[2018 Gib LR 8]

R. v. DELLIPIANI

SUPREME COURT (Ramagge Prescott, J.): January 27th, 2017

Criminal Procedure—abuse of process—stay or dismissal of proceedings—proceedings for historic sexual offences stayed in circumstances where proceedings for same offences had been brought 10 years earlier and withdrawn with court's consent for lack of evidence

The defendant was alleged to have committed certain sexual offences.

In 2006, the complainant made allegations against the defendant which resulted in his being charged with three counts of indecent conduct towards a child contrary to s.119(1) of the Criminal Offences Act 1960. Two of the charges related to the complainant and one charge concerned another child. In 2008, the Crown applied for the charges to be withdrawn as the complainant and the other child were unwilling to give evidence. The Chief Justice consented to the proposal and the defendant was discharged.

In 2015, a new complainant (W) reported to the police that he and another child had been sexually assaulted by the defendant on numerous occasions in 2004, when they had both been under 13 years old. Those allegations resulted in the preferment of an indictment in 2016, containing seven counts relating to sexual misconduct. (That indictment was not challenged by the defendant.) As a result of the similarities with the evidence of the complainant and W, the police approached the complainant, who indicated that he wanted the defendant to be prosecuted in respect of the offences allegedly committed against him. As a result, the Crown filed an application to prefer a voluntary bill of indictment ("VBI") containing two counts in respect of the complainant.

The defence submitted that the VBI was fatally flawed because the Crown sought to charge the defendant under the Crimes Act 2011, which was not permissible given s.601 of the Act, which provided "(1) Proceedings for an offence under any of the repealed Acts that had commenced before the commencement of this Act must continue under the respective Act as if it had not been repealed." The defendant submitted that the withdrawal of the charges in 2006 was tantamount to an acquittal. He also submitted that pursuant to s.8(1) of the Constitution he was entitled to a fair hearing within a reasonable time and there was no good reason for the 10-year delay.

Held, granting a stay:

(1) The withdrawal of the charges in 2008 was not tantamount to the defendant having been acquitted. Once a trial process had begun, only a jury could acquit. The court did, however, agree that, the charges having been withdrawn by the prosecution, the defendant would have understood that the proceedings had been concluded and that there was no expectation that they would be revived in the future. The situation might have been different had the charges been allowed to lie on file in the usual way, because in that instance the defendant would not or should not have assumed that the matter had ended with no possibility of revival. It was significant that the withdrawal took place in open court and was communicated to the Chief Justice who gave his judicial blessing to the prosecution's proposed course of action. It was not of itself an abuse of process for a prosecutor to change his mind and each case must be considered on its own facts. In the present case, there was nothing to suggest that the original decision was wrong. The defence and the court had not been told that this matter might restart in the future. In the circumstances, the defendant was entitled to rely on the withdrawal as an end of the charges against him and he had had that impression for 10 years. While the material issue was that the administration of justice would be brought into disrepute if the prosecution were allowed to reverse the decision or indication communicated to a judge, that issue was compounded when the passage of time between the communication of the decision and the attempt at its reversal was lengthy. In addition, it was the prosecution who, having withdrawn the case, took the initiative to approach the complainant and invite him to proceed with his original complaint. The court was left in no doubt that to allow the Crown to prosecute in respect of the charges under discussion would not only be an affront to the administration of justice but would also result in an injustice being done to the defendant. A stay would be granted of the proceedings sought to be commenced by the preferment of the VBI (paras. 26–27; paras. 30–31; para. 33).

(2) The VBI was not flawed and had been properly preferred. It could not be said that once proceedings had been brought under a repealed Act, whether or not they were withdrawn, they had been "commenced" for the purposes of s.601 of the Crimes Act 2011 and could therefore only proceed under the old Act. The reference in s.601 to proceedings that had been "commenced" was tied to the manner in which those proceedings must continue and must necessarily envisage a progression of the proceedings which had been commenced. If the proceedings had been terminated, they no longer existed and could not be continued. Having commenced proceedings it was only possible to continue them if they were extant. The 2006 offences had not been revived, they were brought before the court by the preferment of a VBI as entirely new proceedings. The situation might have been different if the original 2006 indictment had been allowed to remain on file not to be proceeded with without leave. In that case there might have been grounds to argue that the proceedings would not have

been concluded but would have been continuing and, having been commenced before the Crimes Act 2011, could only be continued under the Criminal Offences Act 1960 (paras. 13–15).

(3) In relation to delay, the defendant could not be said to have been lying under the charges relating to the complainant for 10 years awaiting a trial which had been delayed. The proceedings which began in 2006 terminated in 2008, so that the issue of delay in the sense of a protraction of proceedings or a failure to progress did not arise. The present proceedings were new proceedings advanced in 2016 albeit in respect of offences alleged to have been committed in 2006. The fact that the offences were historic was not of itself a reason to stay the proceedings. Numerous historic sexual abuse cases proceeded both in Gibraltar and in the United Kingdom, and whilst the evidence, particularly recollections of historic events, had to be treated with care and appropriate directions given to juries, this type of case was tried with regularity. It was true that the prosecution could have instituted the present proceedings sooner, certainly as from when the complainant returned to Gibraltar, but that was different from saying that fault should be attributed to it for not doing so. A stay would not have been justified on these grounds (paras. 18–19; para. 21).

Cases cited:
(1) *Att. Gen.'s Ref. (No. 1 of 1990)*, [1992] Q.B. 630; [1992] 3 W.L.R. 9; [1992] 3 All E.R. 169; (1992), 95 Cr. App. R. 296, followed.
(2) *D.P.P.* v. *Taylor*, [2004] EWHC 1554 (Admin), unreported, considered.
(3) *R.* v. *Bloomfield*, [1997] 1 Cr. App. R. 135, considered.
(4) *R.* v. *Sawoniuk*, [2000] 2 Cr. App. R. 220, considered.
(5) *R. (Smith)* v. *Crown Prosecution Serv.*, [2010] EWHC 3593 (Admin), unreported, *dicta* of Ouseley, J. referred to.
(6) *Wemhoff* v. *Germany*, Application No. 2122/64, E.Ct.H.R., June 27th, 1968, considered.

Legislation construed:
Crimes Act 2011, s.601: The relevant terms of this section are set out at para. 10.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), s.8(1):
"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law; and, except with his own consent or as may be prescribed by law, the trial shall not take place in his absence."

K. Azopardi, *Q.C.* and *J. Wahnon* for the defendant;
R.R. Rhoda, *Q.C.* and *J. Fernandez* for the prosecution.

1 **RAMAGGE PRESCOTT, J.:** This is an application by the prosecution for the preferment of a voluntary bill of indictment ("VBI") containing two counts of sexual misconduct in relation to a boy under the age of 13. The proposed VBI reads as follows:

> "1st Count: **Statement of Offence** Engaging in sexual activity in the presence of a child. Contrary to Section 223(1) of the Crimes Act 2011.
>
> **Particulars of Offence** Richard DELLIPIANI, on a date unknown between 1 January 2006 and 7 October 2006, in Gibraltar, for the purpose of obtaining sexual gratification, intentionally engaged in a sexual activity when Master Y, a person under the age of thirteen, was present. Richard DELLIPIANI knowing or believing that Master Y was aware that he was engaging in such activity.
>
> 2nd Count: **Statement of Offence** Causing/Encouraging/Assisting a child under the age of thirteen to engage in sexual activity. Contrary to Section 220(1) of the Crimes Act 2011.
>
> **Particulars of Offence** Richard DELLIPIANI, on a date unknown between 1 January 2006 and 7 October 2006, did encourage Master Y, a child under the age of thirteen to engage in sexual activity by encouraging Master Y to masturbate him."

Although in the normal course of events an application for a VBI would be on the papers and without notice, the defence indicated it wished to make representations and filed a summons seeking that in the event the court were minded to grant leave for the preferment of the VBI, the charges contained therein be stayed or dismissed.

Background

2 The application for the preferment of the VBI arises out of offences alleged to have been committed in 2006, against two boys, C and H.

The alleged offences of 2006

3 On October 7th, 2006, C, who was under residential care with the Care Agency, made a disclosure to a care worker that he had been to the defendant's house together with other boys, and whilst there the defendant had masturbated himself in C's presence, had requested that C masturbate him and had slapped C in the face when C had refused.

4 On October 8th, 2006, C was interviewed under Achieving Best Interview Guidelines and during the course of that interview he revealed inter alia that he saw his friend H touch the defendant's penis. H was a boy under the age of 13.

5 On October 8th, 2006, the defendant was charged with three counts of indecent conduct towards a child contrary to s.119(1) of the Criminal Offences Act 1960, two of the charges related to C and one to H.

6 The trial in respect of those charges was due to begin on February 8th, 2008. On that date the Crown applied for the charges to be withdrawn. The reason for this was because C who was in the care of the Care Agency was in the United Kingdom undergoing treatment in a social behaviour centre and was unable to attend the trial. H's parents upon learning that C would not be giving evidence refused to allow H to give evidence, and H himself was reluctant to do so. The recording of the hearing in 2008 is no longer available but the entry in the Court Minute Book for February 8th, 2008 reads as follows:

> "Infant witness unwilling to give evidence.
>
> The Crown unable to prove the case.
>
> The case is withdrawn.
>
> Bail is terminated.
>
> The prisoner is discharged."

The alleged offences of 2004

7 On March 19th, 2015, W reported to police that he had been sexually assaulted by the defendant on numerous occasions between January and December 2004. He also reported that he had witnessed how the defendant had engaged in anal sex with X. These allegations resulted in the preferment of an indictment on March 18th, 2016 containing seven counts relating to sexual misconduct ("the 2016 indictment"). Those counts are historic, relate back to 2004 and involve two boys who were under the age of 13 at the relevant time. The 2016 indictment is not the subject of a challenge by the defence.

8 As a result of the similarities between the evidence of W and that of C, C was approached by the police and he indicated that he wished for the defendant to be prosecuted in respect of the offences against him allegedly committed in 2004. As a result, on April 1st, 2016 the Crown filed an application to prefer a VBI containing two counts in respect of C.

The VBI

9 The defence advances four submissions which can best be summarized by reference to counsel's skeleton arguments (at para. 24):

> "(1) The VBI is fatally flawed because the Crown seek to charge under the Crimes Act 2011 ('CA11') when this is not permissible by

operation of s601 of the CA11 (and section 700 of the Criminal Procedure and Evidence Act 2011 ('the CPE 2011'));

(2) Depending on the ruling in relation to point (1) above, whether the flaws in the form of the VBI can or should be corrected (having regard to the 8 year delay in making the application for the VBI);

(3) Whether having offered no evidence in 2008 and withdrawn the charges in relation to C, the defendant should be tried in relation to the same;

(4) Whether there has been an abuse of process or a breach of the defendant's constitutional rights under section 8 of the Constitution such that there should be a stay of proceedings as a result of the delay between the 2008 proceedings and the Crown's application for a VBI . . ."

Is the VBI flawed?

10 Section 601(1) of the Crimes Act 2011 provides:

"Proceedings for an offence under any of the repealed Acts that had commenced before the commencement of this Act must continue under the respective Act as if it had not been repealed."

11 Not in dispute that pursuant to s.601(7), for the purposes of s.601, proceedings for an offence commenced inter alia on arrest without warrant. Not in dispute that the defendant was arrested without warrant on October 7th, 2006, and that therefore proceedings commenced on that date. Not in dispute that those proceedings terminated on February 8th, 2008.

12 For the defence said that the fact that s.601 makes reference to proceedings which had commenced, but makes no reference to those same proceedings being withdrawn, means that once proceedings are brought under the old law, whether they are withdrawn or not, they have been commenced and therefore can only proceed under the old law.

13 This raises an interesting point. Even a cursory reading of s.601 reveals that the reference to proceedings which have *commenced* in the section is tied to the manner in which those proceedings *must continue*. The reference to commencement must therefore necessarily envisage a progression of the proceedings which have been commenced. If the proceedings which have been commenced have been terminated, by force of logic they no longer exist and they cannot be continued. The 2006 offences have not been revived, they have been brought before the court by the preferment of a VBI as entirely new proceedings. The situation may have been different had the original 2006 indictment been allowed to remain on file not to be proceeded with without leave of this court or the

Court of Appeal. In that case there may have been grounds to argue that the proceedings would not have been concluded but would have been continuing, and, having been commenced before the commencement of the Crimes Act 2011, could only be continued under the Crimes Act 1960.

14 In my view, therefore, the term "*commenced*" must include reference to proceedings which have not only commenced but which are continuing and have not been withdrawn or terminated. A specific reference in the section to withdrawal or termination is unnecessary. Having commenced proceedings it is only possible to continue those proceedings if they are extant.

15 The VBI is not flawed and has been properly preferred, the issue of correction therefore does not arise.

Effect of delay

16 Submitted for the defendant that pursuant to s.8(1) of the Constitution he is entitled to a fair hearing within a reasonable time. Essentially he complains of lapse of time between the commission of the offence and the start of the trial. Counsel reminds the court that the defendant was first charged on October 8th, 2006, and some 10 years have elapsed since then, and that the VBI appears to have arisen as a result of an approach made to C by the police. Submitted that—

> "there is no good reason why there has been such delay. The police were aware of the 2006 allegations. There is no new material or new circumstance. The statements and documents on which the Crown wish to proceed are exactly the same ones as under the 2006 indictment."

17 Important that the allegation of delay is placed in its proper context. In the first instance charges were preferred expeditiously in October 2006, the day after C was interviewed and two days after the disclosure of the commission of the alleged offences. The charges were withdrawn by the prosecution on the day of trial, October 8th, 2008, for want of evidence because the young boys were not to testify. Thereafter in April 2016, as a result of an analogous complaint in relation to another child, the prosecution sought to prefer the VBI.

18 The defendant relies on *Wemhoff* v. *Germany* (6) (at para. 18) for the proposition that the whole purpose of sections akin to s.8(1) of the Constitution "is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined." The defendant complains that from first preferment of the charges in 2006 to the proposed preferment of the VBI is 10 years. That may be so but upon the facts of this case, the defendant cannot be said to have been lying under a charge for 10 years, awaiting a trial which has been delayed. The

proceedings which began in 2006 terminated in 2008, so that the issue of delay in the sense of a protraction of proceedings or a failure to progress does not arise. These are new proceedings advanced in 2016 albeit in respect of offences alleged to have been committed in 2006.

19 I do not ignore the fact that these offences are historic but that would not of itself be a reason to stay proceedings. In *R.* v. *Sawoniuk* (4), the passage of time from the commission of the offence to trial was one of 42 years. Numerous historic sexual abuse cases proceed both in Gibraltar and in the United Kingdom, and whilst it is true that the evidence, particularly recollections of historic events, must be treated with care and appropriate directions given to juries, these type of cases are tried with regularity. In fact the defence rightly takes no issue with the 2016 indictment which relates to offences alleged to have been committed by the defendant in 2004.

20 In the judgment delivered by Lord Lane, C.J. in *Att. Gen.'s Ref. (No. 1 of 1990)* (1) the following passage provides invaluable guidance ([1992] Q.B. at 643–644):

> "In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay."

21 The reason the VBI was not preferred sooner appears to be due to the curious unfolding of events particular to the facts of this case. It is true that the prosecution could have instituted these proceedings much sooner, certainly as from when the complainant returned to Gibraltar, but that is different to saying that fault should be attributed to it for not doing so. I am of the view a stay on these grounds is not justified.

22 Counsel for the defendant advances a further submission on the subject of delay and that is that the passage of time since the alleged commission of the offence has resulted in evidential prejudice to the defendant because the interview tapes of an 18-minute interview conducted with a Mr. Young who is alleged to have witnessed some of the incidents which form the subject of the charges have been destroyed. It is alleged by the defence that there is "ample evidence to suggest that Mr Young asserted during that interview that none of the incidents alleged by Mr [C] had ever occurred." This submission was raised by letter after the hearing was concluded and although the prosecution was copied in it has not replied.

23 When considering this issue I rely once again on *Att. Gen.'s Ref. (No. 1 of 1990)* (1) and upon the principle highlighted therein (*ibid.*, at 644) that "no stay should be imposed unless the defendant shows on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held . . ." Lord Lane, C.J. went on to explain how the question of whether there had been serious prejudice should be approached (*ibid.*):

> "In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict."

24 I am ignorant as to whether in addition to the taped interview there was a transcript which is still available, and as to whether Mr. Young is able to attend as a witness in the trial. If the answer to either or both of those questions is in the affirmative I am of the view that the degree of potential prejudice which might be caused to the defence would be small and not such as to deprive the defendant of a fair trial.

25 If there is no transcript and Mr. Young were not available to testify then the degree of potential prejudice might increase. However without knowing the nature and extent of the "ample evidence" referred to by the defence suggesting that the incidents never occurred, it is impossible to determine in any sensible way the degree of prejudice, or the impact it might have on the fairness of the proceedings. That said, given the conclusion I reach hereunder, I do not need to decide this point.

Effect of withdrawal

26 I disagree with counsel for the defence that the withdrawal of charges in 2008 was tantamount to the defendant having been acquitted. Evidently once a trial process has begun it is only a jury in whose charge the defendant has been placed which can acquit. I do however agree with counsel that, the charges having been withdrawn by the prosecution, the defendant would have understood that the proceedings had been concluded and that there was no expectation that the charges would have been revived in the future. As I have said once before in this ruling, the situation may have been different had the charges been allowed to lie on file in the usual way, because in that instance the defendant could not, or should not, have assumed that the matter had ended with no possibility of revival.

27 Significant that the withdrawal took place in open court and was communicated to the learned Chief Justice who gave his judicial blessing to the prosecution's proposed course of action. That, in light of the judgment of the Court of Appeal in *R.* v. *Bloomfield* (3), is material. The facts of *Bloomfield* were that on December 20th, 1995 prosecuting counsel first informed defence counsel that the Crown wished to offer no evidence against the defendant on a count of possession of a Class A drug because they accepted the defendant's account as to how he came into possession of the drugs. Thereafter prosecuting counsel informed the judge in his room that she would like to offer no evidence but did not wish to do it on that day; she said ([1997] Cr. App. R. at 137): "What I would like to do today is just adjourn the plea and directions hearing and re-list it for mention to offer no evidence." With the approval of the defence the judge subsequently made the order in open court. Subsequently on January 9th, 1996, defence counsel was told by someone for the prosecution that the prosecution was not going to proceed with the course of action adopted on December 20th and thereafter by letter on February 8th, 1996 the prosecution indicated to the defence that they intended to continue with the prosecution because counsel at the hearing of December 20th had no instructions from the Crown Prosecution Service to indicate that the Crown would offer no evidence. There was an application to stay the proceedings as an abuse of process but that was dismissed, whereupon the defendant pleaded guilty. The Court of Appeal allowed the proceedings to be stayed.

28 In his judgment, Staughton, L.J. said (*ibid.*, at 143):

> "The statement of the prosecution that they would offer no evidence at the next hearing was not merely a statement made to the defendant or to his legal representative. It was made *coram judice*, in the presence of the judge. It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was."

29 I am cognizant that as Ouseley, J. observed in *R. (Smith)* v. *Crown Prosecution Serv.* (5) ([2010] EWHC 3593 (Admin), at para. 31): ". . . [I]t is not of itself an abuse of process for a prosecutor to change his mind even based upon a wrong view of the law." As the case law makes clear, each case must be considered upon its own facts and I accept that there will always be reasons why the prosecution has had a change of mind, and it may be that there arise situations where those reasons are so compelling as to justify a back pedal, but in my view this is not one such situation.

30 In this case there is nothing to suggest that the original decision was wrong. It is not a case where significant or more compelling evidence has

been discovered at a later stage. This was not a case where the court or the defence were told that further evidence might at some stage become available, or that the matter might proceed once the complainant returned from the United Kingdom; the defence and the court were never told this matter might restart in the future. The defendant was entitled to rely on the withdrawal as an end of the charges against him and has harboured under that impression for 10 years. Evident from the fact that when he was arrested he stated: "I already went to court for this and Mr Dudley dismissed me."

31 Whilst the material issue is that the administration of justice would be brought into disrepute if the prosecution were allowed to reverse the decision or indication communicated to a judge, that issue is compounded when the passage of time between the communication of the decision and the attempt at its reversal is lengthy. In *Bloomfield* (3), the period of time was a matter of days, here it has been 10 years. A further point which is noteworthy although not necessarily significant is that it was the prosecution who, having withdrawn the case, took the initiative of its own volition to approach the complainant and invite him to proceed upon his original complaint made some 10 years ago. In the 10 years since the alleged offences were committed, the complainant has not come forward with any desire to recommence, the initiative has come exclusively from the prosecution notwithstanding its previous decision to withdraw.

32 I am fortified in my view by *D.P.P.* v. *Taylor* (2). That case involved a road traffic accident where two people lost their lives. The indication by the accident reconstruction expert was that both the deceased driver and Taylor, who had been driving a bus, were to blame. Despite this, the prosecution decided that there was insufficient evidence of careless driving to justify prosecuting Taylor. On June 12th, 2003, Taylor was informed of that decision by letter. Subsequently representations made by the family of the deceased led to a change of mind and the prosecution decided to prosecute Taylor, and informed him of the same on July 18th, 2003. Submitted to the magistrates that an obvious mistake had been made by the prosecution in deciding not to prosecute. There was no suggestion that there was any severe prejudice caused to Taylor. The magistrates concluded that Taylor was entitled to expect that the initial decision by the prosecution was one on which he could rely and they stayed the proceedings. That decision was upheld upon appeal.

33 As distinct from this case, the case of *Taylor* did not involve a communication made to a judge, rather the decision not to prosecute was made out of court by letter directly to the defendant, and that of itself was considered sufficient to engage the principles expounded in *Bloomfield* and the prosecution were prevented from reversing their decision. When one considers *Bloomfield* together with *Taylor* against the facts and circumstances of this case, I am left in no doubt that to allow the Crown to

prosecute in respect of the charges under discussion would in my view not only be an affront to the administration of justice but would also result in an injustice being done to this defendant. For these reasons I grant a stay of the proceedings sought to be commenced by the preferment of the VBI.

Order accordingly.