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Active defence, abuse of process and disclosure applications – a practical guide.

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Abuse of process and Disclosure

The Definition:

“The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either

(a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or

(b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution”.

Per Ormrod L.C.J. in R. v. Derby Crown Court, ex p. Brooks, 80 Cr. App. R. at 168.

“No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness.”

Per Lord Clyde in R. v. Martin (Alan) [1998] 2 W.L.R. 1, at 25.

The test:

It is a test of fairness:

“The jurisdiction to stay can be exercised in many different circumstances.

Nevertheless two main strands can be detected in the authorities:

a) Cases where the court concludes that the defendant cannot receive a fair trial;

b) Cases where the court concludes that it would be unfair for the defendant to be tried.”

R. v. Beckford (1996) 1 Cr. App. R. 94, at 100G, per Neill L.J.:

In some cases the two categories may overlap. It is a test that is determined on the individual facts of each case. When an application is made for proceedings to be stayed, consideration should be given to the process by which the defendant was brought to court, including, inter alia, the time delay involved, the disclosure and destruction of evidence, any surrounding publicity, the rule of law, and the methods used to investigate and prosecute the offence.

PRACTICALITIES

The Magistrates’ Court:

When do I make the application?

An application to stay proceedings may be considered at a preliminary hearing prior to committal proceedings or summary trial. Applications to stay proceedings should be made as soon as they arise. This is of particular importance in delay cases. The power to stay an indictment is ongoing during a trial and reviewable throughout (R. v. Birmingham [1992] Crim. L.R. 117). The power to stay need not

be used to stay the whole of an indictment and can be used in relation to individual counts (R. v. Munro, 97 Cr. App. R. 183).

R. v. Worcester Magistrates Court ex parte Bell (1993) 157 JP 921

If it is a sex case the application can be made after the evidence for the prosecution has been called.

How do I make it?

By drafting a skeleton argument served in advance of the hearing on the prosecution and the Court. Avoid citing too many cases. Courts are discouraging such an approach as each case is to be decided on the merits of its own facts. The Divisional Court in R. v. Newham J.J., ex p. C [1993] Crim. L.R. 130, held that *“it was a mistake to seek to compare one case with another because the factors in each case were often substantially different”*.

The abuse application may reveal part of the defence case. You must obtain your client’s written express consent to do so.

IF IT FAILS:

If the application fails you can ask for

- (1) bail to enable the Defendant to complete any necessary enquiries
- (2) the trial is expedited
- (3) imposing reporting restrictions
- (4) transferring venue
- (5) using a jury questionnaire

(6) exclusion of evidence

(7) use of the summing-up, to offset any prejudice the accused might suffer as a result of loss of evidence, delay and media attention.

However, the abuse of process principle cannot be used to exclude evidence under section 78 of PACE: *R. v. Aujla* [1998] 2 Cr.App.R. 16.

A retrial may be stayed as an abuse of process to cure any unfairness suffered as a result of the loss of the protection offered by Custody Time Limits (see *R v Leeds Crown Court, ex.p. Whitehead*, 17 June 1999, QBD, CO/795/99 (The Times, 5 July 1999)).

THE HEARING:

Both the Prosecution and Defence are entitled to be heard and present evidence.

It should generally be in open Court.

What are the grounds?

Defendant must establish it is an abuse of process on the balance of probabilities.

The ambit of the Justices' powers is "*very strictly confined*" (*R. v. Oxford City J.J., ex p. Smith* (1982) 75 Cr. App. R. 200 at 204, per Lord Chief Justice Lane . *Environment Agency v. Stanford*, 30 June 1998, DC, CD/4625/97, (1998) 8 *Archbold News* 1, C.O.D. 373 DC)

R. v. Horseferry Road Magistrates Court ex parte K (1996) 2 WLR 68).

In considering a stay application the Justices must make full inquiry into the procedural history of the case (R v Crawley Justices ex.p. DPP (1991) C.O.D.347, DC).

The categories of abuse already established are not exhaustive, as Neill L.J. observed in R. v. Bow Street Stipendiary Magistrate, ex p. DPP (1992) 95 Cr. App. R. 9, at 16,

“the law in this field is still at the stage of development”.

In R. v. Martin (Alan) [1998] 2 W.L.R. 1, at 6, Lord Lloyd stated:

“the categories of abuse of process like the categories of negligence are never closed”.

There are some well known “catagories.”

THE CATEGORIES

1. DELAY

Delay itself is insufficient. You must argue that the Defendant’s right to a fair trial has been infringed by delay. It must be such that it cannot be cured by appropriate rulings in the course of a trial, or by the judicial exclusion of evidence.

THE FOUR FACTORS:

Powell J. in the Supreme Court of the United States in Barker v. Wingo (1972) 407 U.S. 514, identified four factors to which “the court should have regard to”

has been cited with approval by Lord Templeman in Bell v. DPP of Jamaica [1985] A.C. 937 at 951-952D-F

a) **the length of delay**; dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge;

b) **the justification put forward by the prosecution**; a deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay;

c) **the responsibility of the accused for asserting her/his rights**; and

d) **the prejudice to the accused**. Prejudice, of course, should be assessed in the light of the interests of the defendants which the speedy trial right was designed to protect. This court has identified three such interests:

i. to prevent oppressive pre-trial incarceration;

ii. to minimise anxiety and concern of the accused; and

iii. to limit the possibility that the defence will be impaired... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown.”

The longer the delay in any particular case the less likely it is the accused can be afforded a fair trial.

The right to a trial within a reasonable time is set out in articles 5(3) and 6(1) of the ECHR. Article 5(3) states “Everyone arrested or detained ..shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial..”.

Article 6 (1) states:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”.

SEXUAL OFFENCES:

In R. v. Percival, 19 June 1998, CA, No.97/6746/X4, [1998] 7 Archbold News 2, The Times, 20 July 1998. Lord Justice Holland said: “a developing concern with and, understanding of sexual abuse is reflected in a growing experience of cases featuring delays that at one time would have been regarded as intolerable. That experience of cases of unreported abuse has served to encourage experienced judges to be more liberal in their concept of what is possible by way of a fair trial in the face of delay, but, as we think there is a price, namely safeguarding the Defendant from unacceptable resultant prejudice by a “pro active” approach in terms of directions. Before a conviction following such a trial can appear to be safe, it is necessary to be satisfied that the judge has confronted the jury with the fact of delay and its potential impact on the formulation and conduct of the defence and on the Prosecution’s fulfilment of the burden of proof ... (with) a conscientious concern for the burden and standard of proof”

The question for the trial judge is “*whether it is possible to hold a fair trial after a long delay*”: R. v. Wilkinson [1996] 1 Cr. App. R. 81 at 85C.

Cases where the Court will uphold an abuse of process argument where the delay is not caused by the prosecution will be rare.

R v Brian Selwyn Bell (2003) EWCA Crim 319, (2003) 2 Cr. App. R 13 LCJ Woolf presided.

The defendant, before the start of the trial made an application for a stay for abuse of process based on the delay of 30 years between the alleged incidents and the complaint being made. The judge rejected the application but recognised that the delay could cause difficulties for the defendant in that it would be hard to gather witnesses or evidence so long after the incidents had happened. The judge considered that any possible unfairness to the defendant could be dealt with within the trial process. He was convicted. The defendant appealed on the ground that the conviction was unsafe as the evidence relied on was unreliable and unsupported by any independent evidence. The Court of Appeal quashed the conviction saying it had a residual power to do so where the interests of justice demanded that the court had to interfere and set aside the conviction.

2. NON-AVAILABILITY OF EVIDENCE:

The court has a discretion to stay proceedings if evidence has been lost or destroyed, and the defence has been deprived of a potential opportunity to advance its case.

There must be some bad faith or serious fault on the part of the prosecution.

Guidance was given by the Divisional Court in R v Feltham Magistrates' Court ex parte Ebrahim Mouat v DPP [2001] 1 AER 831, as to the approach that the

courts should adopt when faced with the non-availability of evidence at trial - with specific reference to video-tape evidence.

1. Consider the duty, if any, of the investigator or prosecutor to obtain, retain, preserve the evidence.
2. If there was no duty before the defence first sought retention, there could be no question of a subsequent trial being unfair.
3. If the material has not been retained the following principles should be applied:
 - (i) the ultimate objective was to ensure a fair trial to both the defence and prosecution
 - (ii) trial procedural safeguards could deal with the bulk of complaints
 - (iii) if there was sufficient credible evidence which, if believed, could sustain a safe conviction, the trial should proceed. A stay should not be granted unless the defence could show prejudice to the extent that a fair trial could not be had
4. the proceedings could be stayed if the behaviour of the prosecution was so bad - in terms of bad faith or serious fault - that it was not fair to try the defendant

R. v. Birmingham [1992] Crim. L.R. 117 Wood Green Crown Court, H.H.J. Bromley Q.C. held that an indictment charging seven defendants with violent disorder would be stayed. The existence of a video recording of both the locus in quo and part of the incident itself was not disclosed to the defence pre-trial. The police officer in charge of the case had viewed the video tape. However, the video recording was lost. The court held that the prosecution had a duty to disclose the video tape, whether or not it had

been requested, because the tape could have provided material evidence relevant to the defence. The deprivation of this material prejudiced the accused and made a fair trial.

See also R v Medway 2000 Crim. L.R 415

There are a number of cases where destruction of video evidence and exhibits has not been deemed to be an abuse but beware of them because in each case the evidence would not have been central to the issues in the case.

It does not simply relate to retaining items. It extends to failing to get them.

R. v. Gajree 20 September 1994, No. 94/3269/Y2 Initial police failure and delay in forensically examining a carpet for semen led to the conviction being quashed by the Court of Appeal. If the matter had been pursued properly and expeditiously, the question of seminal staining of the carpet would have been capable of forensic resolution one way or the other. Mr Justice Sachs stated: "We are satisfied that because of the passage of time, and the inertia of the police officers, this appellant was deprived of evidence that might have otherwise been available to him, and in our view, renders the verdict in the case unsafe and unsatisfactory"

3. UNFAIR CONDUCT:

The Courts must protect the integrity of the criminal process In R. v. Horseferry Road Magistrates' Court, ex p. Bennett [1994] A.C. 42—Lord Lowry, at 72G observed:

"I consider that a court has a discretion to stay any criminal proceedings on the grounds that to try those proceedings will amount to an abuse of its own process either

(1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or

(2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case."

At 62, Lord Griffiths further observed:

"The courts have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution."

4. EXPECTATION CASES:

Here there is no need to show actual prejudice.

Chu Piu-Wing v. Attorney General (1984) HKLR 411—McMullin V.P. said, at 417-418, that: *"there is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain."*

R. v. Croydon J.J., ex p. Dean (1994) 98 Cr. App. R. 76 DC—The prosecution reneged on its promise that a 17-year-old boy would not be

prosecuted if he assisted the police as a witness. Held to be an abuse of process.

R. v. Robert Thomas [1995] Crim. L.R. 938—The defendant was charged inter alia with section 18 of the Offences Against the Person Act 1861. By letter, the CPS stated that a plea to section 20 was acceptable. The defendant pleaded guilty to section 20. Counsel for the Crown then told the court that the plea was not acceptable and sought to continue proceedings under section 18. The trial was stayed on the basis that officials of the state were bound by promises they had made.

R. v. Bloomfield [1997] 1 Cr. App. R. 135—Prosecution Counsel told defence counsel that the Crown wished to offer no evidence because the prosecution accepted that the defendant had been “set-up”. The case was adjourned to allow the prosecution to offer no evidence at a subsequent pre-trial hearing. The Crown Prosecution Service then informed the defence solicitors that the Crown intended to continue the prosecution. At trial, an application to stay the proceedings as an abuse of process failed and the defendant pleaded guilty. The Court of Appeal quashed the conviction because the decision by the prosecution to continue proceedings would bring the administration of justice into disrepute, as no reason was given for their change of stance; and neither the court nor the defendant could be expected to inquire whether prosecuting counsel had authority to conduct a case in court in any particular way and they were therefore entitled to assume in ordinary circumstances that counsel did have such authority.

In R v Hyatt (1997) 3 Archbold News 2, prosecution counsel promised the defence that if a scientific test which was awaited helped the defence then the

Crown would offer no evidence. The test did favour the defence. The prosecution added a further count to the indictment and continued to prosecute. The defendant pleaded guilty after the judge refused to stay the proceedings. The Court of Appeal quashed the conviction as something so unfair had occurred that the proceedings were an abuse of process.

R. v. DPP, ex p. Burke [1997] C.O.D. 169, DC—The defendant was informed by means of standard letter that the Crown Prosecution Service intended to discontinue proceedings, save “exceptionally, if further significant evidence (was) to become available”. That decision was revoked and proceedings instigated even though no further evidence had come to light. Phillips LJ held that the terms of the letter were not calculated to let the defendant believe he was free from jeopardy.

D (2000) 1 Archbold News 1 CA, no. 98/6262/W2, 9 July 1999 - the Appellant was convicted of sexual offences, originating from a complaint in 1986. The appellant was initially written to by a chief inspector, to the effect that “no further police action will be taken”. A second complainant subsequently made an allegation and the original matter was reinstated. A conviction resulted. The Court of Appeal quashed the conviction saying that the proceedings should have been stayed as an abuse of process. Various materials which might have been of use to the Defence had been disposed of - including the terms of the earlier complaint. The consequence was the Appellant was substantially prejudiced.

5. MISCONDUCT

By the police:

R. v. Liverpool Stipendiary Magistrate, ex p. Slade [1998] 1 W.L.R. 531—Slade was prosecuted under section 1 of the Dangerous Dogs Act 1991 for having an

unmuzzled dog in a public place. At trial the charge was dismissed as the prosecution were unable to call expert evidence. The following day Slade collected his dog and the police allowed him to remove it unmuzzled from the police station. They then charged him with being in charge of an unmuzzled dog in public. The Divisional Court decided that the prosecution was an abuse of process as i) the applicant had no reason to believe he was committing an offence when accepting the dog from the police, ii) having been acquitted of the earlier charge, he reasonably believed that he was entitled to take the dog and could reasonably have assumed that he would not be prosecuted, and iii) the police could have disabused him of that belief but had not done so and iv) there was no discretion to mitigate the severity of the sentence. Accordingly it would be unfair to try the case.

By customs:

In R v Doran 6th July 1999, Bristol Crown Court, J.Turner stayed the indictment as the conduct of HM Customs officers had struck at the rule of law. Customs had deliberately misled the judge at the first trial and the defence on two factual issues: the failure of Customs to (1) obtain the consent of hotel management when bugging hotel rooms (2) follow internal surveillance authorisation procedures. To conceal this fact the officers had allegedly created a trail of false paperwork. This meant that the defence were “deprived of a point which they were entitled to make as part of a broad attack on the character of the conduct of the investigation.... By abuse of executive authority, the prosecution, viewed as a single entity, have, by means which are at least arguably unlawful, deprived the defence of its strategic ability to mount the challenge to the integrity of the prosecution case...What has happened has had a significant impact on the ability of the defendants to defend themselves, and to that extent, and as a

matter of probability, they have been seriously prejudiced in the conduct of their defence”.

In R v Maame Osei-Bonsu 22 June 2000 the Court of Appeal overturned a conviction for assault occasioning actual bodily harm as it was unsafe. Before trial the defence had sought disclosure from the CPS of the names and addresses of any witnesses on whom the Crown did not intend to rely upon. No details were supplied. During the trial the prosecution failed to produce notebooks (as they had been archived, but no longer available) and O.I.S logs. The defence made further disclosure requests of the CPS for the evidence which they failed to produce at the Crown Court. The CPS ignored them. Lord Justice Otton observed *“the information that was requested was an entirely proper request and that the information was clearly discloseable”*.

At the Appeal a note book was produced which Lord Justice Otton found contained “material in the notebook which was of considerable importance to the defence”. The police notebook contained details of a potential witness to the incident, prompting Lord Justice Otton to observe:

“We take a very serious view of that, particularly as the police officer told us that he found this document on his desk when he went back to the station having given evidence in court. He did not hand over to anyone in authority and it has remained in his possession since that time. This was in complete contrast to what the judge was told on the Monday morning when he wanted to know what was the position. There seems to be no excuse or proper explanation as to how that situation occurred”

The conviction was unsafe, as there had been material non-disclosure of

important documents and information amounting to abuse of process. There had been clear breaches of the CPIA Codes of Practice. The prosecution had failed to meet their disclosure obligations, so that the defendant did not have a fair trial.

Lord Justice Otton in his concluding remarks observed,

“the conduct of the Crown’s case here through the CPS and the police has been quite deplorable. They did not give the defence a fair crack of the whip before the trial by not taking any or appropriate action on the civil request advanced by the defence team. That should have been done and we are very disturbed that the attitude of the prosecution seems to have been so lamentably slack on that occasion....the conduct here is so bad that we feel that it be quite wrong to allow this conviction to stand”

In R v Early and others [2002] EWCA Crim 1904 [2003] 1 Cr.App.R. 19 the Court of Appeal, presided over by Vice President, Lord Justice Rose, quashed convictions, where (i) prosecution witnesses lied in evidence in PII and abuse of process hearings, and (ii) the prosecution had failed to make proper disclosure, including a failure on its part to disclose the role of informants, who were facilitating the frauds.

It was observed, per curiam: It is a matter of crucial importance to the administration of justice that prosecuting authorities make full relevant disclosure prior to trial and that prosecuting authorities should not be encouraged to make inadequate disclosure with a view to defendants pleading guilty.

6. INVESTIGATIVE FAILURES

In R. v. Northart 19 February 1996, CA (Archbold Criminal Appeal Office, 3rd Index 1997 T-4, at 274)—the Court of Appeal quashed the defendant’s conviction for robbery. The manner of the police investigation had prejudiced the

preparation of the defendant's case in that: (a) his alibi had not been investigated; (b) no identification parade had been held; (c) the police had failed to investigate the defendant's assertion that his car (used in the robbery) had been stolen at the time of the offence; and (d) the existence of relevant video evidence had not been disclosed to the defence nor had it been available at trial.

In R v Trustham, Southwark Crown Court, 27 November 1997 unreported, proceedings, alleging drug money laundering, were stayed, as the defendant after arrest, was charged but not interviewed. This prejudiced the defendant in two ways. First, a defendant who does not give evidence having answered questions in interview is nevertheless entitled to have the interview explanation considered by the jury. Second, to derive the suspect of the right to give an explanation at the earliest opportunity, despite having been cautioned, is a breach of a person's human rights.

7. MISCONDUCT AT TRIAL

R. v. Leominster Magistrate's Court ex parte Aston Manor Brewery Co., The Times, 8 January 1997, DC The Divisional Court decided that proceedings were an abuse of process where the plaintiff in civil proceedings controls criminal proceedings against the same defendant to the extent that the prosecution are unable to exercise independently their prosecutorial duties

R. v. Luke Anthony Piggott & Jeffrey Simon Litwin (1999) 2 Cr.App.R. 320 where a submission of no case to answer would have been successful but the prosecution were allowed to amend the indictment after the close of its case, a retrial should not have been ordered where evidence on the amended indictment was deemed inadmissible because it had already been heard by the jury. To do

so was an abuse of process. The accused was entitled to know the case he had to meet and the right to a fair trial. For those reasons, the Crown were not entitled to chop and change the way in which the case was submitted and then hope that leave to amend would be given if it had got it wrong. Section 5(5) of the Indictments Act 1915 contemplated amendments only at the very early stage at which a decision may be taken to order a separate trial or to postpone the trial.

8. ENTRAPMENT

The Court of Appeal in R v Junior Blackwood 10 March 2000, CA No. 99/6698/Z5 Archbold News 6 July 10 2000, dismissed an appeal against convictions, inter alia, on the basis that the appellant had not been entrapped. The Police officer involved had not put pressure on the appellant, nor any incentive or enticement in his way to supply drugs. The appellant was willing to see the undercover Police officer whenever she requested a meeting and to supply her with crack cocaine. There was a series of transactions showing that the appellant had access to and was willing to supply crack cocaine. The meetings were all purely voluntary on the appellant's part, attending for the sole purpose as a regular supplier of crack cocaine.

9. PRESS COVERAGE

In R v Hassan and Caldon July 1995, unreported, HHJ Colgan at Isleworth Crown Court stayed trial proceedings, originating from a News of the World "sting" operation, on the basis of a grossly prejudicial pre-trial newspaper article, which described the defendants as "veteran villains" with "long criminal records".

Subsequently the Divisional Court fined the News of the World £50000 for contempt (see A-G v News Group Newspapers, The Independent 17 July 1997);

Attorney General v. MGN Limited [1997] 1 All E.R. 456—proceedings at Harrow Crown Court on 29 September 1995, were stayed, by HHJ Sanders, as a result of prejudicial media reporting. The judge held that “ the reporting was unlawful, misleading and scandalous...the massive media publicity in this case was unfair, outrageous and oppressive” The media had impugned the defendant’s character by making reference to his previous convictions. Consequently, it was held that the pre-trial press coverage made it impossible for the defendant to have a fair trial. Thereafter, the Attorney General applied to the High Court for orders against MGN Limited, Express Newspapers Plc, News Group Newspapers Limited, News (United Kingdom) Limited and Associated Newspapers Limited for contempt of court. When deciding whether publications created a substantial risk that the course of justice would be seriously impeded or prejudiced, each should be regarded separately. Further, the date and time of each publication, the likelihood of it having been read by a potential juror, its likely impact on an ordinary reader at the time of the publication, and its residual impact on a notional juror at the time of trial, should all be considered;

R. v Wood [1996] 1 Cr. App. R. 207—The Court of Appeal quashed the appellant’s conviction for having an explosive substance with intent to endanger life, on the basis that, inter alia, highly prejudicial matters were reported in the press during the week of the trial. Staughton L.J., at 214, stated that “fairness demands that pressure shall not be put on jurors in a particular case by the press or anyone else”.

However bear in mind Rosemary West, Michael Stone and Barry George!

10. OTHER GROUNDS:

1. To prevent the issue of an information (Lloyd v. Young [1963] Crim. L.R. 703);
2. To prevent the issue of a summons (Watford Justices, ex p. Outrim [1983] R.T.R. 26, R. v. Clerk to Medway Justices ex. P. D.H.S.S. (1986) Crim. L.R. 686, DC, R. v. Horseferry Road Magistrates' Court, ex p. Stephenson [1989] C.O.D. 470, CD/113/89, R. v. Bingley Magistrates Court, ex p. Morrow, 28 April 1994 Times and Gleaves v. Insall, 24 March 1999 Times, DC);
3. To prevent a second prosecution, by a private individual, where the accused had already been bound over and a first summons withdrawn (information which the private prosecutor failed to inform the second court) (R. v. Grays Justices, ex p. Low [1988] 3 All E.R. 834);
4. To prevent oppressive or frivolous prosecutions (R v Durham Magistrates, ex.p. Davies (1993) Times 25 May 1993);
5. To prevent summary trials (R. v. Brentford Justices, ex p. Wong [1981] Q.B. 455);
6. To prevent committal proceedings (R. v. Telford Justices, ex p. Badhan [1991] 93 Cr.App.R. 171, R. v. Grays Justices, ex p. Graham [1982] Q.B. 1239 and R. v. Bedwellty Justices ex. P. Williams (1996) 3 AER 737, (1997) AC 225).When hearing an abuse application the justices are considering the evidence to enable them to decide whether a fair trial will be possible. That function is separate and distinct from the inquiry into

the case as examining justices;

7. To prevent charges being pursued when the magistrates have already found no case to answer (R. v. Horsham Justices, ex p. Reeves (1980) 75 Cr. App. R. 236);

8. Double jeopardy (R v Basingstoke Justices, ex.p. Howard QBd CO 1562/84, 18 March 1985) a defendant being tried first on the least serious charge of a series of multiple charges (R. v. Forest of Dean JJ., ex p. Farley [1990] R.T.R. 228);

9. Delay in informing the defendant of the possibility of prosecution can amount to an abuse (R. v. Bow Street Stipendiary Magistrate, ex p. DPP and Cherry (1990) 91 Cr. App. R. 283 and Chief Constable of Merseyside, ex p. Merrill [1989] 1 W.L.R.1077);

10. The improper laying of a less serious charge against the accused (R. v. Canterbury and St Augustine Justices ex parte Klisiak (1981) 145 JP 344 and R. v. Sheffield Justices ex parte DPP (1993) Crim. L.R. 136). This is not the case where a more serious charge is laid depriving the defendant a right to summary trial. Provided the additional more serious charge is justified on the evidence (R v Redbridge Justices and Fox, ex.p. Whitehouse (1992) COD 234).

11. To prevent the inclusion of more serious charges after magistrates had retired to consider their sentence (Harlow Magistrates Court ex parte Michael O'Farrell (2000) Crim.L.R. 589)

12. To prevent a clerk to the justices advising a bench on a resumed hearing to reverse a point of law after the lawfulness of the original ruling had been questioned in a private communication by the prosecutor (R. v. Faversham and Sittingbourne Justices ex parte Stickings (The Times), 9 May 1996);
13. Splitting issues which could be tried together (Intervisions Limited and Norris (1984) Crim.L.R. 350 and R. v. Angela Noe [1985] Crim.L.R. 97);
14. Proceedings for an offence which could have been charged as “part and parcel” of offences charged in previous proceedings (R. v. Birch and Harrington [1983] Crim.L.R. 193);
15. The prosecution laying non-specific information in general terms (R. v. Newcastle-upon-Tyne Justices, ex p. Hindle [1984] 1 All E.R. 770);
16. Delay due to the prosecution’s inefficiency (R. v. Gateshead Justices, ex p. Smith [1985] 149 J.P. 681).
17. Delay by the Prosecution in naming a complainant Daventry District Council v. Olins [1990] Crim. L.R. 414, DC.
18. A fresh charge being laid to avoid a Custody Time Limit (R. v. Great Yarmouth Magistrates, ex p. Thomas, Davis and Darlington [1992] Crim.L.R. 116 and R. v. Wolverhampton Magistrates’ Court and Stafford Crown Court, ex p. Uppal [1995] Crim.L.R. 223) (contrast the situation in R. (Wardle) v. Leeds Crown Court (2001) 2 WLR 865);

19. The destruction of a dog under the Dangerous Dogs Act 1991 (R. v. Liverpool Stipendiary Magistrate, ex p. Slade [1998] 1 W.L.R. 531);

20. Youth court proceedings (R. v. Aldershot Youth Court, ex p. A, 19 February 1997, DC, CD/1911/96 3 Archbold News 2, c.f. the Divisional Court decision in R (on application of A.P., M.D. and J.S.) v Leeds Youth Court (2001) EWHC Admin 215, March 23,2001 Archbold News 5 2001).

21. Delay in serving a summons for an indictable only offence until the accused attained the age of 17 R. v. Rotherham Justices, ex p. Brough [1991] Crim. L.R. 522, DC.

THE DECISION

The Court must give its reasons.

You have a professional duty to record the decision. That note, together with an agreed note summarising the oral evidence must be sent to the Court. R v Feltham Magistrates' Court ex parte Ebrahim, Mouat v DPP (2001) 1 AER 831.

When an application is made for proceedings to be stayed, consideration should be given to the process by which the defendant was brought to court, including, inter alia, the time delay involved, the disclosure and destruction of evidence, any surrounding publicity, the rule of law, and the methods used to investigate and prosecute the offence.

The categories of abuse already established are not exhaustive, as Neill L.J. observed in R. v. Bow Street Stipendiary Magistrate, ex p. DPP (1992) 95 Cr. App. R. 9, at 16,

“the law in this field is still at the stage of development”.

In R. v. Martin (Alan) [1998] 2 W.L.R. 1, at 6, Lord Lloyd stated:

“the categories of abuse of process like the categories of negligence are never closed”.

CHALLENGES TO THE DECISION

A refusal to stay proceedings can be appealed to the Crown Court under s108 Magistrates Courts Act 1980 and/or by judicial review.

THE DIVISIONAL COURT

The Magistrates can where the abuse argument relates to an infraction of law, decline jurisdiction and require the matter to be pursued in the Divisional Court. R. v. Belmarsh Magistrates’ Court, ex. Parte Watts (1999) 2 Cr.App.R. 188 and R v Bow Street Magistrates’ Court, ex.p. Christopher Finch , 9 June 1999, DC, No CO/2181/99, Archbold News 10, 23 December 1999).

If the Magistrates’ Court commits a Youth for trial to the Crown Court under s24 Magistrates Court Act 1980 the application for a stay should be by way of judicial review. In R. v. A.H., 167 J.P. 30, C.A. (18.11.2002), committal of a 14-year-old for trial on a charge of robbery on the ground that he was not a "persistent offender" ruling out the possibility of a detention and training order, but that custody ought to be an option in the event of conviction, R. (on the application of

M.) v. Waltham Forest Youth Court and D.P.P.; R. (on the application of W.) v. Thetford Youth Court and D.P.P., 166 J.P. 453, D.C. (CLW/02/27/2)) that there should only be a committal under section 24(1)(a) where there was a real possibility of a sentence of at least two years.

The Divisional Court will only interfere if the decision is

“... so plainly irrational and untenable that no reasonable bench of justices, properly directed, could have reached it. That is, of course, a very high standard for an applicant to meet.”

R. v. Willesden Justices, ex p. Clemmings, 87 Cr.App.R. 280 at page 286:

“Where magistrates have been discouraged from staying proceedings as an abuse and enjoined only to do so in exceptional circumstances, it would be difficult to overrule their decision as a wrong exercise of their discretion... It must be recognised that a decision whether or not to stay a prosecution is pre-eminently a decision of fact and degree which it will always be difficult to attack in point of law, particularly where (as here) there has been very extensive oral evidence upon which the tribunal will have had to form a judgment. This court is not a Court of Appeal and it will scarcely ever be possible to characterise a refusal to stay as perverse, least of all when the tribunal has had the advantage denied to this court of actually hearing live evidence” per LJ Brooke in R. v. Barry Magistrates’ Court, ex p. Malpas [1998] DC, C.O.D. 90

THE CROWN COURT

You must ask the Court to declare that the original conviction is quashed. Don’t ask for a stay because if you get one it only stays the proceedings in the Crown Court and leaves the original conviction intact.

APPEAL FROM THE CROWN COURT

COURT OF APPEAL

The refusal by the Crown Court to stay proceedings on the grounds of abuse of process, cannot be challenged in the Divisional Court, as it concerns a matter on indictment: s29 Supreme Court Act 1981. However, such a refusal can form the basis of an appeal against conviction to the Court of Appeal. In R. v. Martin (Alan) [1998] 1 Cr.App.R. 347. Lord Hope stated:

“I do not think that it can be doubted that the appeal court...Has power to declare a conviction to be unsafe and to quash the conviction if they find that the course of the proceedings leading to what would otherwise have been a fair trial has been such as to threaten either basic human rights or the rule of law.”

However, such a refusal can form the basis of an appeal against conviction to the Court of Appeal: R. v. Buzalek and Schiffer [1991] Crim L.R. 115 (under the old Criminal Appeal Act 1968), R. v. Bloomfield [1997] 1 Cr. App. R. 135, and R. v. Martin (Alan) [1998] 1 Cr.App.R. 347.

In R. v. Mullen (Nicholas) (1999) Crim.L.R. the Court of Appeal in quashing a conviction for conspiracy to cause explosions likely to endanger life, gave a legal meaning to the “unsafe” test in s2 Criminal Appeal Act 1995 broad enough to include pre-trial abuse of process. Lord Justice Rose, giving judgement of the court, said that the British authorities had initiated and subsequently assisted in and procured the deportation of Mr Mullen by unlawful means, which breached public international law.

A Crown Court decision at a preparatory hearing cannot form the basis of an interlocutory appeal: R. v. Hedworth [1997] 1 Cr.App.R. 421.

THE DECISION

The Court must give its reasons.

You have a professional duty to record the decision. That note, together with an agreed note summarising the oral evidence must be sent to the Court. R v Feltham Magistrates' Court ex.parte Ebrahim, Mouat v DPP (2001) 1 AER 831.

When an application is made for proceedings to be stayed, consideration should be given to the process by which the defendant was brought to court, including, inter alia, the time delay involved, the disclosure and destruction of evidence, any surrounding publicity, the rule of law, and the methods used to investigate and prosecute the offence.

DISCLOSURE AND ABUSE OF PROCESS

Abuse of process may arise in circumstances where the prosecution fails to provide essential information. It is imperative to request such information in a defence case statement and to follow such a request through.

Informants

Lord Esher MR in Marks v Beyfus (1895) LR 25 QBD 494 at p 498:

".. If upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right to show the prisoner's innocence, then one public policy is in conflict with another

public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

If a witness who is called at a trial is a participating informant in that case, if the fact of his involvement is not revealed, there is a serious danger that the jury will be misled and, indeed, a serious danger that the witness will give misleading answers in evidence (R. v. Patel [2001] EWCA Crim 2505).

Observation Posts

If the location can be revealed without identifying the occupier, then it should be revealed (R. v. Johnson [1988] 1 WLR 1377). Johnson also laid down the correct procedure when using observation posts and a failure to comply with that procedure may amount to an abuse of process:

- (1) The police officer in charge of the observation, of no lesser rank than sergeant, should testify that he had visited the observation posts & ascertained the attitude of the occupiers to the use of the premises & to disclosure which might lead to their identification.
- (2) An inspector should then testify that immediately before the trial he visited those places & ascertained whether the occupiers were the same persons as those at the time of the observations.
- (3) If they were not he should testify as to their attitude to the use made of the premises and to possible disclosure which might lead to their identification.
- (4) The judge should explain to the jury when summing up or at some other point the effect of his ruling to exclude the evidence of the location.

Police Complaints Investigations

While the reports of investigating officers are automatically covered by PII, documents obtained or created for the purposes of investigating a complaint are not automatically covered. They may or may not be, depending on the circumstances.

Applications for PII

In R. v. H. [2004] 2 AC 134, the House of Lords laid down the approach to these applications:

- “(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.*
- (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If no, disclosure should not be ordered. If yes, full disclosure should (subject to (3), (4) and (5) below be ordered.*
- (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.*
- (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?”*

Other categories of Disclosure

People who may have witnessed an incident giving rise to criminal charges, including those who call 999 to report an incident must be incorporated into disclosure.

R. v. Heggart [2001] Archbold News 2

Rewards paid, or discussions about rewards to be paid to informants who are prosecution witnesses.

R. v. Allan [2004] EWCA Crim 2236, R v Smith [2004] EWCA 2212. In Smith, a co-defendant was to be paid a reward for giving evidence at the others' trial. They were entitled to disclosure of the records regarding the reward – particularly once he denied expecting one when he gave evidence.

R v McCartney and Hamlett 2003 6 Arch News 2 CA

Prison records of witnesses must be disclosed

Pre-committal Disclosure

Previous convictions of prosecution witnesses (to assist with bail applications) and anything that could assist with early preparation for trial (e.g. eye-witnesses that the prosecution do not rely upon) should be disclosed, but the prosecutor should always be alive to anything that should be disclosed at an early stage. He should ask himself what, if any, immediate disclosure is required by justice and fairness (R. v. DPP, ex parte Lee [1999]2 Cr. App. R. 304)

Post-trial Disclosure

In R. v. Makin [2004] EWCA Crim 1607, it was said that “the duty of disclosure continues as long as proceedings remain whether at first instance or on appeal”. Even after (as in that case) a defendant pleads guilty, there remains an obligation to disclose material that meets the test.

R v West Ricky 2005 EWCA Crim 517

If the material amounts to a proof of innocence and may show that there is a miscarriage of justice non-disclosure is unlikely to be justifiable whatever the circumstances.