SC/CRIM/06/18

JUDGMENT

Regina

Respondent

And

Kenneth William Duvall

Appellant

before

The Honourable James Lewis QC, Chief Justice

GIVEN ON

16th May 2019

Representation	
Mr Robert Wyn Jones	*Appellant*
Mr Stuart Walker	*Respondent*

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CASE NO SC/CRIM/18

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS
ON APPEAL FROM THE MAGISTRATE'S COURT

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 16th May 2019

Before:

THE HONOURABLE JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

REGINA

Respondent

-and-

KENNETH WILLIAM DUVAL

Appellant

- -

Mr Robert Wyn Jones for the Appellant (Instructed by Elizabeth Rice of Falklands legal)

Mr Stuart Walker for the Respondent.

- -

Judgment

- -

I. INTRODUCTION

1. This appeal concerns the rule of law and the integrity of the criminal justice system in the Falkland Islands. The duty of the Supreme Court is to balance the competing public interests engaged, namely the integrity of the criminal justice system on the one hand and the public interest in seeing those guilty of crime punished. This conflict arises, in summary, because some 19 years ago the Attorney General determined after due investigation that the Appellant should not be prosecuted for an allegation of indecent assault, and that decision was communicated to him. The police recently reviewed the investigation files and in conjunction with the present Attorney General determined that that decision not to prosecute was wrong and that the Appellant should indeed be prosecuted for that historic indecent assault notwithstanding there was no new evidence.

II. BACKGROUND

2. On 16th November 2018, before Her Honour Judge Kushner Senior Magistrate, the Appellant was convicted of the following offences:

   (i) Indecent assault
   Contrary to section 14 of the Sexual Offences Act 1956

   (ii) Indecent assault
   Contrary to section 14 of the Sexual Offences Act 1956

   (iii) Indecent assault
   Contrary to section 14 of the Sexual Offences Act 1956

A. Facts

3. The Appellant was investigated for between January and July 2000 getting the complainant, a young child at the time, to touch his penis and for touching her private parts over her underwear.

4. The complainant gave her account to the police and social services in a tape recorded interview on 11 July 2000. The allegations against the Appellant arose during the interview which was concerning an allegation made by her sister also against the Appellant. Once allegations had been made against the Appellant he was arrested and

interviewed under caution in a tape recorded interview later that same day. He denied all the allegations.

5. In August 2000 the Royal Falkland Islands Police submitted a file to the Attorney General David Lang QC ("AG") for the consideration of the laying of charges.

6. The AG sought the opinion of an experienced prosecution barrister in London, Sally Howes (later QC). She considered the matter generally and gave a written advice. In particular she considered the discovery of pornographic videos kept by the mother of the girls at their home. It became apparent that one of those pornographic films to which the children may have had access contained a scene strikingly similar to the allegations made by the complainant's sister against the Appellant. The video involved sexual activity taking place in a bathroom which was the same as the allegation made against the Appellant. Sally Howes advised against charging the Appellant with the allegations made by the complainant's sister, but she did not directly address the allegations that had been made by the complainant.

7. The AG and Principal Crown Counsel accepted this advice after a careful and independent review carried out by themselves and declined to institute a prosecution against the Appellant in respect of the allegations made by the Complaint's sister. The AG issued a decision not to prosecute the Appellant in November 2000 on those allegations. That position remains unchanged. For some unknown reason the allegation made by the complainant was not properly addressed at that time.

8. In December 2000 it was noticed that the complainant's allegations had not been specifically addressed. The AG set this concern out in a minute made after a meeting with the Chief Executive on 22 December 2000. The AG asked D. Morris the then Chief of Police to give him further information. The Chief of Police wrote in reply:

> "[The complainant] never made a fresh/prompt complaint, her allegation was made during the course of the taped interview. She alleged that Kenneth Duvall made her masturbate him while sat on a sofa covered with a quilt. The quilt in question was sent away for forensic examination but the findings were inconclusive and there was no corrobative evidence. Sally Howes has also had the opportunity to review this evidence, as it was in the transcripts of the taped interview, and never reached the conclusion that it should be pursued. I feel that in the light of the above there would be very little chance of conviction. Please find herewith a copy of the relevant pages of the transcript of the taped interview"

9. The Principal Crown Counsel was asked by the AG to consider the police reply and the evidence. He wrote to the AG concluding there was no prospect of a conviction.

10. The AG set out in a written minute dated 23 January 2001 his decision on prosecuting the Appellant. He said:

> "1. Thank you for your letter of 12 January.
>
> 2. A physical examination of [the complainant] could not, of course, be of any probative value, one way or the other, as to the alleged masturbation of her by Kenneth Duvall.
>
> 3. [The complainant]'s allegation that Kenneth Duvall masturbated her is entirely unsupported by the evidence of any other witness. Of course, we must remember that since the enactment of section 32 of the Criminal Justice and Public Order Act 1994 and the corresponding provision in the Falkland Islands any requirement that a warning should be given to the jury about convicting the accused on the uncorroborated evidence of a person in respect of whom he is alleged to have committed a sexual offence, has been abolished. All similar requirements in relation to summary trials have also been abolished.
>
> 4. It is only the requirement, of course, which has been abolished. The requirement about warning a jury in respect of the uncorroborated evidence of a child was abolished in England in 1988 and a corresponding provision has been enacted in the Falkland Islands. But in many cases the judge exercises the discretion which he has to give a "corroboration warning". The offence against [the complainant] would, of course, be triable by the Senior Magistrate summarily. While I believe that there is every reason to hope that he would believe [the complainant], it is almost certain that he would direct himself as to the desirability (not requirement) of corroborative evidence, of which, of course, there is none. Additionally, he would have to take into account the lack of "recent complaint" evidence since [the complainant] appears to have told nobody (so far as we can tell from her statement) of the offence until she was questioned in relation to the alleged offences on her sister. That failure, of course, only touches upon [the complainant]'s credibility.
>
> 5. While, of course, it is possible that the Senior Magistrate would convict Kenneth Duvall on the evidence of [her sister] alone, I have to consider that the probability, in all the circumstances, is that he would not. Applying the English Attorney General's Code for Prosecutors, l then have to come to the conclusion that there should be no prosecution because the "evidential test"' referred to in that Code is not, in my view, satisfied.

11. Soon after the decision was made Detective Sergeant Butler said to the Appellant, who was serving a sentence for another matter, in Stanley police station:

> " Once you have finished your sentence [for the other charge] it would be a clean slate and there would be no outstanding charges. You could start again". This evidence was given by the Appellant and was not challenged by the prosecution in the Appeal before me.

12. In 2017 the police reviewed a number of historic files. They took a fresh statement from the complainant but that repeated the previous allegation. It was not submitted on appeal that this amounted to fresh evidence and of course it does not. Simply asking a witness to make the same allegation at a later date cannot sensibly amount to fresh evidence. It is quite different if DNA evidence now becomes available or a new witness comes forward. Both of those cases would amount to fresh evidence.

13. Surprisingly, for the reasons set out below at paragraph [55] the police also re-interviewed the Appellant. He again denied the offence.

B. Procedural history

14. In 2018 the Appellant was charged with the 2000 offences against the complainant.

15. He came before the Senior Magistrate and on his behalf arguments that it was unfair to try the Appellant and that he could not receive a fair trial were made and rejected. The Senior Magistrate tried the Appellant, and on 16 November 2018 convicted him and sentenced him to 3 years imprisonment on each charge (concurrent) which he is currently serving.

III. THE PROCEEDINGS BEFORE THE SENIOR MAGISTRATE

A. Submissions of the Appellant

16. The Appellant argued before the Senior Magistrate that the case should be stayed as an abuse of process. The application fell into 2 parts. The first was delay and the right to a fair trial. The second was going back on a promise not to prosecute and the subsequent decision to reverse a charging decision without justification.

17. The Senior Magistrate heard submissions by video link on the application to stay on 25 October 2018.

B. Submissions of the Respondent

18. The prosecution submitted that the decision not to charge in 2001 was fundamentally flawed and wrong. In those circumstances it was perfectly proper to revisit the original decision and make a fresh decision to charge the Appellant. There was no unequivocal promise not to prosecute in writing.

19. The prosecution further submitted that the appellant could still get a fair trial despite the delay. Importantly the prosecution in their written submission put most emphasis on this point.

C. Determination and result before the Summary Court

20. The Senior Magistrate said:

> "I have read the various case law which was put before me, which can be found in Archbold, and not simply read the noting up in Archbold, if I can put it like that, or the text in Archbold, but have read the cases as well; in fact, more than once. But the relevant principles can be found in Archbold at '4 7 9', at page 419, which is delay; it deals with delay and the right to a trial within a reasonable time. Because these matters that are subject to the trial, which I have heard over the last few days, occurred in 2000 with consideration of prosecution at that time, but no charges were in fact laid at that time…
>
> Mr Wyn Jones, on behalf of the defendant, put it on two bases. First of all, the question of integrity in the process, of the criminal process, or the criminal justice system. And then, additionally and separately, the point about whether a fair trial would be possible. It is right that by dint of the passage of time the defendant must have felt, or had been led to conclude that he was not going to be charged. That, in fact, is a point which is conceded by the Crown. It is not the same as being told that he is not being charged, but nevertheless, the fact that by passage of time, that he felt that, and the concession made by the Crown, is in fact a very significant factor.
>
> The submissions made by Mr Wyn Jones on behalf of the defendant under this particular heading, was that first of all the decision of the Crown in 2000 was wrong, or that I have to consider whether the decision in 2000 was wrong, and again consider whether the decision of the Crown in 2018 was also wrong. I do not accept that submission. I do not accept that it is for the court to review the decisions, each decision for the prosecution, for the Crown, and not for the court to review the decision in 2000, and nor for the court to review the decision in 2018. Rather, it is for the court to consider whether the process is fair, whether it has integrity, although the decision not to prosecute, or not to charge, obviously provides the context.
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> …
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> There are plenty of cases where there is delay over a number of years before any complaint is made, and in this matter the issue is in fact whether the delay caused by the prosecution, or by the Crown to charge, puts it in a different category. If there are any problems as a result of the delay, I do not consider that they would be any different from delay caused by a late complaint, if I can put it like this, or a delay in making the complaint. It would go to the weight that the court would attribute or place on the evidence, but I do not consider that the cause of the delay, in respect of by the Crown, delay to place the charge, or to lay the charge, undermines the integrity of the process.
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> …
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> In respect to the integrity of the criminal process, or the criminal trial, the availability of witnesses is no better and no worse than in many cases where there has been a significant passage of time. Grounds of Appeal.
>
> …
>
> In my view, I do not consider that a fair trial is not possible, I have reviewed the principles again that I stated at the beginning, and also the right to a trial within a reasonable time. On behalf of the defendant he points to what are irregularities, but not every irregularity amounts to a breach of Article 6, and in this case I do not consider that these irregularities do amount to a breach of Article 6, not individually and not cumulatively. It may be that the defendant, that it may not be the trial that he would want, but with the submissions and directions, in my view, it would be a fair trial.

21. The Senior Magistrate does not separately deal with the submission that regardless of whether the Appellant can have a fair trial it still may amount to an abuse of process if the integrity of the court's process is undermined. The Senior Magistrate appears to elide the availability of witnesses and the delay in bringing the charge as factors that inform the

limb of abuse of process that deals with maintaining the integrity of the criminal justice system. The complaint made by the Appellant was the importance of holding the prosecution to its promise not to prosecute in 2000 and the importance of only allowing the prosecution to change its mind on a charging decision when there is good reason to do so. To allow the prosecution to simply change its mind without good reason would allow it to act in an arbitrary, and therefore unlawful, manner.

IV. GROUNDS OF APPEAL

22. The grounds of appeal fall into two parts. First that the Senior Magistrate should have stayed the case as an abuse of process; secondly that the conviction is unsafe. There is also an appeal against sentence.

23. Although put as an appeal against the decision of the Senior Magistrate not to stay the case as an abuse of process, the Supreme Court can exercise jurisdiction in such matters. Indeed, when an abuse of process pursuant to a challenge that it is unfair the accused should be tried at all (limb two) is made in a summary court often the best practice is to allow the matter to be dealt with by the Supreme Court. This procedure was confirmed in *Regina v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42 at 62H where Lord Griffiths said :

> "The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondent that the examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House…. 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… I adhere to the view I expressed in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108 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."

24. It follows whilst the summary court undoubtably has jurisdiction to stay any case as an abuse of its process, in cases where the rule of law is involved it will be better if this court becomes seized on the matter through judicial review and exercises jurisdiction. However, no complaint can be made in the instant case of the Senior Magistrate dealing with the matter as she undoubtably had jurisdiction to do so.

V. DISCUSSION

25. Although the categories of abuse of the court's process are not closed it is convenient to divide them into two limbs as the main authorities have done so. In *R v Beckford* [1996] 1 Cr App R 95 at 101*; R(Ebrahim) v Feltham Magistrates Court* [2001] EWHC Admin 130; [2001] 1 WLR 1293; *Attorney General's Reference No 2 of 2001* [2003] UKHL 68; [2004] 2 AC 72 two limbs of abuse of process have been identified. Limb one cases where the court concludes that the defendant cannot receive a fair trial; and limb two cases where the court concludes that it would be unfair for the defendant to be tried. It was eloquently stated by Lord Lowery in *Bennett* at p74*:*

> "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 try the accused in the circumstances of a particular case."

26. The former category focuses on the question of whether the defendant can receive a fair trial. Of course, since the trial process itself is equipped to deal with the bulk of complaints on which applications for a stay are based, cases in which a stay has been granted are likely to "be few and far between": *R(Ebrahim) v Feltham Magistrates Court* (supra).

27. The latter category concerns those cases in which a stay is necessary to protect the integrity of the criminal justice system.

28. The clear distinction between these two categories should be maintained in any judgment of the court. In *Warren v. Att.-Gen. for Jersey* [2012] 1 A.C. 22, the Privy Council indicated that these two categories are distinct and should be considered separately. Indeed, different issues are engaged. It appears to me that this clear distinction was not made by the Senior Magistrate and has led to some confusion.

29. The disjunctive nature of the approach is emphasised because for example it is not necessary that there be a finding of bad faith *per se*. As Lord Slynn observed in *R v Crown Court at Leeds ex parte Wardle* [2001] UKHL 12; [2002] 1 AC 754 at para 27, in relation to custody time limits:

> "27 It has been said that where the new charge is brought in bad faith or dishonestly, that would amount to an abuse of process. In my view the ambit of "abuse of process" is not so limited. If a new charge is brought simply to keep the accused in custody for a longer period, that is clearly contrary to the intention of the legislation and constitutes an abuse of process.

And per Lord Hope:

> "92 In my opinion the essence of abuse of process in the context of criminal proceedings is that the prosecutor has sought to take advantage of a procedural rule for a purpose which can be described as improper or as arbitrary. Difficulty has arisen because it has been suggested in some of the authorities that a complaint of abuse of process has to contain an allegation of bad faith.
>
> …
>
> 97 I do not think that it can be doubted that, where dishonesty or mala fides can be established, that will be sufficient to show that there has been an abuse of process. But the concept of abuse of process is not to be confined to cases where there is proof of conscious dishonesty or of an improper motive of that kind. To the extent that the authorities to which I have referred may be taken as indicating the contrary, I would be inclined not to follow them. It seems to me that a broader and simpler test is, in this context, more appropriate. That would be more in keeping with the purpose of article 5.1 of the Convention, which is to protect the individual from arbitrariness when he is deprived of his liberty."

30. It follows there is no need for the prosecution to have acted in bad faith. If it has acted in an arbitrary way albeit with the best of motives that may still amount to a limb two abuse of process.

31. Another example of the importance of this disjunctive approach can be seen in the requirement to show prejudice. In limb one cases the demonstration of irremediable prejudice is the cornerstone of the application. This is especially so in historic sex cases. The leading case remains R v S (PS) [2006] EWCA Crim 756 where Rose L.J. said at [21]:

> "In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles:
> (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
> (ii) Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;
> (iii) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
> (iv) When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;
> (v) If, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted.

32. The third ground is apposite and usually determinative in these types of application. Prejudice is also required some limb two cases. In a breach of promise not to prosecute case the United Kingdom Court of Appeal in *Abu Hamza* [2007] Q.B. 659 said at [54]:

> "4. These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment."

33. Of course that was said in the context of an assertion the prosecution were resiling from a promise not to prosecute which is analogous to breach of a substantive legitimate

expectation (which may require the showing of detriment) although that civil corollary does not completely fit with a criminal abuse of process complaint. Accordingly the authorities show that in a breach of promise application to limb two abuse some prejudice or detriment to the defendant is required. What is important is not to elevate the requirement to show prejudice or detriment in a limb two case to the same level as would be required in a limb one case, namely that a fair trial is impossible. As a matter of common sense and logic if that were so then limb two abuse of process would become otiose and completely subsumed in a limb one abuse of process application.

34. It does appear in the present case that the clear distinction between the different limbs of abuse of process was not clearly recognised by the Senior Magistrate or to some extent the prosecution in their written argument before her. The Senior Magistrate concentrates on whether a fair trial is still possible while in law that test is only applicable to limb one abuse of process cases. It is perfectly possible for a fair trial to still be possible but there still be an abuse of process under limb two.

35. I have no doubt in the present case the Senior Magistrate was correct in holding that a fair trial was possible. The high threshold as indicated in the case of *Re S* [ibid] was not made out. Indeed in oral argument before me Mr Wyn Jones did not press the argument that a fair trial of the Appellant was impossible (limb one abuse). However, in the circumstances it is open to this court to decide afresh the submissions made under limb two abuse of process.

36. The submissions made by Mr Wyn Jones are twofold and cumulative. He submits that there was no good reason, in the absence of fresh evidence, for the prosecution to reconsider their decision made in 2001 not to prosecute; further that there was a promise made in 2001 upon which the prosecution should not be permitted to resile.

37. He bases the first submission on the prosecution code of practice. Mr Wyn Jones put before me the current CPS Code operative in the United Kingdom, and Mr Walker for the Crown tells me that the identical code has been adopted in the Falkland Islands by the AG. In material part it states:

> "There is a presumption that once a suspect is informed of a decision not to prosecute, she or he is entitled to rely on that decision. Therefore, such a decision should not ordinarily be revoked…

> Section 10 of the Code for Crown Prosecutors explains that occasionally there are special reasons why the prosecution service will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will re-start the prosecution, particularly if the case is serious. It states:
>
> 10.1 People should be able to rely on decisions taken by the CPS. Normally, if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, the case will not start again. But occasionally there are reasons why the CPS will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will restart the prosecution, particularly if the case is serious.
>
> These reasons are set out at 10.2 of the Code and include:
>
> - cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;
>
> - cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again;
>
> - cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and
>
> - cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute."

38. The Code goes onto say:

> "There is also the need to preserve the public's understanding that decisions by prosecutors have finality to them, and that it is only in 'rare' cases that they will be re-visited."

39. Mr Walker relies solely on the first reason in paragraph 10.2 of the Code. He submits that the decision by the AG not to prosecute in 2001 was clearly wrong and that is the 'gateway' allowing a prosecution to be commenced in 2018. The Code of course speaks generally and does not set out definitive rules, but it does amount to a clear policy statement the prosecution will adhere to.

40. Mr Walker accepts, rightly in my view, that the previous decision must be 'wrong' in a public law sense. It cannot just be a decision that the current prosecutor disagrees with. If it were so it would allow the prosecution to act in an arbitrary fashion, and acting in such a way would amount to an abuse of process as identified by Lord Hope above. In my judgment this specie of abuse of process, change of position by the prosecuting authorities, does not require demonstration of prejudice or detriment by the accused

although any prejudice or detriment would exacerbate the unfairness. It requires justification by the prosecution.

41. It is of note that the prosecution in describing the original decision as 'fundamentally flawed' refused a defence request for disclosure of any documents relevant to the change of decision. While Mr Walker has made submissions on why the original decision was flawed, submissions by counsel are not evidence and are no substitute for evidence.

42. In reality once it is clear that the prosecution have made a considered decision not to prosecute and communicated that to the accused it is up to the prosecution to justify reconsideration of that decision. It is because the prosecution must justify their action to the court that no demonstration of prejudice or detriment by the accused is required. Obviously if there is no detriment that is a factor the court may take into account. For example if the decision to prosecute is made a few weeks or months after the wrong decision not to prosecute, and there is no prejudice, that will be a factor in maintaining confidence in the criminal justice system. In fresh evidence cases where a conditional decision has been that may be relatively simple. But in a case where the defendant has been informed he will not be prosecuted and 18 years have passed with no action by the prosecution then it may not be so easy and the refusal by the prosecution to disclose evidence relevant to the change of decision does not help them to justify the original decision as being wrong. Further, the fact the prosecution have disclosed the file in relation to the original decision but not disclosed the file in relation to the re-considered decision leaves the court with a feeling of unease that the disclosure may have been selective.

43. The Falkland islands, like the United Kingdom does not have a statute of limitations in bringing criminal charges. This is unusual in that almost every other country in the world has a statute of limitations. In the United States of America it is 5 years. In France it is 3 years after the last investigative act by the prosecution. In Italy it is 6 years for felonies and 4 years for misdemeanours. Of course in most cases these statutes of limitation only begin to run once the crime is discovered by the authorities. It is to prevent a person being subject to prolonged investigation and chimes with Article 6 of the ECHR which requires trial within a reasonable time.

44. In the majority of historic sex cases the investigation only starts once a complaint is made, often many years after the conduct has occurred. A good example is the current #MeToo where complainants are only now coming forward. None of these cases would engage a statute of limitations as the crime has only recently come to the attention of the prosecuting authorities and time would start to run from then. The present case is somewhat unique in that the police investigation was completed 18 years ago and there has been complete inaction by the authorities for that period. If this were the United States of America, France or the majority of countries in the world, their statute of limitations would bar as case such as this from being prosecuted after such a long period. Of course, that is not the case in the Falkland Islands because it is left to the court to determine if it is fair, in all the circumstances, for the accused to be tried. However, it supports the requirement of this court, as the final arbiter, to scrutinise carefully the decision of the prosecution in such a case to ensure the integrity of the justice system.

45. Of course the jurisdiction to stay proceedings should be exercised carefully and sparingly and only for very compelling reasons. It was not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.

46. Turning back to the Code, it states:

> "When considering what might be regarded as wrong, prosecutors may find it useful to reflect on whether any of the following can be identified:
> - A significant misinterpretation of the evidence;
> - An incorrect application of the law;
> - A failure to consider, or a decision to not follow, relevant CPS policy that cannot be properly justified."

47. It comes to this: it will be an arbitrary decision to commence a prosecution after a considered decision not to prosecute *unless* there is good and valid reason to depart from the original decision. Moreover, to establish an abuse of process under the second category involves more than the satisfying of a threshold condition. It requires an evaluation of what has occurred in the light of competing public interests.

48. In *R v Brown and Taylor (No.2)* [2009] NICC 58, Hart J. sitting in the Crown Court said:

> "[31] No doubt it will only be in very rare cases that a decision will be taken to restart a prosecution in the absence of new evidence when a defendant has been told that there wit! not be a prosecution, because were it otherwise the general principle would be undermined that normally a prosecution will not be re-started when a defendant is told by the PPS that a decision has been taken not to

> prosecute him. However, I consider that neither the Code nor principle prevent a prosecution being re-started in every case where a defendant has been told he will not be prosecuted."

49. In that case the victim's family sought a review of the decision not to prosecute and a second opinion favouring prosecution was made. The period of review, some 7 and a half months between a letter saying he would be prosecuted and a letter saying on re-consideration he would is important. Hart J. said:

> "[36] The review process, lasting as it did some 7½ months, could have been conducted more speedily, nevertheless I do not consider that the time which elapsed from the notification to the defendant of the decision not to prosecute and the decision to restart can be considered to have created any prejudice to the defendant in the conduct of his defence to these charges, nor has any been suggested."

50. Although Hart J. specifically considered the lack of prejudice it appears he based his decision concerning the Code, on the fact that the review in that case was appropriate and within a reasonable time.

51. The second submission on a limb two abuse of process concerns breach of promise. This relies on the promise made by DS Butler and is independent of the submission on reconsideration of the decision to prosecute. Authorities on breach of promise not to prosecute are more well-trodden. In *Croydon Justices ex parte Dean* [1993] QB 769 there had been no decision by the CPS not to prosecute only a promise by a police officer. The principle argument was that as the CPS had not made a decision not to prosecute, the promise by the police was not sufficient to amount to an abuse of process. Staughton L.J. said at page 135:

> "It is submitted on behalf of the Crown Prosecution Service that they alone are entitled, and bound, to decide who shall be prosecuted, at any rate in this category of case; and that the police had no authority and no right to tell Dean that he would not be prosecuted for any offence in connection with the murder: see the Prosecution of Offences Act 1985, s 3(2). I can readily accept that. I also accept that the point is one of constitutional importance. But I cannot accept rhe submission of Mr Collins that, in consequence, no such conduct by the police can ever give rise to an abuse of process.
>
> …
>
> In my judgment the prosecution of a person who had received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. Mr Collins was eventually disposed to concede as much, provided (i) that the promiser had power to decide, and (ii) that the case was one of bad faith or something akin to that. I do not accept either of those requirements as essential."

52. *Dean* was approved by the House of Lords in *Bennett.* The case of R *v Bloomfield* [1997] 1 Cr App R 135 concerned prosecuting counsel asking for an adjournment as he was going to

offer no evidence and on the adjourned hearing new counsel saying he had reviewed the papers and was going to continue with the prosecution. The Court of Appeal said it was an abuse of process and that prosecuting counsel could not tell the court one thing and then just change its mind.

53. One thing is clear, the task of the court is to balance two competing public interests. The public interest in holding public officials to their word and the public interest in seeing those guilty of crime convicted. In *R v Downey* Sweeny J. (unreported 25 February 2014) stayed the prosecution of a defendant accused of being an 'on the run' IRA terrorist because he had been sent a letter by the police which misinformed him that he was not still liable owing to the Good Friday Accord. Downey was charged with four murders and causing explosions, namely the notorious Hyde Park bombings in 1982. He said at [93]:

> "To establish an abuse of process under the second category involves more than the satisfying of a threshold condition. It requires an evaluation of what has occurred in the light of competing public interests. In *Latif* Lord Steyn explained as follows:
>
> "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed; *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42. *Ex p Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex p Bennett* conclusively established that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. The general guidance as to how the discretion should be exercised in particular circumstances would not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crime should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means".

54. Mr Wyn Jones submits that there has been prejudice to the Appellant. He pointed out in oral argument that if he knew in 2001 he was to be prosecuted he would have taken steps to preserve evidence or take statements while matters were relatively fresh in people's minds. He has been denied that opportunity. In addition he has married in 2016 and established himself in a way that happens over 18 years. His wife faces deportation following his conviction on this matter.

55. He was of course subsequently re-interviewed in 2017. This is somewhat at odds with the prosecution submission that the original decision was clearly wrong. If the original decision was clearly wrong then it means there was, on review, sufficient evidence to

charge the Appellant. It is trite law that once there is sufficient evidence to charge, a defendant should not be further interviewed. However, the Appellant was further interviewed on 26 October 2017, and that interview was adduced in evidence against him at his trial before the Senior Magistrate. If there was insufficient evidence to charge and properly the interview the Appellant that fact is at odds with the submission that the original decision was clearly wrong. In short if the original decision was wrong and there was on review sufficient evidence to charge the Appellant he should not have been further interviewed. If he was properly re-interviewed there was a breach of procedure giving rise to evidence that was used against him. Had the full decision making process for the review and decision to commence proceedings in 2018 been disclosed it may have shone light on this apparent dichotomy.

56. The present appeal is further complicated by the fact that the Appellant has been convicted after, as both the Senior Magistrate and I have held, was a fair trial. In *R v Mullen* [2000] QB 520 the defendant pleaded guilty to possession of over 100lbs of Semtex at a flat in Battersea. In the flat timing and power units for detonating various types of bomb, a number of ready made car bombs, blasting incendiary devices, mortar bomb equipment, firearms and ammunition were found. He was sentenced to 30 years imprisonment.

57. On appeal he complained that he had been unlawfully deported to the United Kingdom and therefore his trial should never have taken place. He accepted, as he had to having pleaded guilty, that the trial was fair. It follows there was no dispute as to his guilt or fairness of trial. The seminal question for the court of appeal was whether his illegal deportation was enough to render the whole criminal process an abuse and therefore his conviction 'unsafe' within the meaning of the Criminal Appeal Act. The definition of an 'unsafe conviction' is the same in the Falkland Islands as it is in the United Kingdom. . Rose L.J Vice President of the Court of Criminal Appeal said:

> "This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the I.R.A. and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts.
>
> …Furthermore, in our judgment, for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the Oxford

> English Dictionary gives the legal meaning of "unsafe" as "likely to constitute a miscarriage of justice.
>
> …It follows that, in the highly unusual circumstances of this case, notwithstanding that there is no criticism of the trial judge or jury, and no challenge to the propriety of the outcome of the trial itself, this appeal must be allowed and the defendant's conviction quashed."

58. The above two cases demonstrate that even in the most serious cases of murder and bombings and even where the bomber has admitted his guilt, the adherence to the rule of law is so strong in common law jurisprudence that it can outweigh the punishment of the guilty.

VI. CONCLUSIONS

59. Taken on its own the breach of promise by DS Butler that the appellant would not be prosecuted in the absence of some easily determinable prejudice would not be enough to establish an abuse. But in this case there is the careful and considered decision of the AG in 2001. Having reviewed the evidence it is impossible to say that his was a decision no reasonable AG could take, or that it was clearly wrong. It was a decision supported by experienced leading counsel in the United Kingdom and by the Principal Crown Counsel. When tested against the Code set out at paragraph [46] above, namely was there a significant misinterpretation of the evidence by the AG in 2001; an incorrect application of the law by the AG in 2001; or a failure to consider, or a decision to not follow, relevant prosecution policy? I cannot see how any of those questions can be answered in the affirmative. The fact that it turned out to be wrong in hindsight is not enough.

60. In the absence of fresh evidence, waiting 18 years to reconsider a decision which cannot be said to be clearly wrong, is an afront to the integrity of the criminal justice system.

61. I therefore allow the appeal on that ground alone.

CHIEF JUSTICE