R. v. BRANCATO and BARCELO

SUPREME COURT (Schofield, C.J.): June 1st, 1998

Criminal Procedure—stay of proceedings—tampering with prosecution evidence—stay if prosecution conduct undermines integrity of whole judicial process—main police witness tampering with tape-recorded evidence justifies stay—interests of justice not served by voir dire during trial

The accused were charged with offences relating to the possession and supply of a Class A controlled drug.

The second accused was contacted by a police officer posing as a potential purchaser of Ecstasy tablets. They met in the officer's car to discuss the proposed transaction and later the first accused brought the drugs to a bar and handed them over to the officer, who paid for them in cash. The accused were then arrested.

They applied for the proceedings against them to be stayed on the ground that tape-recorded evidence from a recording device hidden in the police officer's car had been tampered with whilst the officer in question was preparing an English transcription of the conversation in Spanish in the car. As a result, there were numerous unexplained erasures and over-recordings on the tape and no record of a telephone conversation which the undercover officer had with the second accused, during which he admittedly acted as an *agent provocateur*.

They submitted that (a) the court should stay the proceedings on the ground of abuse of process since the integrity of the prosecution evidence had been compromised in a way which prejudiced the presentation of their defence; (b) the police had failed to preserve the original tape recording by taking a copy of it and sealing the original for use in court, and had also failed to take the necessary precautions to prevent over-recording; (c) the duration of the tape was half an hour short of the anticipated length based on the Crown's account of the surveillance operation; and (d) accordingly, since the transcribing officer must have tampered with the tape in order to erase the evidence of the telephone conversation, which was crucial to their defence, the case should be stayed in the interests of justice.

The Crown submitted in reply that (a) the court's discretion to stay proceedings on grounds of abuse of process should be exercised rarely and only where there had been deliberate and unconscionable behaviour on the part of the prosecuting authorities; (b) the failure to observe standard procedures had been due to oversight rather than foul play, since it was easy when transcribing a recording accidentally to press the wrong button on the tape recorder, and the officers may have been mistaken,

when giving their evidence months later, as to the time-scale of the events; (c) since the relevant telephone call may have been made outside the vehicle in which the recording device was hidden, there was no reason to suspect interference with the prosecution evidence and no justification for a stay of the proceedings.

Held, staying the proceedings against both accused:

(1) The court would exercise its discretion to stay the proceedings since exceptional circumstances had been shown. Circumstances which would justify a stay included not only cases in which a fair trial would not be possible or the accused would be prejudiced in the conduct of his defence, but also those in which the judicial process was tainted by conduct on the part of the prosecution which offended against the court's sense of justice and propriety. Whilst the improper obtaining of and interference with evidence could sometimes be dealt with at the trial in the absence of the jury, a stay of proceedings would be warranted in an extreme case in which the whole trial process would be open to mistrust (page 327, lines 1–6; page 328, lines 37–45).

(2) In the present case, the police's failure to observe procedures for preserving the integrity of prosecution exhibits and the absence of any convincing explanation for the missing evidence led the court to conclude that the investigating officer had tampered with the tape recording so as to remove from it the crucial telephone conversation with the second accused. As he was the main witness for the Crown, this interference undermined the credibility of the whole prosecution case, not only as against the second accused, but also against the first, since their alleged offences were inextricably connected. Furthermore, the accused would be prejudiced in their defences if they wished to dispute the contents of the conversation, and should not be put in the position of having to testify on matters which were within the Crown's province to prove, thereby relinquishing their right to remain silent. The interests of justice would not be served by addressing the matter in a *voir dire* in the course of the trial and, accordingly, the proceedings would be stayed (page 325, lines 4–37; page 326, lines 11–32; page 329, lines 1–32).

Cases cited:

(1) *R.* v. *Heston-Francois*, [1984] Q.B. 278; [1984] 1 All E.R. 875, distinguished.

(2) *R.* v. *Horseferry Rd. Magistrates' Ct., ex p. Bennett*, [1994] 1 A.C. 42; *sub nom. Bennett* v. *Horseferry Rd. Magistrates' Ct.*, [1993] 3 All E.R. 138; (1993), 98 Cr. App. R. 114, *dicta* of Lord Lowry applied.

(3) *R.* v. *Schlesinger*, [1995] Crim. L.R. 137, applied.

A.A. Trinidad, Senior Crown Counsel, for the Crown;
G. Licudi for the first accused;
D. de Silva, Q.C., and *R. Pilley* for the second accused.

SCHOFIELD, C.J.: The two defendants are separately charged with possession of a controlled drug and possession of a controlled drug with intent to supply. Brancato is further charged with being concerned in offering to supply a controlled drug, and Barcelo with offering to supply a controlled drug. The defendants are jointly charged with attempting to supply a controlled drug. All counts on the indictment relate to approximately 300 tablets of a drug commonly known as Ecstasy, which is a Class A drug.

Very briefly, the Crown's case is that Nelson Santiago, a criminal investigator with the US Navy, had spread word in Gibraltar that he was interested in buying Ecstasy tablets and as a result obtained the telephone number of a man named Antonio. Antonio is Barcelo's Christian name. Arrangements were made for Antonio to come into Gibraltar from Spain and meet Santiago at a car-park near to the Air Terminal

Santiago was fitted with a body microphone and was given an alarm device. These were to enable other officers carrying out surveillance to listen in to his conversations and to enable them to come to Santiago's assistance should the need arise or should a transaction be completed. Santiago was in a hire-car and a micro-cassette recording device was placed under the back seat of the car near the boot, with a microphone situated between the seats. The object of that device was to record conversations between Santiago and the supplier of drugs.

Antonio arrived at the car-park. He proved to be Barcelo. After some discussion about quantities and the cost of pills they agreed to go to the Copacabana Bar. Santiago went in his hire-car, accompanied by a man identified in the depositions as a look-out. Barcelo travelled in his own car.

Santiago and Barcelo waited at the Copacabana Bar for someone whom Barcelo said would bring the pills. During that time the cost of 300 pills at £7 per pill was calculated and £2,100 counted out. Barcelo made several calls on a mobile phone. They waited for about two hours until Brancato walked into the bar and went straight to the toilets at the rear. Barcelo motioned for Santiago to follow him. A transaction then took place in which Brancato handed over 303 Ecstasy tablets and Santiago handed over £2,100 plus an amount for the extra three tablets. Santiago gave a pre-arranged signal and pressed the alarm device and the officers of the Drugs Squad arrived on the scene and arrested the two defendants.

This is an application made at the instance of Barcelo to have the proceedings stayed on the ground of abuse of process of the court. The issue involves the tape recording made on the micro-cassette recorder fitted in the hire-car and arises in this way: The cassette tape from the recording device, which recorded the conversation conducted in Spanish between Santiago and Barcelo at the car-park, was taken into the possession of the Gibraltar Police. Six days later it was handed to Officer Santiago, who then proceeded to make an English transcription of the

conversation on the tape. However, subsequent to the return of the tape to the Gibraltar Police, it was found that there were 11 over-recordings or erasures of varying durations between 0.23 and 7.12 seconds. I should say that the duration of the tape was 1 hour, 1 minute and 28 seconds and that the conversation between Santiago and Barcelo lasted less than 10 minutes. Of the 11 over-recordings or erasures only 7 occurred during the period of the conversation. For most of the time that the tape was running Santiago was in the car-park waiting for Barcelo to arrive and the tape was running after Santiago had left the car to go to the Copacabana Bar.

It is argued on behalf of Barcelo that a stay ought to be granted on three grounds, namely:

(a) there is a duty on the prosecution to preserve the integrity of the exhibits, and the corruption of the tape points to deliberate interference in the case;

(b) the defendant may be prejudiced by the corruption of a crucial exhibit by being denied an opportunity to demonstrate his defence and the court may be denied the material it needs to determine issues of entrapment, *etc*.; and

(c) there is conduct on the part of the prosecution or those associated with it which has deprived the defendant of material that may be relevant to his defence.

In a *voir dire* I heard evidence from Officer Santiago and from Officer Charles Frank Warmuth, who placed the tape-recording device in the car and who listened in to the transmission from Santiago's body microphone. I also heard the evidence of Christopher Martin Mills, a forensic audio consultant called on behalf of the Crown, and Dr. John Peter French, a similar consultant called on behalf of Barcelo. The evidence of the two expert witnesses agreed in most respects. The tape recording was 1 hour, 1 minute and 28 seconds in duration. To switch the tape recorder off and on Officer Santiago would have had to press the manual buttons on the machine. There were 11 places on the tape where there were obliterations of various durations due to erasure or over-recording. These obliterations occurred after the recording and were caused by a different machine than the machine on which the conversations were recorded. It is easy to erase or over-record when playing back a tape on a micro-cassette machine because the record button and playback button are directly adjacent to each other and it is therefore easy to hit the wrong button.

Dr. French said that in all his experience he had never come across a tape submitted by a law enforcement agency which had as many as 11 erasures or over-recordings. None the less, both experts agreed that it was impossible to say whether the obliterations were as a result of ineptitude or were made deliberately. Both experts agreed that the usual procedure for the preservation of a tape recording as an exhibit is for a second recording to be made from the original tape which will be used for

transcription purposes. The original tape is then sealed to preserve its integrity. There are two small plastic lugs on a cassette tape which, if removed, prevent any erasures or over-recordings. The 11 obliterations had to have occurred before the lugs were removed. When the cassette reached Mr. Mills the lugs had been removed.

The expert witnesses differed in one respect in their reports but when they testified the difference in their evidence was narrowed. In his report Mr. Mills opined that it was highly probable that the cassette tape was originally a continuous recording. Dr. French said in his report that in his opinion there was no technical evidence to support this view. If a tape recorder is switched on or off a click is heard and a mark is made on the tape. By erasing or over-recording that portion of the tape a person can mask the click and the mark on the tape. In his testimony, Mr. Mills acknowledged that he could not be absolutely sure that the cassette tape in question was a continuous recording.

Officers Santiago and Warmuth were both taken through their police statements and adopted them as their evidence. They said that they met at the car-park on November 5th, 1996 at about 5.45 p.m. and there Officer Warmuth fitted Santiago with the body microphone and placed the cassette recorder in the vehicle. Santiago said that this all took about 10 minutes and agreed that Warmuth had left by 6.00 p.m. at the latest. From that time, testified Santiago, he did not switch the cassette recorder off or on. It was a continuous recording.

Santiago had conversations on his mobile telephone with Warmuth. He also spoke to the defendant Barcelo by telephone. Officer Santiago was uncertain whether he had made these telephone calls when he was inside or outside the vehicle. He left the vehicle for about 10 minutes and may have made the calls when he left the vehicle. It is common ground between the Crown and the defence that there was no recording of any telephone conversation between Santiago and Barcelo. There were recordings of one-way conversations with Warmuth prior to the arrival of Barcelo. However, Santiago repeated under cross-examination that at no time did he stop the tape-recording machine.

Officer Santiago testified that Barcelo arrived at the car-park at about 6.45 p.m. After their conversation, which is recorded, he was guided by the look-out to the Copacabana Bar. On the journey to the bar the look-out asked Santiago the time and it is recorded that he replied “7.10.” Dr. French testified that there was 20 minutes left on the tape after that exchange was recorded.

Officer Santiago said that he received the cassette tape from Insp. Massias of the Royal Gibraltar Police Force six days after the recording was made. He knows how important it is to preserve the integrity of a tape and he knows that in order to preserve a tape one removes two lugs from it. He did not remove any lugs from the cassette in question and is not sure whether the lugs were on the cassette when he received it from

Insp. Massias. When he listened to the tape it was fine. As he transcribed the tape he could have pressed the wrong button on the machine but he was not aware that he did so.

The first question I have to answer is whether the defence has proved, on a balance of probabilities, that the cassette tape has been deliberately tampered with so as to erase material upon it. I think it is now accepted by the defence that Officer Santiago cannot have switched the tape machine off and on during his conversation with Barcelo. Such an action would have been physically impossible without Barcelo noticing. The only material lost during his conversation with Barcelo is that represented by the seven gaps, the largest of which was 7.12 seconds. If the tape was stopped, it was stopped prior to Barcelo's arrival. The defence contends that this must have been done to erase Santiago's telephone conversation with Barcelo.

It must be accepted that there was, at very least, great ineptitude on the part of the police in the handling of this exhibit. No copy was made of the tape. It was not preserved in accordance with standard procedure. Then it was handed over to the prosecution witness, Officer Santiago. For the erasures or over-recordings to have occurred the tape must have been played back without its integrity having been preserved, *i.e.* before the two lugs were removed from the cassette. This was either done before Officer Santiago received the cassette or after he did so. But Santiago said that when he first played back the tape it seemed fine and he is prepared to accept responsibility for the obliterations. We must accept that if there were 11 breaks in the conversation, one of which lasted over 7 seconds, Santiago would have noticed it when he played the tape back. If those gaps were not present when Santiago first played the tape back he must have caused the obliterations, for they are noted on the transcription he made.

In all the circumstances, I find it more than unlikely that Santiago would not have noticed that he pressed the wrong button on at least one occasion when, if the obliterations were accidental, he would have had to have done so on 11 occasions. Yet that is his evidence. Furthermore, here was an officer who knew that it was important to preserve the integrity of the exhibit and knew how to do so, by the simple expedient of removing two lugs from the cassette. It is beyond belief that he did not notice whether the lugs were in place when he received the cassette from Insp. Massias.

Officer Santiago has testified that the tape recorder was not switched off by him on November 5th, 1996. The tape was fractionally over one hour's duration. When Santiago was driving to the Copacabana Bar he gave the time as 7.10 p.m.. There are 20 minutes of tape time after that conversation. This means that the tape recorder must have been switched on at approximately 6.30 p.m. if the tape ran uninterrupted. Yet we have the clear evidence of Santiago that Warmuth had fitted up the recording devices and had left the car-park with the tape running by 6.00 p.m.

Mr. Trinidad, for the Crown, has manfully argued that in the many months which have gone by since this incident the officer may have got his times wrong, indeed, that the time of 7.10 p.m. could also be wrong, and that the fitting up of the recording device could have occurred later than 6.00 p.m. and the tape recording commenced closer to 6.30 than 6.00 p.m. But the statements which were adopted in evidence in court and which gave the timings were made one week after the incident. Furthermore, the preponderance of evidence is that Barcelo arrived at the car-park at 6.45 p.m. There are just over 32 minutes of tape running before a car horn seems to announce his arrival, and certainly before the conversation commences. From the time the tape was started Santiago called Barcelo and persuaded him to make the journey to Gibraltar from Spain. That conversation, as I said, was not on record. There were telephone conversations with Warmuth, one at least of which is on record.

A transcript was produced to me of a conversation on the tape prior to Barcelo's appearance on the scene, on which is expressed some impatience that Barcelo has not arrived. In this same period Santiago spent 10 minutes or so outside the vehicle. All this is consistent with there being a period of more than half an hour between Warmuth switching on the tape recorder and Barcelo arriving at the car-park. I am satisfied on a balance of probabilities that Santiago switched off the tape recorder between the time Warmuth switched it on and the time Barcelo arrived. Mr. Trinidad has argued that Santiago has testified that there was a conversation between him and Barcelo and he admits he acted as an *agent provocateur*. In those circumstances, he would gain nothing from avoiding the tape recording of any conversation. However, that all depends upon the content of the conversation of which there is now no recorded proof. I am satisfied on a balance of probabilities that the obliterations on the tape were made with the intention of masking the fact that the tape recorder had been at some point switched off. They were made deliberately. There has been a deliberate tampering with the cassette tape which was to be exhibited in evidence.

What are the implications of that finding? The defence say that this amounts to such unworthy conduct on the part of the investigating officers that a stay of the trial should be ordered regardless of whether prejudice would be suffered by the defendants. In any event, they say, the defence have been deprived of evidence of the telephone conversations, thereby depriving them of material they need to challenge the evidence of Santiago. Mr. Licudi, acting for Brancato, argues that these considerations affect his client as much as Barcelo, for the whole integrity of the prosecution case is, he says, affected. Mr. Trinidad argues that these are not grounds upon which to order a stay of proceedings. He argues that these are matters which can and should be dealt with at trial by challenges to the admissibility of the tape recording and orders in connection therewith.

I need hardly repeat that an order of a judge staying proceedings properly brought by the Attorney-General is an exceptional order which will only be made in exceptional circumstances. The authorities are very clear on this. However, it is also clear that the court's jurisdiction to stay proceedings is not confined to cases where a defendant will be unable to get a fair trial and cases where his defence is prejudiced. As Lord Lowry stated in *R.* v. *Horseferry Rd. Magistrates' Ct., ex p. Bennett* (2) ([1994] 1 A.C. at 74):

> ". . . [I] consider that a court has a discretion to stay any criminal proceedings on the ground 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. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct."

He went on to say (*ibid.*, at 76):

> "The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend, Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial."

That was a case where a defendant was kidnapped from overseas to be returned to the United Kingdom for trial, the prosecutors thus by-passing the extradition procedures. However, this jurisdiction to stay on grounds of abuse is not confined to such a case. *R.* v. *Schlesinger* (3) was a case where defence witnesses had been prevented from coming to court at the

initiative of the prosecuting authority. The commentary states ([1995] Crim. L.R. at 138):

> "There were two categories of abuse of process. The first was where there had been prejudice to a defendant or a fair trial could not be had (see *Ex p. Brookes* . . .). The second was where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible (see *Horseferry Road Magistrates' Court, ex p. Bennett* . . . ; *Croydon Justices, ex p. Dean* . . .). Counsel for the Crown contended that the class of case in which the Court would grant a stay without prejudice being shown or where a fair trial could still take place was very small, and specifically confined, consisting only of cases in which the defendant could not have been brought before the Court at all but for the impropriety; thus in *Bennett* the defendant was improperly kidnapped, and in *Dean* the prosecution reneged on its promise that he would not be prosecuted if he assisted it.
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> Although those two cases could be brought under the small umbrella erected by Crown counsel the class was not so confined. Dicta from *Bennett* were couched in wider terms. Crown counsel also referred to the warning of Lord Lane C.J. in *Att.-Gen's Reference (No 1 of 1990)* . . . that stays should only be employed in exceptional circumstances in order to avoid the public viewing the process with suspicion and mistrust. However, the machinations in this case to prevent defence witnesses being available, coupled with the non-disclosure, constituted such an interference with the justice process as to amount to an abuse of it."

I have been directed to the case of *R.* v. *Heston-Francois* (1), an English Court of Appeal decision in which it was held that the court's inherent jurisdiction to stay proceedings did not include an obligation to inquire before the trial into allegations of misconduct such as the improper obtaining of evidence, tampering with evidence or the seizure of a defendant's documents prepared for his defence. It was held that such conduct fell to be dealt with during the trial by judicial control on admissibility of evidence, power to direct a verdict of not guilty or by the jury taking account of the conduct in evaluating the evidence.

It is significant that *Heston-Francois* was decided 10 years before *Bennett* (2) and was not cited to the House of Lords in *Bennett.* Whilst it is true that most questions involving improperly obtained evidence or tampering with evidence may be dealt with at the trial, there may be such cases where the conduct of the prosecuting authorities in putting their case together amounts to such an affront to the court's sense of justice and propriety as to fall within the principles enunciated in *Bennett* and the authorities succeeding it. Such cases will be very rare indeed because, for example, it would be a rare occurrence that the main law enforcement witness in a trial committed such a gross interference with exhibits as has been presented in this case.

I have reached the conclusion that the conduct of the investigating officers in this case, particularly that of Santiago, is such that it would be an affront to justice and propriety for this case to go forward. If I allowed the trial to go forward in these circumstances the whole trial process would be open to suspicion and mistrust. It is not a small piece of evidence which has been tampered with. It is not a case of ineptitude. It is a significant piece of deliberate tampering with evidence by the main witness for the Crown. His actions undermine the whole integrity of the prosecution case and, indeed, would undermine the whole integrity of the trial process. In this I would include the case against Brancato, because the cases against both defendants are inextricably intertwined.

If I am wrong in that, I find that there is prejudice to the defendants so as to cause me to exercise my power of stay. There has been erased from the tape material which should be made available to the defendants to enable them to mount their defences. The evidence of the conversation may be available from Barcelo himself, but if there is a dispute between Santiago and Barcelo over what was said during the telephone conversation should the tape recording not be available to enable the court to resolve that dispute? In any event, Barcelo should be entitled to remain silent and not be obliged to testify on matters which are within the Crown's province to prove.

Furthermore, it would not satisfy the interests of justice merely to deal with the question of the tape recording at the trial on the basis of admissibility. Should not the jury be made aware of the fact that the tape has been tampered with by the very witness upon whose testimony they are being invited to find the defendants guilty? The forensic problems in getting that information to the jury are problems which ought not to be placed on the defence. To allow the trial to go forward and then to stop it at the end of the prosecution case would, in the light of my finding, be unfair to the defendants.

The upshot is that I am satisfied that the trial against these two defendants ought to be stayed and I so order.

Order accordingly.
