Abuse of process as an appeal ground

By Colin Wells of 25 Bedford Row

The recent Court of Appeal decision in R v Abu Hamza [2006] EWCA Crim 2918, presided over by Lord Phillips LCJ, Penry-Davey J, Pitchford J, on 28th November 2006, illustrates the difficulty appellants have in relying upon abuse of process grounds in overturning convictions on appeal.

Factual Background

The appellant, Abu Hamza, was convicted at first instance of soliciting to murder; using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred; possessing threatening, abusive or insulting sound recordings with intent to stir up racial hatred; and possessing a document or record containing information of a kind likely to be useful to a person committing or preparing to commit an act of terrorism.

Most of the counts of which the appellant was convicted related to speeches given by him between 1997 and 2000; the sound recordings in his possession were of such speeches and the documents in his possession were volumes of the Afghani Jihad Encyclopaedia. The cassettes and encyclopaedia had been seized by police in 1999 following an unrelated arrest and police interview. The items were returned to the appellant and he was informed that no further action would be taken. He received both expressly and by implication various assurances from police officers and persons representing or purporting to represent the UK government that at the material time he was not breaking the law and would therefore not be prosecuted: indeed, before a Judge in the Crown Court, the appellant was subsequently informed that no further action would be taken against him in relation to the criminal allegations.

Appeal

It was argued on appeal, inter alia, that there was an abuse of process because (1) the returning of his materials gave the appellant a legitimate expectation that he would not later be prosecuted for possession of them; (2) the state had failed to bring a timely prosecution and the delay led to a risk of prejudice to the appellant by reason of changes in attitude and public

perception in relation to terrorism and by reason of a sustained campaign of adverse publicity, thus precluding a fair trial.

Abuse of Process arguments

The Court of Appeal rejected the abuse of process arguments (in addition to jurisdictional points).

- Breach of promise/expectation

Breach of promise has long been recognised as a category of abuse of process. Where a defendant has been induced to believe that he will not be prosecuted, this is capable of amounting to an abuse of process. Lord Justice Staughton in R v Croydon Justices, ex parte Dean ([1993] QB 769, [1994] 98 Cr App R 76) laid down the principle that, "the prosecution of a person who has received a promise, undertaking or representation from police that he will not be prosecuted is capable of being an abuse of process".

It was not likely to constitute an abuse of process to proceed with a prosecution unless (a) there had been an unequivocal representation by those with conduct of the investigation or prosecution of a case that the defendant would not be prosecuted and (b) that the defendant had acted on that representation to his detriment (R v Townsend (Phillip Henry) (1998) Crim LR 126 and R v Croydon Justices, Ex p. Dean (1993) QB 769 considered).

However, on the facts of the present appeal, the Court of Appeal decided that it was not an abuse of process to proceed with the prosecution

The facts relating to the prosecution of Abu Hamza on the possession of the cassettes and encyclopaedia fell, in the view of the Court of Appeal, a long way short of satisfying those criteria.

Some may find this surprising when the following actions are considered. What do the following actions amount to? The returning of seized items by the police, no charge after questioning and investigation and being informed at the Crown Court that no further action will be taken in relation to criminal allegations. Collectively taken, do such actions not give the impression that the earlier speeches would not form the basis of criminal proceedings.

After the 1999 arrest and seizure, Abu Hamza had continued his preaching and reference to seized materials. He had no reason to suspect that his actions or instruments were illegal: after investigation, he had not been charged or tried. There was nothing to make Abu Hamza believe that his actions were contrary to the law. To charge, try and convict him several years later, on the same evidence as had been previously seized it was argued amounted to a breach of a promise by the state as the appellant was induced to believe by the collective actions of the state that he would not be prosecuted.

This line of reasoning was rejected by the Court of Appeal. Unless there has been an unequivocal representation by those prosecuting the case or with conduct of the investigation **and** the appellant had acted on that representation to his detriment, this was not a breach of a promise, or an abuse of process.

The nature, circumstances and reasons for the representation will always be important for courts to consider; but may differ enormously from case to case. In addition to considering objectively the form and content, there is the more basic question of whether it is reasonable for the accused to have relied on the representation in the circumstances in which it was made. Only in the strongest cases, will courts stay proceedings as an abuse, where such promises have been breached.

- Adverse publicity

It was also argued on behalf of the appellant that he could not receive a fair trial because of adverse publicity.

The fact that adverse publicity could have risked prejudicing a fair trial was no reason for not proceeding if the judge had concluded that it was possible to have a fair trial (R v Coutts (Graham James) (2006) UKHL 39, (2006) 1 WLR 2154 and Montgomery v HM Advocate (2000) UKHRR 124 considered).

The Court of Appeal decided that the trial judge had correctly concluded that the fairness of the trial was put at risk by the events, which occurred during the delay. However, he had also correctly assessed that he could discharge the task of neutralising the effects of those matters by appropriate directions, guidance and summing up.

Accordingly, the convictions were deemed safe. The appeal was dismissed.

Conclusion

This judgement highlights the difficulties appellant's face when relying upon abuse of process arguments in expectation and adverse publicity cases.

Staying proceedings as an abuse of process is an exceptional course and a discretionary power that is used sparingly.

The trial process itself has a number of alternative remedies which can cure any unfairness to the accused as a result of adverse media publicity; including :

(1) the postponement of a trial to allow a "fade" factor to take affect (as in *A-G v News Group Newspapers* (1987) 1 QB 1 and upheld by the U.S. Supreme Court in *Patton v Yount* 467 US 1025, 81 L Ed 2d 847, 104 S Ct 2885) and

(2) judicial directions to the jury that they should consider only evidence that they have heard in court as opposed to any media coverage. Lord Taylor CJ observations in *Ex parte The Telegraph PLC* (1994) 98 Cr. App. R. at 98, illustrate the faith placed in jurors: *"In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them".*

Similar sentiments were expressed by the Court of Appeal in *R. v. Rosemary West* [1996] 2 Cr. App. R. 374. The Court of Appeal in refusing the appeal held that although press coverage in advance of the trial had been adverse to the applicant, it would be absurd if allegations of murder of a horrific nature caused such shock to the nation that an accused could not be tried. Lord Taylor C.J., at 386A, stated that

"providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose they would do otherwise", and by extension, no reason to suppose that the trial would be unfair. See similar remarks in *R v Kray* (1969) 53 Cr.App.R. 412, *R v Coughlan* (1976) 64 Cr.App.R.11 and *Ex.p.B* (1994) AC 42 by J. Scott Baker *"…jurors are well able to put out of their minds extraneous material and try the case on the evidence they hear in court"*

The above cases illustrate the point that abuse of process applications should not be viewed as usurping the Crown's prosecutorial prerogative nor an acceptance of the pre-eminence of the interests of the accused, but rather as judicial control of the trial process to ensure fair play and maintain public confidence in the criminal justice system.

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For a more detailed analysis of abuse of process see "Abuse of Process – a practical approach " published by Legal Action Group June 2006 - www.lag.org.uk