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# A1 Abuse of Process

## A1.1 Introduction

Abuse of process is something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a regular proceeding: *Hui-chi Ming v R* [1992] 1 AC 34.

A stay on these grounds falls into two main categories:

- where a fair trial of the particular defendant is impossible (eg due to loss of evidence);
- where there is a misuse of court process (where it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case). In relation to this category of case, the magistrates' court does not have jurisdiction to determine the issue and proceedings ought therefore to be adjourned in order that the defence may seek a judicial review.

A stay of proceedings based on an abuse of process will be rare and should be allowed only in exceptional circumstances (see *Attorney-General's Reference No 1 of 1997* (1992) 95 Cr App R 296); and if the court process can compensate for any unfairness or wrongs, so as to allow for a fair trial, that is the way in which it should proceed.

On an application to stay for abuse of process, it is for the defendant to satisfy the court on a balance of probabilities that no fair trial is possible. The application should be decided on material adduced by prosecution and defence, with both parties having the right (subject to usual judicial discretion) to call evidence (*R v Clerkenwell Magistrates' Court, ex p Bell* [1991] Crim LR 468).

## A1.2 Relevant grounds

### A1.2.1 Missing evidence

The issues identified in *R v Dobson* [2001] EWCA Crim 1606 are as follows:

- What was the duty of the police?
- Did the police fail in their duty by not obtaining or retaining the appropriate (material)?
- If so, was there serious prejudice which rendered a fair trial impossible in the light of such failure?

## A1 Abuse of Process

- Alternatively, did the police failure result from such bad behaviour, in the sense of bad faith or serious fault, as to render it unfair that the accused should be tried at all?

There is no *general* duty on the prosecution to retain CCTV evidence that might have given insight into whether a warning was given to a detainee during a breath test procedure (*Morris v Director of Public Prosecutions* [2008] EWHC 2788 (Admin)). This decision follows the leading case of *R v Feltham Magistrates' Court and another, ex p Ebrahim* [2001] EWHC Admin 130.

That case emphasizes the early identification of the significance of the relevant material is a key factor to ensure that the prosecution are under a duty, not least under the code of practice made under the Criminal Procedure and Investigations Act 1996.

### A1.2.2 Failure to supply initial details of the prosecution case

There is no jurisdiction to stay proceedings for failures in service of initial details of the prosecution case under r. 10 of the Criminal Procedure Rules; the appropriate remedy is retrial/journ (*R v Leeds Youth Court, ex p P(A)* [2001] EWHC 215 (Admin)), although repeated failure to comply with the rules may provide for a stay in truly exceptional circumstances (*R v Willesden Magistrates' Court, ex p Clemmings* (1988) 152 JPN 46). A threat to stay a prosecution if there were further disclosure breaches did not give rise to any legitimate expectation on the part of the defendant so as to require the court to carry through its threat on the next occasion (*R v Leeds Youth Court, ex p AP and others* [2001] EWHC 215 (Admin)).

### A1.2.3 Improper motive

The fact that there was a mixed motive for launching a private prosecution will justify a stay only if the conduct of the prosecutor is truly oppressive, as it was obvious that many private prosecutions would be brought with mixed motives (*Dacre v City of Westminster Magistrates' Court* [2009] 1 Cr App R 6).

In *Nembhard v Director of Public Prosecutions* [2009] EWHC 194 (Admin), the court ruled that a magistrates' court was correct to refuse to stay proceedings on the ground that a request to produce traffic documents was motivated by improper considerations—namely a desire to harass the defendant. In such cases the proper course of action would be either to stay the prosecution pending determination of the issue by the High Court, or to apply for judicial review of the decision to prosecute. This case is an important reminder that in instances where an abuse of state power is being alleged, a magistrates'

court has no jurisdiction to stay proceedings (*R v Horseferry Road Magistrates' Court, ex p Paul James Bennett* [1994] 1 AC 42).

#### A1.2.4 Delay

In the absence of other compelling reasons, a lengthy delay, in itself, does not justify a stay of criminal proceedings (*Spiers v Ruddy* [2008] 1 AC 873, PC).

In *Ali v Crown Prosecution Service* [2007] EWCA Crim 691, proceedings brought seven years after the incident should have been stayed, as important documentary evidence, relevant to assessing the victim's credibility, had been lost. The court emphasized that:

this is a rare case where prejudice following from the delay was not alleviated and probably could never have been cured during the course of the trial.

In *R (Flaherty) v City of Westminster Magistrates' Court* [2008] EWHC 2589 (Admin), the last two years of a ten-year delay in enforcing a confiscation order were attributable to the prosecution. The proceedings ought to have been stayed, as confiscation proceedings must be determined within a reasonable time.

Earlier cases, such as *R v Clerk to the Medical Justices, ex p DHSS* [1986] Crim LR 686, DC, in which a prosecution was stayed where the prosecution laid the information on the last day before it was time-barred, should be treated with extreme caution in the light of considerable and more recent appellate-level scrutiny of the principles that apply. It is almost inconceivable that the *Medway* case would be decided similarly today.

#### A1.2.5 Legitimate expectation

The prosecution of a person who has received a promise, an undertaking, or a representation from the police that he will not be prosecuted is capable of being an abuse of process (*Croydon Justices, ex p Dean* [1993] QB 769). So too will be the prosecution of a person denied a caution by the failure of the police to make appropriate disclosure to enable legal advice to be given (*DPP v Ara* [2001] EWHC 493 (Admin)). The administration of a caution may make it an abuse for there to be a later prosecution (*Jones v Whalley* [2007] 1 AC 63). The Crown may in appropriate cases, where there is a proper basis, change its mind as to how to proceed. However, the Crown is required, absent a change of circumstances, to proceed in a single prosecution with all the charges it proposes to bring arising out of the same incident (*Connelly v DPP* [1964] AC 1254).

