

“Prosecution misconduct: an abuse of process?”

The Privy Council in the case of Curtis Francis Warren and others v Her Majesty's Attorney General of the Bailiwick of Jersey [2011] UKPC 10, recently examined the relationship between prosecution misconduct and criminal proceedings being stayed as an abuse of process.

Background

In October 2009, the appellants were convicted of conspiracy to import into Jersey cannabis with a street value in excess of £1m. Terms of imprisonment ranging from 5 to 13 years' were imposed on the conspirators.

At a preparatory hearing the appellants applied for a stay of the proceedings on the grounds of abuse of process, as crucial evidence on which the prosecution wished to rely had been obtained as a result of serious prosecutorial misconduct.

The application was dismissed. The appellants then made an application for a ruling that the evidence obtained by the use of an audio device should be excluded under article 76(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 which mirrors section 78 of PACE. This application was also refused.

The facts

In 2007, the States of Jersey Police received intelligence that the appellants were planning to import a large quantity of drugs, by car, into Jersey via Amsterdam and Normandy. The police wished to deploy two surveillance devices in the car. They knew that they would need the authority of the Attorney General to install and use these devices in the car both in Jersey and abroad (under the Regulation of Investigatory Powers (Jersey) Law 2005 (“RIPL”). They also knew that they would need the consent of the French, Belgian and Dutch authorities.

The police had obtained authority from the Attorney General and met the Crown Advocate at the Law Officers' Department in Jersey to arrange for the immediate transmission of letters of request to France, Belgium and The Netherlands.

In view of the urgency of the investigation the Police decided that, if consent was not forthcoming from the foreign authorities, the police would install and use an audio device in the car in any event.

The French and Dutch authorities response was to grant permission for tracking but not for audio monitoring. The Belgian response was that they would be happy to assist if a guarantee of reciprocity were to be given. Such a guarantee was given by the Jersey

authorities.

The Police became aware that the planned route had changed and that a hire car was to be used. It called for urgent action. The Police officers then decided to request assistance from the French police in deploying a tracking device in the hire car. The Jersey police officers were given permission by the French authorities to deal directly with the car hire firm.

The Attorney General of Jersey granted authority to install a tracker device and an audio device on the ferry boat for 72 hours. The Attorney General made it clear that, if the French authorities were not prepared to agree to the audio device, it would have to be switched off when the boat entered French waters. The Police did not tell the Attorney General that the hire car was being the subject of audio surveillance without the permission of the French authorities.

The Law

The Privy Council considered the prosecutorial misconduct Supreme Court of the United Kingdom decision in *R v Maxwell* [2010] UKSC 48: in which Sir John Dyson SCJ said:

"13. It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system." (as per Lord Steyn in R v Latif [1996] 1 WLR 104 , 112F).

Decision

The Privy Council decided that the lower court had reached the right conclusion in this case. The decision in *R v Grant* [2005] EWCA Crim 1089 , [2006] QB 60 was considered by the Board as wrongly decided. In the opinion of Lord Dyson the present case falls into an entirely different category from the cases where the courts were persuaded to stay the prosecution. Here there was no suggestion of torture, coercion, procurement or entrapment or any breach of legal professional privilege or deception of a foreign court or of the defendants themselves. There has been no suggestion of prejudice or unfairness to the defendants or that a fair trial cannot take place.

Discussion

The police were unquestionably guilty of grave prosecutorial misconduct in this case. They acted in the knowledge that the Attorney General and the Chief of Jersey Police had not given authority to install the audio device without the consent of the relevant foreign authorities and would not do so; and that the foreign authorities had refused their consent. The misconduct was very serious. Furthermore, unlike in the case of Grant, without the product of the unlawfulness, there would have been no trial. This was truly a “but for” case.

But as against that, there were factors which, taken cumulatively weighed heavily against a stay:

1. The offence with which the appellants were charged was very serious.
2. This was a professional drugs operation of the first order.
3. The unwise advice of Crown Advocate mitigated the gravity of the misconduct of the police.
4. There was no attempt to mislead the Jersey court. It was always understood by the police that the circumstances in which the evidence was obtained would be revealed to the appellants and that the court would be required to decide whether to refuse to admit the evidence under article 76(1) of the 2003 Law.
5. There was real urgency in the Police investigation.

Word of warning

Lord Hope, at para 62 of the judgment, gave a word of warning:

62....But the range of operational decisions that the police may take does not include deliberate law-breaking, either at home or abroad. The police cannot take the law into their own hands. If conduct of that kind were to be permitted it would undermine the rule of law itself. That is why any abuse of state, or police, power must always be taken very seriously. It may lead the court to conclude that, however strong the evidence may appear to be against him, the defendant cannot have a fair trial or that, even if he can, it would be an affront to the public conscience to allow the proceedings to continue.”

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