**Prosecuting in a banana republic- the Scappaticci perjury saga**

The word ‘saga’ is from the Norse language and has nothing to do with old people going on holiday. It denotes a story which goes on for a very long time. This one has lasted fifteen years , so far and there is no end in sight

Having received a great deal of publicity, about whether or not he was an agent, Freddie Scappaticci, a member of the IRA, resorted to litigation in 2003. The case came before Carswell. The present Chief Justice, Declan Morgan, appeared for the State.

Carswell summarised the issues as follows:

***[1]****In this application the applicant Mr Freddie Scappaticci seeks judicial review of a decision of Ms Jane Kennedy MP, Minister of State at the Northern Ireland Office, the minister responsible for security matters in Northern Ireland, whereby she refused to confirm or deny allegations made in the Press that the applicant was an undercover agent for the Government, commonly referred to as "Stakeknife" (sic).  Mr Scappaticci has at all times strenuously denied these allegations.  His case is founded on the proposition that since the making of the allegations has seriously endangered his life, the Government owes him a duty under Article 2 of the European Convention on Human Rights to reduce that danger by confirming that he is not Stakeknife.  The minister's response is that it is Government policy to make no comment on intelligence matters and that she accordingly can neither confirm nor deny the allegations.*

Unsurprisingly, he dismissed the application by Scappaticci.

His affidavit then came under scrutiny. Ian Hurst, a British Army soldier who penetrated the IRA said that Scappaticci was lying and made a complaint to police.

It is reported that , three years later , in 2006 Pamela Atchison was one of a number of lawyers who took the decision not to prosecute Scappaticci for perjury.

Let’s look at the offence.

**Perjury**

**3.**—(1) Any person lawfully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement material in that proceeding, which he knows to be false, or does not believe to be true, shall be guilty of perjury, and shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years, or to a fine, or to both.

(2) The expression “judicial proceeding” includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath.

(3) Where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorised by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for the purposes of this Article, be treated as having been made in a judicial proceeding.

(4) A statement made by a person lawfully sworn in Northern Ireland for the purposes of a judicial proceeding—

(a)in another part of Her Majesty's dominions; or

(b)in a British tribunal lawfully constituted in any place by sea or land outside Her Majesty's dominions; or

(c)in a tribunal of any foreign state;

shall, for the purposes of this Article, be treated as a statement made in a judicial proceeding in Northern Ireland.

(5) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court at the trial.

Apparently, the crucial issue for the PPS was the word “wilfully”. Their reported logic was that , because Scappaticci feared for his life, he was not ‘wilfully’ making a false statement.

So, on foot of Ian Hurst’s complaint, what did the police file say? “Mr Scappaticci swore an affidavit denying being Stakeknife. We say that he is and we enclose his file , showing that he has been an informer since the 1970s in the pay of the RUC and latterly MI5.”

Aside from the issue of the voluntariness of his statement, there is another element to consider. It is Article 14.

## Corroboration

**14.**  A person shall not be liable to be convicted of any offence against this Order, or of any offence declared by any other enactment to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury, solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

So the State would have to come up with two witnesses. Clearly, they had corroboration.

What is “corroboration”?

It is supporting evidence, independent from the primary evidence. In this case it could be a document.

In any event no prosecution was directed, on limb one, that there was not a reasonable prospect of success.

The PPS could have directed no prosecution on limb two, that prosecution was not in the public interest. This does not seem to have been the decision.

If you are still with me, Dear Reader, these events occurred in the period 2003-2006.

So, what was happening in the Public Prosecution Service during this time? It was headed by Alasdair Fraser. He had joined the nascent Service in the early seventies, without much experience as a practising barrister at the sharp end. He made his way up the organisation, then headed by Sir Barry Shaw, ex Royal Artillery and sometime counsel for Gusty Spence, [who had a poor opinion of his case preparation].

On Shaw’s retirement, in 1989 Fraser was appointed, a number of outstanding lawyers, such as Alan White, having left the Service.

Sadly , Fraser contracted cancer, which he battled for a number of years. During his absences because of illness, he was replaced by Jimmy Scholes and , no doubt Pamela Atchison also “acted up” as deputy.

Fraser retired in September 2010. His tenure is regarded as being marked by a series of rear guard actions against the progress of time in regard to openness and transparency.

On 2011 , Scholes having again “acted up” , McGrory was appointed, bringing with him not baggage but a whole skip load of Sinn Fein/IRA history.

Suddenly, in 2016,McGrory asked Atchison to take gardening leave.

It is said that having been told that she would be reported for some offence, she left her office forthwith and subsequently negotiated her retirement.

The matter resurfaced in an application by Frank Mulhern for judicial review of the activities of the PPS. His application was for :

1. *(a)  An order of certiorari to bring up and quash the decision of the Director of Public Prosecutions not to prosecute Freddie Scappaticci for an offence of perjury relating to the judicial review claim he issued in 2003;*
2. *(b)  An order of mandamus to compel the Director of Public Prosecutions to take a fresh, lawful decision on whether to prosecute Freddie Scappaticci for an offence of perjury relating to the judicial review claim he issued in 2003;*

*(c)  A declaration that the said on-going failure is unlawful.*

Mulhearn’s solicitors wrote to McGrory.

A response was received on 22 May 2017. This response reads as follows:

*“The Director has asked me to reply to your letter of 16 May 2017.*

*You will appreciate that the PPS is unable to make any comment on the suggestion in your letter as to the identity of the agent codenamed Stakeknife.*

*It is correct however that an individual was reported to the PPS in 2006 for the alleged offence of perjury during court proceedings in 2003 involving the individual referred to in your letter. While it was considered, on the evidence, that perjury was committed, the view was taken that the individual concerned had a viable defence of necessity and a no prosecution decision issued. These matters are now the subject of investigation by Operation Kenova and it would be inappropriate to comment further.”*

 The reply to this pre-action correspondence is dated 25 September 2017. This reply refers back to the letter of 22 May 2017. It also refers to a press release which issued in October 2015 and contained the following information:

*“The Director of Public Prosecutions Barra McGrory QC has announced today (Wednesday 22 October 2015) that he has requested that the Chief Constable investigate a range of offences which relate to the activities of an individual who is commonly known under the codename Stakeknife.*

*The Director of Public Prosecutions has also carried out a review of relevant papers and information within the PPS and has identified one case where he now considers there is sufficient basis to review a prosecutorial decision. This relates to a case involving an allegation of perjury in 2003. The Director explains:*

*‘I have serious concerns in relation to this decision. Having reviewed all of the available evidence I consider that the original decision did not take into account relevant considerations and also took into account irrelevant factors. I have concluded that the original decision was not within the range of decisions that could reasonably be taken in the circumstances. This decision has been set aside. In accordance with our code for prosecutors, I have asked the Chief Constable to*

*provide further material so that the matter may be reconsidered’.”*

To the outside observer, it might seem odd that Sinn Féin/IRA’s lawyer of choice , Barra McGrory is making a decision in respect of a man who, conceivably was spying and informing on his former clients. But, Dear Reader , this is post Belfast Agreement, where anything is possible.

This course led to replying correspondence being filed by Chief Constable Boutcher dated 26 January 2018.

*(2) From a policing and investigatory perspective, best practice would dictate that PPSNI simultaneously considers as many interconnected matters as possible in the light of the widest possible range of evidence and potential charges. If the court were to find that PPSNI should take a prosecution decision in relation to the perjury allegations now, before we have investigated and reported on them, PPSNI could only do this by reference to the evidence currently available.”*

The terms of reference were stated to be as follows:

*“4.1 Operation Kenova’s terms of reference are underpinned by four requests made by the Northern Ireland DPP to the Chief Constable of PSNI under Section 35(5) of the Justice (Northern Ireland) Act 2002 and one open PSNI murder file, which have all been transferred to my team for action under Section 98 of the Police Act 1998: request 4 under this section is as follows:*

*Request 4 – 22 October 2015 – perjury*

*A Section 35(5) request was also made in relation to a case involving related allegations of perjury, perverting the course of justice and misconduct in public office in 2003.*

*5 – Transferred murder file – Mulhern*

*The PSNI Serious Crime Branch re-opened the investigation into the 1993 murder of Joseph Mulhern in 2011 and forwarded an interim report to the Northern Ireland DPP in January 2016. This case was also transferred to Operation Kenova for continued investigation together with the Section 35(5) requests.”*

The court went on to state that : *The core question is whether it is reasonable of the DPP to defer a decision on prosecution for perjury pending the conclusion of the investigation of Operation Kenova.*

*Having considered the arguments made by both of the parties, the comprehensive documentation that has been put before the court, and the oral submissions, we do not consider that the decision can be described as unreasonable or irrational such as to render it unlawful.*

*However, we also note that Chief Constable Boutcher is committed to a full investigation of all issues and we trust that he will issue his report within the near future. In the light of the foregoing the applicant has failed to mount an arguable case with a reasonable prospect of success. The application for leave to apply for judicial review must therefore be dismissed.*

The defence of necessity

Archbold says this [at 17-132 . 2015ed] *A person will have a defence to a charge of crime if*

*[a] the commission of the crime was necessary or reasonably believed to have been necessary..for the purpose of avoiding or preventing death or serious injury to himself or another*

*[b] that necessity was the sine qua non of the commission of the crime; and*

*[c] the commission of the crime , viewed objectively, was reasonable and proportionate having regard to the evil to be avoided or prevented.*

Scappaticci had already denied , to the media that he was an informer. He went further and , it would appear that the PPS came to this view, he deliberately lied in a sworn affidavit. The defence of necessity used to be explained as ‘the horns of a dilemma’. Here , Scappaticci knowingly and voluntarily put himself in a position where he had to lie to further his case. The situation was entirely of his own making.

Given the comments above, it is clear that the PPS considered that there was a case which passed the directing test. The issue was whether the defence of necessity was available to Scappaticci. The PPS then thought it was. McGrory, not in the first division of legal intellects, thought it was not. Cui bono? Did McGrory have an agenda? If so what was it? If the decision is to be re-visited, what additional evidence would be required from Operation Kenova? The answer is none is necessary. The issue is about applying the law properly. If he is a state agent, which is clearly the evidence in possession of the PPS, then the question is, when he lied about that in his affidavit, had he a defence. All this stuff about further inquiries is otiose.

Misconduct in a public office

The statement from McGrory refers to an enquiry into the offence of misconduct in a public office in 2003. That would appear not to relate to the activities of Pamela Atchison, who was involved in the prosecutorial decision much later. So who is in the frame for this offence?

Now what?

Tony McGleenan, on behalf of the Public Prosecution Service, said that Operation Kenova is dealing with this and other issues and that [‘sic’] ‘independent police investigation should take its course’. Keegan J, doing Morgan’s bidding , agreed. The application was dismissed.

So, fifteen years after Scappaticci swore his affidavit and twelve years after the PPS thought that he had told a lie, there is no outcome.

Why? Men in grey suits visit the Director of Public Prosecutions [ as they have for years] , the Chief Justice, the Attorney General and anyone else who has influence. They have a message.

Who wants Scappaticci in a court? Who wants him a witness box? Not the British State. He is an old man.

But so are many of his victims.

There is just one more thing to consider. Scappaticci undoubtedly has a letter telling him that he is not being prosecuted.

Does that ring any bells?