## R. v. CLANCY

SUPREME COURT (Schofield, C.J.): July 16th, 1996

*Criminal Procedure—abuse of process—remedy—Supreme Court has inherent jurisdiction before or during trial to stay proceedings likely to constitute abuse of process—judicial review of Crown's refusal to abandon prosecution inappropriate and unnecessary on that basis*

*Criminal Procedure—abuse of process—prevention of oppression—Supreme Court may order permanent stay of proceedings if accused's mental condition seriously prejudices proper conduct of defence—discretion not limited to delay or manipulation of court's process by prosecution*

The accused was charged with attempting to obtain property by deception.

He applied to the Supreme Court before the commencement of his trial for the permanent stay of proceedings against him on the ground that he was suffering from brain damage causing such severe impairment of his memory and cognitive functions as would seriously prejudice the conduct of his defence. The Attorney-General had refused to enter a nolle prosequi in response to an application made on the same ground.

The accused submitted that (a) the court had power, under its inherent jurisdiction, to stay the proceedings at any stage if to continue them would amount to an abuse of process, whether the oppression or unfairness to him was caused by delay of the prosecution or some other external factor such as his own ill-health; and (b) since, on the medical evidence before the court, his mental condition was shown to be such that a fair trial was impossible, the court should exercise its discretion to order a stay.

The Crown submitted in reply that (a) the court's power to stay criminal proceedings on the ground of unfairness to or oppression of the accused could be exercised only in exceptional circumstances, namely when the prosecution had misused the process of the court to deprive him of the law's protection or delayed proceedings to an extent likely to cause him prejudice in the conduct of his case, which was not the case here; (b) the medical evidence adduced by the defence failed to show conclusively that the accused's incapacity rendered him unable to defend himself adequately, or that he had not exaggerated this incapacity for the purpose of evading prosecution; and (c) in any event, the proper procedure for challenging the indictment was an application for judicial review of the Attorney-General's decision not to enter a nolle prosequi.

**Held**, staying the proceedings:

(1) The accused had properly applied for a stay of proceedings rather than for judicial review of the Attorney-General's refusal to enter a nolle prosequi. It was inappropriate and unnecessary for the court to interfere with that decision since it had an inherent power to order a stay in exceptional circumstances at any time if an abuse of its process was otherwise likely to occur (page 314, lines 6–13; lines 41–42; page 315, line 35 – page 316, line 36; page 316, line 41 – page 317, line 10).

(2) The Supreme Court's discretion to order such a stay was not confined to circumstances of delay or manipulation of the court's process by the prosecution as would have been the case in a lower court (page 317, lines 10–19).

(3) In the present case the medical evidence indicated, on the balance of probabilities, that the accused's memory and reasoning were so impaired that further criminal proceedings would be oppressive and there could not be a fair trial, and accordingly the court would exercise its discretion to order a permanent stay (page 319, line 42 – page 320, line 8).

**Cases cited:**

(1) *Att.-Gen. (Hong Kong)* v. *Cheung Wai-Bun*, [1994] 1 A.C. 1; [1993] 2 All E.R. 510, *dicta* of Lord Woolf applied.
(2) *Att. Gen.'s Ref. (No. 1 of 1990)*, [1992] Q.B. 630; [1992] 3 All E.R. 169.
(3) *Connelly* v. *D.P.P.*, [1964] A.C. 1254; [1964] 2 All E.R. 401.
(4) *D.P.P.* v. *Humphrys*, [1977] A.C. 1; *sub nom. R.* v. *Humphrys*, [1977] Crim. L.R. 421, *dicta* of Lord Salmon applied.
(5) *R.* v. *Derby Crown Ct., ex p. Brooks* (1984), 80 Cr. App. R. 164; *sub nom. R.* v. *Derby JJ., ex p. Brooks*, [1984] Crim. L.R. 754, distinguished.
(6) *R.* v. *Horseferry Rd. Mags. Ct., ex p. Bennett*, [1994] 1 A.C. 42; [1993] 3 All E.R. 138, *dicta* of Lord Griffiths applied.

*D. de Silva, Q.C.* and *R. Pilley* for the accused;
*R. Rhoda, Senior Crown Counsel* and *C. Pitto* for the Crown.

**SCHOFIELD, C.J.:** The defendant Thomas Clancy faces four counts of attempting to obtain property by deception, contrary to ss. 196(1) and 7 of the Criminal Offences Ordinance. The amounts mentioned in the four counts are large, totalling over £50,000. The timing of the alleged offences ranges from late July 1994 to early October 1994. The defendant is not a Gibraltarian and has been held within the jurisdiction, for five months at the Moorish Castle on remand, and for some 16 months on bail within the city, except for a short period when he went to England to undergo a medical examination. No trial date has yet been fixed.

The defendant seeks a stay of these proceedings on the grounds that it would be an abuse of the court's process for the prosecution case to continue. He is suffering from brain damage such as to cause thought-block and memory impairment, the defendant and his advisers say, which would seriously prejudice the preparation and conduct of his defence.

The power of a trial judge to stay proceedings in the exercise of his inherent jurisdiction was recognized in the House of Lords decision of *Connelly* v. *D.P.P.* (3). Lord Morris of Borth-y-Gest had this to say ([1964] A.C. at 1301–1302):

> "The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. That power, as is demonstrated by a stream of authority to which I will refer, has, however, never been regarded as endowing a court with a power to say that evidence given in reference to one charge may not be repeated in reference to another and different charge. Nor does it enable a court to order that a prosecution be dropped merely because of some rather imprecise regret that an accused should have to face another charge."

His Lordship was careful to emphasize that the court should not usurp the function of the prosecutor. He said this (*ibid*., at 1304):

> "It would, in my judgment, be an unfortunate innovation if it were held that the power of a court to prevent any abuse of its process or to ensure compliance with correct procedure enabled a judge to suppress a prosecution merely because he regretted that it was taking place."

This view was repeated in the later House of Lords decision of *D.P.P.* v. *Humphrys* (4). Viscount Dilhorne had this to say in the context of a private prosecution under the Administration of Justice (Miscellaneous Provisions) Act 1933 ([1977] A.C. at 24):

> "Where an indictment has been properly preferred in accordance with the provisions of that Act, has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise the existence of such a degree of omnipotence is, as my noble and learned friend Lord Edmund-Davies has said, unacceptable in any country acknowledging the rule of law."

He went on (*ibid*.): "But saying this does not mean that there is not a general power to control the procedure of the court so as to avoid unfairness." He further went on to say (*ibid*., at 26) that the power should only be exercised in the most exceptional circumstances.

Lord Salmon said (*ibid*., at 46):

> "I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any

responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of polity, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred. I express no concluded view as to whether courts of inferior jurisdiction possess similar powers. But if they do and exercise them mistakenly, their error can be corrected by mandamus: see *Mills* v. *Cooper*. . . .”

There have been a number of cases since 1977 involving a review of the court’s discretion to stay a trial on grounds of abuse of process. For our purposes I need only refer to one of the latest cited, the Privy Council opinion delivered in *Att.-Gen. of Hong Kong* v. *Cheung Wai-Bun* (1). In that case the defendant was indicted on charges of conspiracy to defraud and false accounting. Upon the defendant’s application, the judge held that delay by the prosecution in bringing the case to trial had seriously prejudiced the defendant to the extent that a fair trial could not be held and he granted a permanent stay of proceedings on the ground that the delay constituted an abuse of the process of the court. The Hong Kong Bill of Rights Ordinance entitled the defendant to be tried without undue delay, but it was held that, for all intents and purposes, the power to grant a stay at common law and under the Bill were the same. The defendant had a serious medical condition which had probably been worsened by the stress caused by the delay in the trial. Lord Woolf said ([1994] 1 A.C. at 6):

“. . . Duffy J., having surveyed the leading authorities from various Commonwealth, European and United States courts, as Mr Nicholls accepts, correctly set out the test which he had to apply when he said: ‘Ultimately what has to be determined is whether proceedings can be fair, and it is for the defendant, if he is to succeed, to establish on the balance of probabilities that they cannot be fair.’ That test does not materially differ from that laid down by Lord Lane C.J. in *Attorney General’s Reference (No.1 of 1990)* . . . which was approved by their Lordships’ Board in the *Tan* case. Lord Lane C.J. stated, ‘no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held.’ ”

Although *Wai-Bun* was a case involving delay I see no reason why the same test should not be applied in the present case. However, in applying

the test, I do not think that the courts should be other than extremely cautious in exercising the power to stay. That the power should be exercised only in exceptional circumstances was again emphasized by Lord Lane, C.J. in *Att. Gen.'s Reference (No. 1 of 1990)* (2) ([1992] 3 All E.R. at 176) when he said:

> "Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. . . ."

Mr. Rhoda for the Crown has referred me to the decision of the Divisional Court in *R.* v. *Derby Crown Ct., ex p. Brooks* (5), where it was held that the power to stop a prosecution arises only where it is an abuse of the process of the court and it may only be an abuse if either (a) the prosecution has manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the 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. But that case involved the exercise of the power of a magistrates' court to stop a prosecution. The law in regard to the magistrates' powers has developed quite separately to that in regard to the exercise of a judge's powers and must be more limited. Indeed the very existence of the power was doubted by Viscount Dilhorne and Lord Salmon in *D.P.P.* v. *Humphrys* (4).

The distinction between the exercise of the power by magistrates and the exercise of the power by the superior courts was made in the recent case of *R.* v. *Horseferry Rd. Mags.' Ct., ex p. Bennett* (6) where Lord Griffiths said: ([1994] 1 A.C. at 64):

> "I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *Reg.* v. *Guildford Magistrates' Court, Ex parte Healy* . . . that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an

adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken."

This, I consider, also answers Mr. Rhoda's other question of whether the correct procedure should be for the defendant to apply for judicial review of the Attorney-General's decision to refuse to enter a nolle prosequi. Whilst the magistrates are limited in the exercise of their powers to stay proceedings, those limits have never been suggested to apply to the superior courts which can as well determine what is an abuse in the course of a criminal trial as they can in judicial review proceedings. It may well be that the power I am asked to exercise is most often exercised in cases of delay, but it would be wrong to attempt to define or indeed limit the categories of case in which the power can be called upon. The authorities show that the exercise is considered in diverse circumstances.

In my judgment it is open to me to order a stay if I am satisfied on the balance of probabilities that the ill-health of a defendant is such that the pursuit of proceedings against him cannot be fair or, to put it another way, that to continue with the trial in the face of his ill-health will cause him serious prejudice to the extent that a fair trial cannot be held.

Let us now turn to the medical evidence in the case. There are seven medical reports, commencing with a report from Dr. M. Maskill, a consultant physician here in Gibraltar. There is no date on this report but Dr. Maskill oversaw the defendant when he was admitted to St. Bernard's Hospital on two occasions in December 1995 and January 1996. It seems the report was prepared soon after the defendant's release from hospital on the second occasion. Dr. Maskill set out a catalogue of the defendant's ailments among which are chronic pulmonary emphysema and hypertension. The defendant is just over 69 years of age and has a history of alcohol abuse. The final paragraph of that report requires recitation:

> "Mr. Clancy is approaching 70 years of age. It is not uncommon to see some signs of loss of memory in people of that age. During the several weeks he was under my care in St. Bernard's Hospital, Mr. Clancy exhibited such signs with a frequency which I consider unusual. Accordingly I have referred him for specialist examination."

The next report is that of Dr. C.M. Montegriffo, dated March 26th, 1996. Dr. Montegriffo's report contains the following opinion:

> "Mr. Clancy describes symptoms indicative of thought block and memory impairment. Mental state examination reveals some deficit in cognitive function, particularly in the realm of attention and memory. This clinical picture is consistent with an organic cerebral pathology [brain damage] of long standing."

He suggests that it may be possible to obtain more definite information as to the cause of the defendant's disability by carrying out further tests. On June 18th, 1996 the defendant was given an MRI scan by Dr. T. Cox,

Consultant Radiologist at the London Bridge Hospital. The abnormalities were then considered by Dr. C. Clough, Consultant Neurologist. He said:

> "There is one small lesion within the pons [the brain stem]. The conclusion of the brain scan is that these abnormalities represent evidence of cerebro-vascular disease, in other words, hardening of the arteries. It would seem likely that the blood-vessels have been damaged and caused damage to the brain and this is most likely due to the long history of high blood pressure, though previous history of alcohol abuse might be important. There was no evidence of any brain trauma relating to his previous Korean war injury."

Dr. Clough's conclusion, which I feel I must repeat in full, was:

> "This man reports significant memory problems. These are confirmed on simple neurological testings. Investigation has revealed evidence of cerebro-vascular disease most likely related to high blood-pressure. These changes on the brain scan could undoubtedly lead to memory problems such as he has reported. However, whether this undoubted abnormality is the total explanation for his reported memory difficulties is difficult to say. Thus we must consider an alternative explanation that he is exaggerating his memory difficulties. Assessing memory objectively is very difficult but can be performed by neuro-psychologists, they can assess more expertly the degree to which memory loss may have an organic explanation such as cerebro-vascular disease or from additional psychological explanations. Psychological explanations include people who are exaggerating their difficulties or sometimes anxiety states and depression can cause additional memory problems. Thus it may be possible to differentiate to a degree how much of Mr. Clancy's memory difficulties are related to his brain damage. It is certainly possible that all his claimed memory difficulties are related to his brain damage but I am unable to say with a 100% certainty that that is the case."

Dr. Maskill made a further report on June 28th, 1996. He noted a marked deterioration in the defendant since their previous encounter. His conclusion was:

> "There is no doubt the examinations in London have confirmed positively that serious abnormalities exist in Mr Clancy's brain. In my judgment, the combined effects of these and his other medical difficulties could severely handicap and impair his ability to concentrate and to give clear instructions or to give evidence. Moreover the stress associated with a trial is likely to have a marked effect upon his blood-pressure and other physical infirmities."

Dr. R. Abbott, a Consultant Neurologist, examined the defendant on July 5th, 1996. His report was the only medical report not agreed by the Crown. An illegible copy was transmitted to the Attorney-General's chambers on Thursday of last week and the legible copy only reached Mr.

Rhoda's chambers on Friday. However, as the Crown had been offered access to Dr. Abbott by the defence in advance of Dr. Abbott's visit to Gibraltar and as the Crown had not made use of Dr. Abbott's presence in Gibraltar, leaving the defence to seek a report from him, I considered it just to admit the report even though Dr. Abbott had left the jurisdiction and was not available for cross-examination. Of course, the Crown had every opportunity to comment on the report and on the fact that Dr. Abbott was not questioned upon it.

The summary and conclusions of Dr. Abbott are as follows:

> "I have seen the report of June 12th, 1996 by Dr. Christopher Clough, Consultant Neurologist and I agree almost in the entirety with his report. Mr. Clancy is a gentleman who has had long standing hypertension and at the present time is poorly controlled although he has not taken any tablets for the last two to three days. His MRI scan shows features of white matter cerebral ischaemia indicative of the effects of hypertension on the blood vessels leading to cerebral ischaemia. Patients with these radiological findings often demonstrate features of dementia as manifested by Mr. Clancy.
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> On examining Mr. Clancy I have no doubt that he suffers from a degree of dementia manifested by poor short-term memory, difficulty with concentration and impaired judgment. Mr. Clancy also suffers from quite severe emphysema which renders him breathless and has a number of less important medical problems.
>
> It is my opinion that this gentleman would not be able to give a coherent or well-judged account of events to a court of law as a result of his cerebro-vascular dementia."

Dr. Maskill furnished a final report in which he agreed with those conclusions.

There can be no doubt that the defendant has suffered brain damage and that, according to Dr. Clough, his memory problems are confirmed by neurological testings. Dr. Clough points to the possibility of the defendant exaggerating his memory difficulties, but he does not say that memory difficulties do not exist; the difficulties undoubtedly do. All Dr. Clough is saying is that he cannot be 100% certain that all the defendant's claimed memory difficulties are related to his brain damage.

The Crown would present this defendant as a professional confidence trickster and asks the court to consider that his alleged medical problems are in keeping with his illegal activities. But there is no cogent evidence for me to come to such a conclusion as suggested by the Crown. The Crown could, furthermore, point to no previous convictions which could support its contention.

If one looks at the medical evidence in its totality the preponderance of evidence is that it is probable that the defendant's condition is such that he suffers from poor memory and lack of ability to concentrate. The court is driven to the conclusion that in all probability, his infirmities are such

that he will not be able to give proper instructions to his counsel or follow the court proceedings in a complicated trial involving a large number of documentary exhibits and taking place over, possibly, three weeks. In short, the defendant will suffer serious prejudice to the extent that a fair trial cannot be held. Indeed, for the Crown to continue this prosecution would be oppressive and vexatious so as to amount to an abuse of the court's process.

This is an exceptional case and I order that proceedings be stayed.

*Order accordingly.*