operations remain covert and they will operate on a need to know basis … A police officer from C3 will be appointed to input intelligence from the process and to ensure that it is properly disseminated."*

That just gives the impression, which was a feature of this and other trials, that PSNI agents are involved in these cases, yet they do not seem to appear. Sometimes you get the idea that one half of the Police Service is doing something and the other half is controlling the other half. For someone to be signed off at the end of the process as a witness of truth but then be pulled apart in court makes one wonder about the motivation for the case in the first instance.

Mr McGrory: A couple of points arise there, Mr McCartney. I would be surprised if it were said that it would not be in the public interest to prosecute somebody where there is evidence that they were involved in crime because they were otherwise a state agent. What happened in this case was that the Stewarts came in and said what they said about the people with whom they said they were involved in these crimes. Whether those people were or were not otherwise state agents is not something of which we take account. If the evidence is there to prosecute, they will be prosecuted. So I cannot see how it would be in the public interest to factor issues such as that into the decision to prosecute.

The other issue that you raised was in the context of demeanour. I have been giving very careful thought to all the headings under which Mr Justice Gillen found that he could not convict in this case, one of which is demeanour. The problem is that, to determine demeanour, you have to observe the witness and how the witness recounts the story and reacts to cross-examination. There is a limit to the extent to which you can assess demeanour in the context of the decision to prosecute. The police are probably in a better position than a prosecutor, because they are doing the interrogation. However, that raises other questions about whether or not the prosecutor should seek to become involved in the assessment of demeanour of a witness. That leads us into other very difficult territory that could

create other difficulties. It is an example of the complexity of the problems that confront the prosecutor in determining these cases. However, as far as I am concerned, we take those complexities, we consider them and we make our decisions in a balanced and well-thought-out way. I hope that the public have confidence that the Public Prosecution Service is going about its duties in that way.

Mr McCartney: I accept that, but it is in the public interest to ensure that public confidence in the process is not undermined by anything that you do. There is a balance there. In my opinion, and it is only my opinion, public confidence has taken a step back. Whatever has happened in the past, people were saying that the courts are a place where things are done in an open and transparent way. However, the commentary behind this particular case is anything but open and transparent and has damaged public confidence. It has damaged public confidence, because it is linked to something that failed, and failed miserably, in the past.

Mr McGrory: I understand that public confidence has been damaged, or adversely affected, because there were no convictions in this case. That is understandable. However, I have difficulty with the suggestion that there was anything undisclosed, underhand or secretive about the process. In fact, nothing could be further from the truth. The process has been very transparent. In fact, it is the very transparency of the process that has perhaps led to some of the questions that have been raised. That is because it was done in such an open way. We have people who were prosecuted themselves, who received a sentence, who are on licence and who are subject to review of their sentence. That process is under way. They had an open trial. They had disclosed to them all the information that the police gleaned in the debriefing process. They had disclosed to them all other available material that was of assistance to them. They had an open and fair trial that led to their acquittals. The public ought to be taking a great deal of solace and comfort from the transparency of the process. So I beg to differ from you in that regard.

Mr McCartney: Under the immunity clauses, or discount, as I think they call it, are they immune from prosecution for perjury?

Mr McGrory: No. Nobody is.

Mr McCartney: Would that be a consideration? The trial judge has publicly called them liars. Could perjury also be a possible outcome of this?

Mr McGrory: Yes. That will have to be examined. However, the very fact that a judge says that somebody has lied in one context does not necessarily lead to a conviction for perjury. There has to be a separate process. However, that is something that would be open to the prosecution.

Ms J McCann: May I just ask a question on the back of some of the answers that you gave earlier? You said that, if an assisting offender gives information that might include police wrongdoing, the police would interview them. If they are giving information about police wrongdoing, who interviews them? Is it the PSNI? Who then goes in to interview them?

Mr McGrory: That is a matter for the police. If there is an investigation into police wrongdoing, it ought to be, where possible, the ombudsman who carries out the investigation. We touched earlier on issues of oversight of the police, and that is a matter for the police to address. Certainly, one would be looking for a considerable degree of independence on the part of the investigators when issues of alleged police wrongdoing are involved.

Ms J McCann: Are you saying that the information that comes through one of those interviews goes to the ombudsman's office?

Mr McGrory: Yes, the ombudsman's office is charged with the responsibility of investigating the wrongdoing of police.

Ms J McCann: If that is the case, the police would already be aware of that wrongdoing as a result. Is that right?

Mr McGrory: That depends on the extent to which the ombudsman shares the fruits of his investigation with the police. I cannot speak to that; I am a prosecutor, and these are police issues.

Ms J McCann: I understand that, but I am just trying to get my head some of the answers that have already been given about transparency. If that is the case, and that information would all be in the mix, how does that sit with article 2, where offenders assisting investigations and prosecutions have immunity from prosecution?

Mr McGrory: The decision to give immunity is entrusted to the Director of Public Prosecutions; that is a prosecutorial decision. The Director of Public Prosecutions has to be given the information by the investigator, whether that is the police or the ombudsman.

Ms J McCann: If the information given includes information about the wrongdoing of police officers, how does that sit with circumstances in which you are giving people immunity from prosecution?

Mr McGrory: If the Director of Public Prosecutions takes the view that an investigation is required into any aspect of criminality, he can raise the issue with the Chief Constable under a provision in the Justice Act and ask for information that he will be required to give. For example, if information about alleged police wrongdoing comes to my attention, and I feel that it has not been properly investigated, I have the power, as the Director of Public Prosecutions, to go to the Chief Constable and say that I require him under section 35(5) of the Justice (Northern Ireland) Act 2002 to give me information about this. That power has been invoked, and I have said publicly before that I will not shirk from using it if I feel that it is required. You would hope that those matters would be identified and dealt with before they reach the prosecution service.

The Chairperson: Have you invoked it in your current position?

Mr McGrory: Yes, I have, but it is not something that I am able to discuss.

The Chairperson: We are almost finished now, but that takes me back to when you mentioned the 'Spotlight' programme. I want an assurance from you about the motivation behind all these trials connected to Operation Stafford. From that programme, it was clear to me that it is about trying to allege collusion. I want an assurance that the PPS will not be party to the particular motivation that was very evident in that programme.

Mr McGrory: I assure you that the Public Prosecution Service addresses only such information as is put in front of it. We have no hand, act or part in determining the motivation behind police investigations. The context in which the power I referred to might be used is if there are gaps in an investigation that the prosecution feels need to be filled through further investigation. It can make suggestions. That is the context in which it would be used.

The Chairperson: My understanding is that, when the ombudsman produced Operation Ballast, the then Chief Constable referred it to the HET. I think that the Public Prosecution Service looked at it, and the director said that, on the face of it, nothing alleged in the document warranted prosecution.

Mr McGrory: With respect, and I do not mean this in a pejorative way, I do not know what you are talking about. This is news to me. I cannot comment on that.

The Chairperson: I suspect that the two are connected and that Operation Ballast rolled into Operation Stafford, to which these current cases are all connected.

Mr McGrory: If and when the police put the fruits of those investigations in front of me and ask me to determine whether there should be a prosecution, those decisions will be taken based on the evidential and public interest tests. That is all that I can say.

Mr A Maginness: I want to ask one final question. It is a technical question, really. I have some sympathy with what Mr McCartney said about the 2005 Act, and, indeed, you highlighted some weaknesses or difficulties in the Act. What would the position be on accomplice evidence if the Act were completely repealed? Would we revert to a common law position?

Mr McGrory: Yes; there would only be the common law, so those provisions that guarantee the transparency with which this case was conducted would not exist in law.

Mr A Maginness: Corroboration, which was formerly an element to be taken into consideration in any prosecution of that sort, is no longer a requirement because of a judicial decision. There would be no requirement for corroboration in those circumstances, would there?

Mr McGrory: Again, that is dealt with in the common law, but the reality is that, even though the requirement for corroboration has been removed in certain types of case as a consequence of what we call the Makanjuola principle, a court would still find it highly desirable in a case of this kind.

Mr A Maginness: Does that mean that it is not essential?

Mr McGrory: It is not essential in the common law.

The Chairperson: Thank you very much, Mr McGrory. We appreciate your time and engagement with the Committee. We are very much obliged.

Mr McGrory: Thank you for having me. Do not be asking me up too often *[Laughter.]* I am happy to come when needed.