

A PRIVATE PROSECUTION UNDER THE PROSECUTION OF OFFENCES ACT 1985, s. 6(1): Overview of Peter M. Southwood's basis for instructing a firm of solicitors to proceed

1. Summary

A private prosecution against D1, D2 and D3 is proposed, being current or previous Attorneys General, for alleged offences under the Perjury Act 1911 in 2018. The case is based on the Crown Prosecution Service's 'Full Code Test' which I have applied as closely as possible.

2. Background

Following the decision of the Iraq War Families Campaign Group publicised on 18 December 2017 not to commence legal proceedings (which I had hoped to join), in the light of the Legal Opinion obtained from Counsel via McCue, I began my own claim for judicial review. My claim form was issued by the Administrative Court, London on 26 March 2018. (Evidence attached.)

3. Research Method & Its Limitations

The main limitation is the lack of easy access to criminal law reports on perjury cases.

4. The Law on Perjury & Kindred Offences

The relevant sections of the Perjury Act 1911 (the 'Act') in this private prosecution are section 5, on other false statements made without oath, and section 7, on aiders, abettors, etc.

5. Allegations (with precise dates of the offences explained under '6. A' below)

'D1' – the Attorney General as Interested Party (until 9 July 2018) made a false declaration in my judicial review proceedings contrary to the Act s. 5(b).

'D2' – the Attorney General as Interested Party (from 9 July 2018) sustained a false declaration in my judicial review proceedings contrary to the Act s. 5(b).

'D3' – the former Attorney General as Defendant aided and abetted the Interested Party to commit an offence contrary to the Act s. 7(1).

6. The Case

A. The Evidential Test

- (i) The actus reus of the offence was committed by D1's solicitor in his Acknowledgment of Service (AoS) of 24 April '18 when he falsely claimed '... I am duly authorised by the defendant to sign this statement.' (Evidence attached.)
- (ii) There was no mens rea of an offence by D1 on 24 April '18. The mens rea of an offence kindred to perjury only arose when D3's newly appointed solicitor wrote to the Court on 27 April '18 – out of time – taking the same view as D1's 'Summary Grounds of Resistance' in his AoS and affirming D1 as 'the correct defendant'. The motive of D1 and D3 was to avoid admitting error. No moral culpability is implied thereby.

The cognitive state of D3 on 27 April '18 as the alleged accessory to the s. 5 offence under the Act, using the leading *Jogee* case of the UK Supreme Court, was as follows:

- (1) D3 intends that D1 can sustain D1's false declaration of 24 April as being true; D3 intends or believes that his statement of 27th will be of assistance to D1; and D3 was under no obligation to assist in this way but did so.
- (2) The mens rea of this offence is deception (as explained in s. 1 of the Act):
 The adoption of common positions by D3 and D1 on my claim, and on D1 being 'the correct Defendant', were intended to demonstrate that D1's declaration of 24 April '18 was not false after all and persuade the Court to adopt that view. That view was deceitful because both principals, D3 and D1, knew that retrospective sanction could not be given by the Court to the false AoS declaration of 24 April '18 even if it had accepted their joint view that D1 was 'the correct Defendant'.
 Had D3's encouragement or assistance to D1 to perpetrate this deception, being the mental element which the offence required of D1, succeeded in giving such retrospective sanction then the civil Court judges would themselves have been implicated in this crime (albeit having judicial immunity from prosecution).
 It is noteworthy that D1 was, and D3 had been, a Law Officer of the Crown. The foresight required by both was to appreciate that their deception would *confirm* the mens rea of a crime on 27 April '18, contingent with the actus reus of the AoS of 24 April '18, rather than *undermine* the potential for any such offence. Either they foresaw the risk they were taking or were reckless in disregarding it.
- (3) [Taken before (1) and (2) in the full analysis below.]
 The actus reus of the offence by D1 was known to D3 and the other parties and the Court by the date of service of D1's AoS (26 April '18).

In summary, the liability of D3 is: his assistance took the form of 'aiding' D1 to perpetrate a deception on 27 April '18 even though D3 did not cause the actus reus of D1's offence on 24 April '18. It also took the form of 'abetting' because the principal offence occurred on 27 April '18 when D1's actus reus of 24 April '18 was joined with the mens rea of deception outlined in (1) to (3) above. A meeting of minds of principal and accessory was disclosed on 27th when the offence occurred.

The *liability of D1* is as principal offender. Without the actus reus of his offence on 24 April '18 D3 could not have been an accessory on 27th. The prosecution is not required to prove that there was an agreement between D1 and D3 and cannot do so. It suffices to show they had a common purpose, to avoid admitting error or to create the impression that the false declaration did not matter. This led D1 into the deception he perpetrated with D3's encouragement or assistance on 27th.

The *liability of D2* is that he sustained the mens rea of his predecessor, in his solicitor's letter to the Appeal Court of 17 August '18, by not disowning it.

'A Material Particular' (Perjury Act 1911, s. 5)

This issue of law relates primarily to the credibility of D1, D2 and D3 in my judicial review case as past or present Attorneys General, especially as Law Officers.

However, their offences, if proven in Court, would also have the effect of undermining the perception of my case as being totally without merit.

(iii) Absence of a Valid Defence:

The following theoretically possible lines of defence are considered but thought, for reasons given, to be invalid: acknowledgment of a mistake; abuse of process; necessity; delay; vexatious and/or malicious prosecution. Costs are also considered, although not a defence.

Overall, on the evidential test, I conclude that 'there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge [or allegation].'

B. The Public Interest Test

Principal reliance is placed on the CPS Full Code Test's 'Public Interest Stage' but this is supplemented by the Public Prosecution Service Code for Prosecutors in Northern Ireland. These latter aspects can be used because the CPS Code's list of questions is not exhaustive.

(i) Case for the Prosecution

- (a) *The seriousness of the offences*: three current or previous Law Officers voluntarily chose to commit crimes under the Act instead of admitting error by D1's subordinates.
- (b) *The level of culpability*: while D1's solicitor caused the actus reus of the offence, D1 and D3 provided the mens rea (even if it may have been suggested to them by subordinates). The principals have all benefitted from the presumption that the result of my civil case in 2018 – certified as totally without merit – was achieved by exclusively lawful and objective means when it was not. Moreover, the likelihood of re-offending by the principals is high.
- (c) *The impact on the community*: the offences strike at the heart of the justice system for if such senior government lawyers in England and Wales do not have to conduct themselves truthfully, even in a case they totally oppose, there is no reason for anyone else to do so.

(ii) Case against Prosecution

- (a) *The circumstances of, and harm caused to, the victim*: it might be argued that this is a 'victimless' crime in that the result of my claim for judicial review in 2018 would have been rejected whether or not the suspects had committed the offences under the Act of which they stand accused. However, in that case, I was not the principal victim. It was the public benefit of a judicially defined 'irenical perspective' on 9 October 1998, affirmed by the Court of Appeal (Civil Division) on 28 June 2000, which stood behind that claim in 2018 and without which it could not have been brought in the first place.
- (b) *Prosecution as a proportionate response*: there are several inter-related factors here:
- A guilty verdict from a jury against D1, D2 and/or D3 would deliver a seismic outcome.
 - The offenders presumably have no previous criminal record but their conduct cannot now simply be written off as an error of judgement or a genuine mistake.
 - An obvious potential conflict of interest in the CPS prosecuting this case against the Attorney General supports the case for a private prosecution instead.

(c) *Harm to international relations or national security*: it cannot be ruled out that the reason that the suspects urged the Court to certify my judicial review claim in 2018 as being totally without merit was to avoid a public hearing. If so, it can be expected that the suspects will do everything possible to deny a public hearing of this criminal case, too. This might include intervention by the Director of Public Prosecutions to take over and drop it.

(iii) Sentencing Considerations

Archer's case before the Court of Appeal in 2002 provides a useful benchmark against which to assess this case and address factors mitigating prosecution.

The main factors listed by the Court which seem relevant in mitigation here are: the number of offences and the timescale over which they were committed. The factors aggravating the offence appear to be: the seriousness in the preceding civil litigation I undertook in 2018; the planned nature of the offences; their being persisted in; the impact of the lie on the credibility of the litigants and in undermining my case being certified as totally without merit; how the Interested Party drew in the Defendant into his deception; and that all three offenders were principals, not beholden to each other except by reason of the high public office they held, or once held. They acted voluntarily in committing these offences. ***In summary***, sentencing on conviction points to a fine on the offenders for their misdemeanours.

C. Test for the Prosecution

It has been met prima facie against D1, D2 and D3 on each allegation under the Perjury Act 1911 concerning a '... statement false in a material particular'. There is sufficient evidence to provide a realistic prospect of conviction:

- ✓ The actus reus of D1's AoS of 24 April '18 is the undeniable foundation.
- ✓ D3's solicitor's letter of 27 April '18 to the Court provides the basis for determining D3's and D1's cognitive state, i.e. the mens rea of the offence.
- ✓ By that date, after the deadline for response to my claim, D3 knew of the actus reus of D1's offence. Their common motivation was to avoid admitting error.
- ✓ The timing and content of D3's solicitor's letter prove that D3 intends that D1 can sustain his false declaration of 24 April as being true and this will assist him.
- ✓ D3 was under no compulsion to assist in this way.
- ✓ The adoption of common positions by D3 and D1 on my claim, and on D1 being 'the correct Defendant', were intended to demonstrate that D1's declaration of 24 April '18 was not false after all and persuade the Court to adopt that view – a position that on 24 April '18 had undoubtedly usurped the authority of the Court.
- ✓ That view was deceitful because both principals, D3 and D1, knew that the Court could not give retrospective sanction to the false AoS declaration of 24 April '18, i.e. make a declaration true at the time when it was false and a usurpation.
- ✓ As Law Officers, past or present, D3 and D1 had the foresight to appreciate that their deception would *confirm* the mens rea of a crime on 27 April '18.
- ✓ D2's solicitor's letter of 17 August '18 sustains this mens rea by not disowning it.

Public interest/benefit factors tending against prosecution do not outweigh those in favour.

Main References & Notes

David Ormerod QC and Karl Laird, Smith, Hogan and Ormerod's Criminal Law 15th edition (Oxford University Press, 2018)

Statute

Perjury Act 1911 (as amended). [I have not used s. 1(1) of the Perjury Act 1911 because D1's solicitor's declaration in his Acknowledgement of Service did not appear to me to qualify as being by a person '... lawfully sworn as a witness...' in a judicial proceeding.]

Legal Cases

Jogee [2016] UKSC 8.

'In Full: Lord Burns Explanation to the Jury on Andy Coulson's Acquittal', The Herald (3 June 2015). [Although in a different jurisdiction (Scotland) the trial and acquittal of Andy Coulson on a charge of perjury was of assistance to me here.]

Q v Jeffrey Howard Archer [2002] EWCA Crim 1996.

Slade J. in McGovern v Attorney General [1982] Ch 321 at 333G-334B. [For an explanation of 'public benefit'.]