

ABUSE OF POWER

When will a Judge throw a case out of Court because of the behaviour of the Prosecution? - An Article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

This short phrase ‘abuse of process’ will be well known to many of our readers. In this article we set out to explain the basics of the abuse of process jurisdiction and the main issues that arise.

THE JUDGE’S ROLE

There are many reasons why a Judge might conclude that it would not be proper for the Courts to be used to prosecute a Defendant, and they all come back to the question of fairness. For example, delay in bringing proceedings, manipulation of the Court’s procedures, entrapment by police officers, loss of evidence and so on. The prosecution facing an abuse of process application will always argue that the Judge can ensure fairness by, for example, excluding any evidence which is causing dispute, or by warning the jury that the Defendant has been unable to call certain evidence because it has been destroyed - in other words anything except throw the case out before it even starts.

LEADING CASE

One of the leading cases in this area is *R (Ebrahim) v Feltham Magistrates’ Court*; *Mouat v DPP* [2001] 2 Cr. App. R, 23, DC. The High Court considered the situation where the two Defendants had asserted that video evidence would have assisted their defences but that the video material was no longer available. In *Mr. Mouat’s* case he was videoed by an unmarked police car exceeding the speed limit. His defence was that he was trying to get away from a driver who was driving dangerously close behind him and he had no idea it was a police car; i.e. duress of circumstances. Once he stopped he was shown the video by the officers and had the choice to accept a penalty or go to trial - he elected trial. By the time of the trial the tapes in the police car had been re-used. The High Court quashed *Mr. Mouat’s* conviction. *Mr. Ebrahim* was not so fortunate. *Ebrahim’s* case concerned un-seized CCTV material. On the facts of that case the Court found that the Defendant had had a fair trial even though CCTV material was missing. The Court of Appeal said that when considering an abuse application on this basis it must consider what the duty was to preserve any video material. If the Court finds that there is no such duty for the material in question to be seized or preserved then there can be no stay of the prosecution. If, alternatively, there is such a duty, and it has been breached, then the Court can only consider staying the

indictment as an exceptional measure as the trial process itself can remedy the problem; e.g. by the Judge to warning the jury about missing evidence, or by him excluding certain other evidence etc. If, however, the police or the prosecution appear to have acted with “bad faith or at the very least some serious fault” then a stay may be more readily granted.

TWO CATEGORIES OF ABUSE

The way the case law has developed the Courts appear to have been careful not to use the abuse of process jurisdiction to effectively punish the police or the prosecution for errors or faults. The ‘serious fault’ limb of abuse is really part of the development of the abuse of process jurisdiction into two broad situations; (i) cases where the Defendant cannot receive a fair trial, and (ii) cases where it would be unfair for the Defendant to be tried: *R v Beckford* (1996) 1 Cr App R 94, 101. So, if evidence that should have been seized by the police and now cannot be got, and would have been helpful to the defence, then that is a ‘Category 1’ situation and the Judge could, exceptionally, stay the trial as the Defendant could not get a fair trial.

If the police had the material but maliciously destroyed it then that would be a ‘Category 2’ case and even though the Defendant could get a fair trial it would be unfair to try him - in as much as it would offend our sense of justice and bring the administration of the criminal justice system into disrepute to do so, see e.g. *R v Mullen* [1999] 1 AC 42, HL.

R v Grant [2005] 2 Cr. App. R 28 is another Category 2 case; there the Court of Appeal considered a case where the police eavesdropped on the communications of a suspect and his solicitor. The acts of the police were unlawful and, according to the Court, were capable of infecting the proceedings as abusive of the Court’s process.

The Court held that unlawful acts of such a kind, amounting to a deliberate violation of a suspect’s right to legal privilege were such an affront to the integrity of the justice system, and therefore the rule of law, that the prosecution was rendered abusive and ought not to be countenanced by the Court.

Where a Court is faced with illegal conduct by police or State prosecutors which is so grave as to threaten to un-

dermine the rule of law itself the Court is likely to regard itself as bound to stop the case.

RECENT DEVELOPMENTS

The area of disclosure has always been the most contentious area of criminal litigation and most of the great miscarriage of justice cases have turned on failures to disclose by the prosecution. The House of Lords laid down final and conclusive guidance on disclosure and Public Interest Immunity applications in the case *R v H & C* [2004] 2 AC 134 (the authors represented 'H').

However, it is a sad fact that today prosecutors are still not getting disclosure right. With the pressure on the prosecution not to give the defence the 'warehouse keys' there has been an over analysis of Defence Statements and a willingness to conclude that no further disclosure is necessary.

In a case called *R v O* [2007] EWCA Crim 3483 a Crown Court Judge was so exasperated by H.M. Customs's failure to properly respond to the defence's proper applications for disclosure he stayed the case as an abuse of process. The prosecution appealed and the Court of Appeal upheld the decision. The case was a VAT carousel fraud allegation where O was simply asking for business documents held by customs after they had searched his premises; this comprised of around 8,000 pages most of which was not disclosed to the defence, despite the material belonging to the Defendant in the first place. Customs had been taking the line that most of the material neither assisted the defence or undermined the prosecution case and was therefore not disclosable and refused to even let the defence have sight of the outer covers of the documents. The defence were adamant that the business documents could show a line of legitimate trading and therefore support the defence's case. The Judge had the option of ruling in favour of the prosecution, ordering disclosure or staying the case as an abuse of process. The Judge was swayed by the obstructive nature of Customs, he did not even make a decision on the merits of the material in question but was pushed in the end to saying that Customs had relied too heavily on the precise rule of law on disclosure, to the extent that they were inflexible and obstructive. His Honour said "if the prosecution approach the case without concession then they can expect none" and with that he threw the case out.

Recently the Court of Appeal confirmed the Crown Court's jurisdiction to stay confiscation proceedings where, in limited cases, the Crown's application for confiscation amounts to oppression: *R v Morgan & Bygrave* [2008] EWCA Crim 1323 (20/6/08), para 27. This is not stopping the trial but the confiscation process - this appears to be indicative of a recent trend by the Courts to be more prepared to use the abuse of process jurisdiction, see for example another recent case at Harrow Crown Court where the Judge threw out a substantial confisca-

tion case. This was not because the prosecution had erred but because under the new legal aid scheme the solicitors for the Defendant could not find any barrister willing to take the case on at the ludicrously low rates that the State pays in confiscation proceedings. No effective representation the Judge felt meant that it would be an abuse to try the Defendant and he dismissed the case as an abuse of process.

CONCLUSION

What is required in any abuse application is material upon which such an application can be supported. This usually means early and focussed pressure on disclosure where a possible abuse of process application might be made. The Courts have shown a willingness in recent years to stay proceedings in a wider variety of cases than might previously have been the case. That said prosecutors will always meet such applications with the standard line that staying a case is an exceptional measure. In order to persuade a Court to stay an indictment a Defendant has to have the ammunition to support the application. That means the lawyers have to be alive to the possibilities that might arise in any case and always have the possibility of an abuse argument in the back of their minds.

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