Neutral Citation No. [2011] NIQB 128

Ref: **GIR8375**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **13/12/11**

2011 No. 113926

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Nolan's (Kevin Barry) Application [2011] NIQB 128

IN THE MATTER OF AN APPLICATION BY KEVIN BARRY NOLAN FOR JUDICIAL REVIEW OF A DECISION OF A DISTRICT JUDGE (MAGISTRATES' COURTS) MADE ON 23 AUGUST 2011

Before: Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] The applicant Kevin Barry Nolan and Gerard James McManus were on 23 August 2011 committed in custody for trial following a preliminary investigation before a District Judge (Magistrates' Courts) under Article 37 of the Magistrates' Courts (Northern Ireland) Order 1981. The charges upon which they have been committed for trial are attempted murder of a student police officer contrary to Article 3(1) of the Attempts and Conspiracies (Northern Ireland) Order 1983; possession of a firearm and ammunition with intent to endanger life or cause serious damage contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004; and making use of a firearm with intent to prevent the lawful arrest or detention contrary to Article 59(1) of that Order.

[2] In these proceedings the applicant seeks an order of certiorari to quash the District Judge's decision to commit him to trial on those charges and an order of certiorari to quash the decision of the District Judge the effect of which was to prevent the applicant's counsel cross-examining Crown witnesses. As paragraph 3 of the applicant's Order 53 shows the applicant's case is that the District Judge misdirected himself in holding that questions directed to the issue of entrapment were beyond the relevant issues for the committal proceedings and that they were irrelevant because the prosecution had informed the court that it was satisfied that

there was no duty of disclosure arising in the circumstances. The applicant challenges the sufficiency of the District Judge's enquiry on the issue of entrapment.

The evidential background to the charges

[3] The events in question are alleged to have occurred on 21 November 2009 at 12A Brollagh Road, Garrison, the home of a trainee police officer. The premises appear to have been under surveillance by two police vehicles. At 18.04 a blue Vauxhall Astra with two occupants drew into the car parking area. A man got out, pulled on a partly rolled balaclava or hat and knocked the door of Flat 2 at the address. He was challenged by police and made off down the side of the property with the police in pursuit. As pursuing officers approached a turn in the path two warning shots were fired. Police fired a single shot and the response came from a low velocity weapon. The suspect was not apprehended despite a search of a nearby field. Gerard James McManus was arrested early the next morning hiding in the garden shed of a nearby house. His face and hands were covered with minor scratches and his dark clothing was wet and torn on one knee. No weapon was recovered.

[4] The police arrested the applicant who was the second man who remained in the front passenger of the Vauxhall Astra throughout. When apprehended he was wearing a scarf or bandana over his mouth and nose and a peaked baseball cap, a dark fleece and blue denim jeans. A loaded Glock handgun magazine was found on the seat beside him when he got out of the vehicle on police instructions. In the foot well of the vehicle there was a large quantity of broken firelighters and a green reusable carrier bag on the back seat which contained dark clothing and baseball caps. There were in addition three cigarette lighters, matches and ten cigarettes. The fleece pocket contained an unused, unwrapped bar of Palmolive soap.

[5] When charged the applicant replied not guilty. McManus replied "We were not going to kill any one. We were just going to scare him" in relation to charges 1 and 2 and "no" in relation to charge 3.

[6] In interview McManus read a prepared statement saying that he intended to frighten the police officer and order him out of the area but not to shoot him. He fired a shot during the chase to scare the police but not to kill them. After several lengthy no comment interviews about the incident and the whereabouts of the gun when he was interviewed on 24 November he maintained the officers following him were SAS officers with English accents and he fired the shot away from them.

[7] In interview it was put to Nolan that he purchased the blue Astra in Pomeroy on 18 November. He was asked about his associations with the co-accused and with other named persons and about the planning of the offences but he made no response. On 23 November he stated that the plan (of which he was informed some ten days in advance, by persons whom he declined to identify, stating fear as his

reason) was to scare, not to injure and to let a couple of air shots off into the air. He stated that Garrison was a Nationalist village and he would not like to see a member of the PSNI or anyone else involved in administering British rule in the area. The written statement furnished by McManus was read to him. He answered questions elaborating on his statement as to the sequence of events but maintaining that the intention was to frighten not to kill. He was told that he would be picked up at a certain place and was taken to a car park on the shore of Lough Melvin when he was asked to get into the blue Astra and give the driver directions to the trainee police officer's house. He declined to say by whom he was picked up stating it to be out of fear for his family. He said that he knew there was a gun in the car. It was in the foot well and he picked it up wearing gloves and then put it down. He saw firelighters in the car and knew it was to be burnt out after the job was done. It was put to him that it was an elaborate plan just to frighten someone out of the area and he declined to comment.

[8] Committal proceedings were first listed for hearing on 26 July 2010 but they were adjourned on a number of occasions. On 27 October 2010 the applicant and the co-accused indicated that they wished to raise the issue of entrapment at the hearing of the committal proceedings. The District Judge, who was not the District Judge who ultimately conducted the preliminary investigation, asked for skeleton arguments. Counsel for the applicant submitted a skeleton argument on 16 November 2010 in which he declined to provide any factual basis for the alleged entrapment because he considered that it would be wholly inappropriate for the defence to set out detailed submissions relating to the facts of the case in advance of any evidence to be called.

[9] On 19 November the PPS asked the defence to confirm the nature of the alleged entrapment; the name of any individual(s) allegedly involved in the said entrapment; the nature of the applicant's relationship with any individual involved in the entrapment; and the nature of any contact between the client and any individual to have been trapped in terms of dates, times and location means of contact; and whether anyone else saw or heard any contact. They asked if the applicant would be willing to be interviewed by the police regarding this matter.

[10] By letter of 23 November 2010 the applicant's solicitors replied stating that the name of the individual was AK and that he caused or commissioned the offences. He declined to answer questions about the nature of the applicant's relationship with AK or the nature of the contact because those questions did not assist the PPS in assessing their pre-committal disclosure duties. The solicitors stated that the applicant would only be willing to be interviewed by the police regarding the matter "upon confirmation that the charges against the applicant would be dropped". It is the applicant's case that he was told that it was not necessary to plead his case in detail at that stage as the purpose was to allow the PPS to carry out the disclosure obligations.

[11] The Crown skeleton argument dated 1 December 2010 stated that the prosecution had considered its duty of disclosure and confirmed that no duty of disclosure arose. The skeleton asserted that there was no evidence that the accused were entrapped.

[12] When the matter was next listed on 15 March 2011 the applicant's counsel stated that no disclosure at all had been received after provision of the name of the alleged informer. Counsel argued that the prosecution's statement that no duty of disclosure arose was ambiguous. It might mean that the prosecution after proper enquiry found no disclosable evidence. It might also mean that the Crown were denying a duty of disclosure at that stage of the proceedings. The District Judge gave directions which were repeated in a letter to the PPS from the applicant's solicitors. These directed the prosecution to review all the material in its possession in respect of the allegation of entrapment and all materials relating to AK. The prosecution should then reply to the defence providing such material or stating that it did not exist. The review of the evidence was to be carried out by 5 April 2011 and the prosecution was to provide the material if any by 12 April 2011.

[13] On 14 April 2011 the PPS sent a letter stating that the issue of entrapment was not raised in any "after caution" interview but only before the District Judge by means of a skeleton argument. The PPS asserted that no duty of disclosure arose but that the matter would be kept under review in accordance with the prosecution's disclosure duties.

[14] At the hearing on 21 April 2011 prosecuting counsel informed the court that the prosecution had reviewed the papers in line with the duty of disclosure pursuant to the Attorney General's guidelines and that it was after having taken that step that the prosecution had indicated to the defence that no duty of disclosure arose. The applicant in his grounding affidavit accepted the statement of counsel and indicated to the court that as prosecution counsel had now clarified the basis of their failure to provide disclosure and had indicated that a review of material had taken place on the basis of the name provided, the defence could not and would not challenge the statement of counsel on the issue of disclosure. Because of a problem relating to witness availability the preliminary investigation was then adjourned to 23 August 2011.

[15] The preliminary investigation commenced before a fresh District Judge on 23 August in Enniskillen. According to paragraph 12 of the applicant's unchallenged affidavit, it was explained to the District Judge that the abuse of process issue remained a live one for the court but that it was proposed to deal with it at the conclusion at the evidence.

[16] Counsel for the co-accused sought to cross-examine the first Crown witness P C Allen, one of the interviewing officers. He was asked if the incident happened close to the border (which it had). He was then asked whether there had been Garda involvement in the operation. Prosecuting counsel objected contending that the

question of Garda involvement was irrelevant. He said that the defendants had already been told that no duty of disclosure arose in relation to the named alleged informant and the question was one that sought to go behind the prosecution statement that no duty of disclosure arose and it amounted to a fishing expedition.

[17] The District Judge was then addressed by counsel for the applicant who submitted that the questions being asked were relevant to the issue of abuse of process and that prosecution counsel was conflating the issue of disclosure with that of relevance. A witness may have relevant knowledge on the issue of entrapment or the involvement of an informer without that information ever having made its way into a disclosable document. The absence of a disclosable document on the issue of entrapment did not prevent the raising of questions that sought to go behind the prosecution statement that no duty of disclosure arose.

The District Judge's ruling

[18] The District Judge did not give a written ruling. However the applicant in paragraphs 17 and 18 of his uncontradicted affidavit purports to set out the effect of the District Judge's ruling:

> "17. The District Judge then said the following. He said that he had to address the following issue: whether the questions asked sought to go behind the prosecution statement that no duty of disclosure arises. He said that prosecuting counsel said that it did and that the questions were therefore not relevant. He said that he accepted that the Magistrates' Court could consider an abuse of process within the rules of that Court. He said that the previous District Judge had considered the prosecution duty of disclosure to be discharged. He said that there was not prejudice to the defendants in making their abuse of process point in the Crown Court and that this was simply a pre-trial proceeding and its function was to ensure that there was a prima facie case. He said that there was nothing wrong with the rules of the Magistrates' Court being so constrained. There was no prejudice to the defence because all of these issues could be raised in the Crown Court. He ruled that he would not allow any question that seemed to go behind the prosecution duty of disclosure.
>
> 18. He said that his decision was that any question about joint operations with the Garda or the identity or involvement of an informant would be disallowed.

> He said that the nature of the operation that led up to the arrest of the defendants was a matter that went beyond the issues of that court. He said that while he had the power to consider any abuse of process application he would consider it only on the evidence it was disclosed on the papers. He said that the questions sought to go beyond the available evidence before the court would not be allowed as there had been no disclosure on the issue of joint operations no questions on that issue would be allowed."

Thus, the effect of the District Judge's ruling was to disallow all questions about the nature of the operation which led to the arrests, the issue of cross-border co-operation on the operation and the involvement of the named individual. Following the District Judge's ruling the applicant and the co-accused concluded that the abuse of process point could not be advanced before the Magistrates' Court and that there was no further purpose in proceeding with the matter by way of a preliminary investigation. By agreement the District Judge considered the remaining papers and in effect he conducted it as a preliminary inquiry. The prosecution submitted that on the papers there was a prima facie case. No contrary submission was made by the applicant or the co-accused. The District Judge committed the applicant and the co-accused for trial.

The parties' contentions

[19] Mr Rodgers QC who appeared with Mr Reel for the applicant contended that District Judges had an undoubted power to stay committal proceedings for abuse of process (Re DPP ['1999] NI 106, R v Telford Justices Ex Parte Badham [1991] 93 Cr. App. R 171). Relying on R v Loosely [2001] 1 WLR 2060, counsel argued that where entrapment is established the proper remedy is to stay the proceedings as an abuse of process. Where a person is wrongfully returned for trial it is not an answer to say that he will have the benefit of a fair trial and suffer no prejudice. The decision to return the defendant for trial causes irretrievable prejudice, particularly when he is remanded in custody. Distress, labour, expenses and possible loss of liberty entailed by having to await the end of the prosecution's case at trial is something against which the defendant is entitled to protection. In a case such as this he must rely on evidence being adduced in respect of entrapment. This must now await trial whereas on the applicant's case it should have been considered and determined by the District Judge. The District Judge erred in concluding that cross-examination would improperly go behind the Crown's statement that no duty of disclosure arose. Witnesses could have relevant oral evidence to give that was not disclosable in any document. The questions the applicant wanted to pursue were relevant to his right to explore the issue of entrapment. Whilst the District Judge is tasked with a low evidential burden in deciding whether there is a triable case he was bound to address the abuse of process on such evidence as the defendant adduced. The defendant was entitled to adduce evidence on the issue just as at the trial.

Disallowing cross-examination on relevant issues was contrary to natural justice and led to a substantive wrong (R v Edmonton Justices (Ex Parte Brookes) (1960) 1 WLR 697 Para. 29).

[20] Mr Coll who appeared for the District Judge submitted that the District Judge sought to restrict questioning to matters of relevance. The applicant had not led any evidence to raise the issue of entrapment abuse of process. In its absence the proposed questions were irrelevant and amounted to a fishing expedition. The applicant gave no evidence to establish that the named person was an agent provocateur. If he had, it would have been a matter for the Crown to decide how to deal with that and whether evidence should be permitted in relation to it. The applicant would then have had an opportunity to cross-examine on the entrapment issue. Counsel accepted that entrapment can be a ground for granting a stay on the grounds of abuse of process. He further accepted that the accused can make an abuse of process application before the Magistrates' Court at committal stage. In this case the judicial review challenge was satellite litigation in the context of a criminal trial process offending against the principle identified in Re O'Connor v Broderick [2006] NI 114. Counsel relied on what Lord Mustill said in Neill v North Antrim Magistrates' Court (1992) 1 WLR 1220: "It is only in the case of a really substantial error leading to a demonstrable injustice that judges in a Divisional Court should contemplate the granting of leave to move". Counsel argued that the court should be reluctant to intervene on the outcome of committal proceedings to grant relief in the absence of real prejudice to the applicant.

Entrapment and abuse of process

[21] In R v Loosely [2011] 1 WLR 2060 the House of Lords took the opportunity to lay down the relevant principles to be applied in cases of alleged entrapment. It made clear that the court is required to balance the need to uphold the rule of law by convicting and punishing those who committed crimes and the need to prevent law enforcement agencies from acting in a manner which constituted an affront to the public conscience or offended ordinary notions of fairness. Each case depended on its own facts. The principle to be applied is that it would be unfair and an abuse of process if a person has been lured, incited or pressurised into committing a crime which he would not otherwise have committed. As all the speeches in R v Loosely and in R v Latif [1996] 1 WLR 104 make clear the court must exercise a discretion, balancing the competing requirements of the public interest that those charged with serious crime should be tried and that proceedings should not be an abuse of process amounting to an affront to the public conscience. The exercise of that discretion will require a careful scrutiny of the available evidence, making relevant findings and drawing proper inferences and exercising a judgment to apply the principles enunciated in R v Loosely.

The proper role of the District Judge

[22] Well presented and detailed though the skeleton arguments and oral submissions of counsel for the applicant and the District Judge were, they failed to address important issues arising from the decision of the House of Lords in R v Horseferry Road Magistrates' Court Ex Parte Bennett [1994] 1 AC 42 ("Bennett") which provide guidance on the proper procedures to be followed by a magistrate at the committal stage when a question of abuse of process arises.

[23] That case related to the alleged kidnapping of a defendant from South Africa by members of an English police force in disregard of the extradition arrangements between the United Kingdom and South Africa. Having been brought back to the United Kingdom as a result of alleged collusion between the English and South African police, the defendant was arrested in England and brought before a Magistrates' Court on an application for committal for trial on fraud charges. The defendant sought to adjourn the proceedings before the Magistrate so that he could make an application to challenge the jurisdiction of the Magistrates' Court. The application was refused and he was committed for trial. He applied to the Divisional Court to challenge the decision. The Divisional Court ruled that even if he had been kidnapped as a result of police collusion the court had no jurisdiction to enquire into the circumstances and it had dismissed the application. The question arose as to whether the Divisional Court had power to enquire into the circumstances and if so, what remedy was available to prevent his trial when he had been subsequently lawfully arrested within the jurisdiction. The House of Lords held that when a defendant had been brought to the United Kingdom in disregard of available extradition procedures and in breach of international law the courts in the United Kingdom should refuse to try the defendant. In the exercise of its supervisory jurisdiction the Divisional Court had power to enquire into the circumstances by which the applicant had been brought to the UK and if satisfied that there had been a disregard of extradition procedures it might stay the prosecution as an abuse of process and order his release.

[24] In the course of the speeches given by the members of the House consideration was given to the role and function of magistrates at committal stage when allegations of abuse of process are raised by a defendant. Lord Griffiths dealing with the question at [1994] 1 AC at 62 et seq accepted as correct what Lord Parker CJ said in Mills v Cooper [1967] 2 QB 459 namely that "every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court". Lord Griffiths continued at 63H to state:

> "Provided it is appreciated by a magistrate that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning … it appears to me to be a beneficial development and I am unpersuaded that there are sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the

> Divisional Court who are clearly in much closer contact with the work of the Magistrates' Court than Your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. 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."

Having so stated he went on to say:

> "However, in case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrow issues that arise from considering domestic criminal trial procedures. I adhere to the view I expressed in R v Gilford Magistrates' Court (Ex parte Healy) [1983] 1 WLR 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."

Lord Slynn and Lord Bridge agreed with Lord Griffiths' reasoning. While Lord Oliver differed from the majority on the main issue, he seems to have agreed with Lord Griffiths' observation on the functions of magistrates (see 73F).

[25] Lord Lowry did not consider the resolution of the point to be essential to the decision but he considered the question whether examining magistrates can stay committal proceedings on an abuse of process point. He considered, in particular, a judgment in the Australian case of Grassy v R 168 CLR 1 of Dawson J who, having analysed the history of the powers of examining magistrates, concluded that such magistrates' had no power to stay proceedings for abuse of process. The ultimate question whether a person committed for trial is actually exposed to trial does not rest with the magistrate. The statutory mandatory obligation of the magistrate

excludes a discretionary power to terminate the proceedings in a manner other than that provided. Lord Lowry concluded at 84B:

> "It would of course be convenient (as well as correct in my view) if the examining magistrate could not stay an abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates erred in their exercise of discretion. Moreover, the decision would not bind the court of trial, if the Attorney General were to prefer a voluntary bill."

[26] In the context of the actual decision in Bennett the guidance as to the proper procedures to be followed where an abuse of process challenge is mounted at committal stage may be strictly obiter. It is clear that there are the differing schools of thought as to whether a magistrate has any jurisdiction to stay for abuse of process. However, Lord Griffiths and Lord Lowry are in agreement that it is undesirable for magistrates to be drawn into reaching determinations on abuse of process allegations in cases other than those strictly related to the procedural fairness of exposing an accused to trial.

[27] The trend of authorities subsequent to Bennett points to the acceptance and application of the conclusions expressed by Lord Griffiths in Bennett as to the proper jurisdiction of a committing magistrate and the proper procedure to be followed in the event of an abuse challenge. Thus, for example, in Re DPP's Application [1999] NI 106 this court accepted the jurisdiction of a committing magistrate to entertain an abuse of process application. It did not, however, have to consider the issue arising in this case, namely whether, under Lord Griffiths' categorisation of abuse of process allegations, an allegation of entrapment is one falling within or outside the magistrate's jurisdiction.

[28] When it is alleged that entrapment by state agents should lead to the court to stay criminal proceedings as an abuse, the challenge is not one that relates to matters affecting the procedural fairness of exposing the accused to trial. If a stay were granted, it would be because, in the words of Lord Lowry in Bennett, it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case. It would not be because it would be impossible, in Lord Lowry's words, to give the accused a fair trial. In R v Latif (which was an entrapment case) the House of Lords concluded that the principles established in respect of abuse of process in Bennett (which, as noted, related to the improper removal of a defendant from another jurisdiction in breach of extradition procedures) applied equally to an entrapment case (see in particular Lord Steyn at [1996] 1 WLR at 112H).

[29] R v Bow Street Magistrates' Court (ex Parte Finch) and R v Thames Magistrates' Court (ex Parte Bossino) (CO-1258-99, CO-2181-99) were cases in which there were judicial review challenges by the applicants seeking to quash decisions by the Metropolitan Stipendiary Magistrate to commit the applicants for trial. It was argued that the magistrate wrongly refused to stay the committal proceedings because evidence indicated an abuse of process. It was alleged the police officer incited the applicant to do what he would not otherwise have done, namely to demonstrate his ability to generate illegal funds for transfer as a means of persuading her to buy his business. In that case the magistrate took the view that he had jurisdiction to consider and rule on the alleged abuse of that kind. In effect, it was a case of a magistrate considering that he had jurisdiction and that he was bound to consider the allegation of entrapment. This course was considered by the Divisional Court to have been correct. Auld LJ stated:

> "The magistrate, in the reliance in the well known analysis of Lord Griffiths in R v Horseferry Road Magistrates' Court (ex Parte Bennett) (1994) 1 AC 42 rightly took the view that he had jurisdiction to consider and rule on an alleged abuse of this sort. His view was that the officer had acted within the bounds of the relevant guidelines governing the conduct of police officers in such undercover exercises. In particular, she had not incited the commission of a more serious offence than on the evidence before him he would have committed. He was satisfied on that evidence that, when Finch introduced the officer to Bossino, he was interested in more than just the sale of his bureau de change. In short, the Magistrate's view was that the officer had not crossed the permissible line which would require his exercise of the abuse of process jurisdiction to grant a stay."

The court upheld the magistrate's refusal to stay the proceedings and concluded that he was correct to do so bearing in mind that the courts have made it clear that stays by any court should only be granted in the most exceptional circumstances and where a defendant is able to demonstrate that he has suffered serious prejudice. This was, Auld LJ, concluded, particularly so in committal proceedings where the final airing of the evidence and decision at trial were yet to come.

[30] However we respectfully consider that Lord Griffiths' speech in Bennett, on its proper analysis, does not support the view expounded by Auld LJ that the magistrate had jurisdiction to consider and rule on an alleged abuse of process arising in an entrapment case. We reach this conclusion for the reasons which are set out in paragraph [28] above. Accordingly while the magistrate's decision not to stay in that case was in our view properly upheld by the Divisional Court, we do not

consider that in such a case a magistrate should consider and rule on an alleged abuse of this kind.

[31] There are sound practical reasons why it would be wrong and undesirable for a magistrate to become embroiled in deciding an application to stay proceedings in an entrapment case at, prior to or subsequent to committal proceedings. As Auld LJ accepted, in committal proceedings before a magistrate there is no final airing of the evidence. The function of the magistrate is to determine whether there is a prima facie case which justifies committal for trial. The ultimate determination whether he does in fact stand trial does not rest with the magistrate (as Lord Lowry accepted citing with approval what Dawson J said in Grassy v R 168 CLR.) In a stay application in which the onus is on the applicant the court must make findings of fact which lay a sound evidential basis for concluding that it would be wrong to try the defendant. In an entrapment case this involves careful scrutiny of the relationship between the actions of the defendant and the alleged entrapper and between the alleged entrapper and the state, issues which will generally only become clear at trial. The magistrate's decision would not, as Lord Lowry points out, bind the court of trial if a voluntary bill were preferred. A rejection at committal stage of an abuse application of this nature could not bind the trial court because it could not give rise to a res judicata or prevent the induction of further evidence or a review of the evidence by the trial judge. Entrapment only becomes a relevant issue if it is established or admitted that the defendant committed an offence brought about by the alleged entrapper. The magistrate at the preliminary investigation stage must determine whether there is a prima facie case that the defendant committed the alleged offence. He does not and should not determine that the accused has committed the offence. That can only be determined after full trial or on a plea of guilty by the accused. Having found a prima facie case, the magistrate has carried out his statutory function. If, having so decided he proceeds not to commit because of alleged entrapment, he is carrying out a quite different exercise from that arising in the committal proceedings. He would be carrying out a function vested normally in the High Court under its inherent supervisory jurisdiction or in the Crown Court, whether before or at the trial. Preliminary investigation proceedings would provide a quite unsatisfactory forum to reach a definitive conclusion on the question whether to grant a stay on the grounds of abuse of process because of entrapment.

[32] In the present case, following the logic of Bennett, once the question of alleged entrapment/abuse of process arose it was open to the applicant to apply to the District Judge to adjourn the committal proceedings for an application to be made to the High Court for an order of prohibition and for an order quashing the prosecution's decision to move for a committal. Before such an adjournment could be permitted the court would have to be satisfied that there was a serious question of abuse of process. In the present case there was no application to adjourn. While a District Judge may of his own motion adjourn to enable an applicant to apply for judicial review of the decision to bring the committal proceedings, before doing so the District Judge would have to have material before him demonstrating that there

was a serious question worthy of consideration by the High Court. In the present case the applicant at no stage put before the District Judge any material showing that there was a serious question of abuse. Nowhere in his police interviews did he allege anything approximating to a case of entrapment.

[33] The decision to commit the applicant to trial was one justified by the evidence before the District Judge. If, as we consider, the District Judge was bound to leave the question of abuse of process and entrapment either for consideration by the High Court or, probably more suitably, to the trial judge in the Crown Court, his decision to limit cross-examination was in fact a correct one, though not for the reasons given. If the District Judge had a jurisdiction to consider the issue of staying the proceedings then his refusal to permit cross-examination because it sought to go behind the Crown's statement that there was no duty of disclosure could not have been logically justified. The fact that the Crown states that it had examined the relevant documents and that it was satisfied that there was no duty of disclosure did not preclude the possibility that witnesses in oral testimony might give evidence tending to support a case of entrapment. The Crown's assertion could not preclude a party's right to explore issues by way of oral evidence which may demonstrate the inaccuracy of the Crown's statement or establish, outwith documentary evidence, facts assisting the defence. Such issues can be pursued quite clearly and properly at the trial provided they are consistent with the defence statement.

[34] Even if, contrary to our conclusion, the magistrate had jurisdiction to entertain the stay application and was wrong to exclude a right to cross-examine in the circumstances, this is a case in which, in the exercise of our discretion, we would have declined the relief sought. As Lord Lowry pointed out in Bennett, an application to stay can quite properly be made at the court of trial (either before or in the course of the trial). A quashing of the committal at this stage would require a fresh preliminary investigation. The District Judge would be bound to find a prima facie. A referral back would necessitate a hearing of an application to stay proceedings, possibly at length, before a District Judge whose decision on the issue would be unlikely to be final. The applicant has adduced no evidence laying out a meaningful basis for entrapment which is not supported by anything he said in interview. He has declined to be re-interviewed on the issue. In substance, his case appears to be that he should be given the opportunity to use the preliminary investigation as a means to see whether he can find evidence which might support a case of entrapment, a case he has declined to support in his own evidence. As noted, he will, of course, be free in the trial to explore all such issues as far as relevant in light of his defence statement.

[35] While he has an entitlement to bring proceedings in the High Court seeking to stay the proceedings as an abuse such an application would have to be based on evidence adduced by him in support of such a case. It seems unlikely that he would wish to pursue such an evidenced-based application at this stage. This would often be the case in such cases for many defendants will, no doubt, be anxious and be advised to keep their ammunition dry for trial. Challenges in the High Court in

advance of trial in such cases are thus likely to be very uncommon since they will often meet evidential difficulties at that stage. In Bennett the facts were clear and not seriously in dispute and hence remittal to that Court was entirely justifiable. Where the facts are not established and require a full trial process to undercover them the Divisional Court's procedures are not apt to carry out that exercise. A defendant's real remedy lies at the Crown Court trial stage, the trial process providing the most effective and fairest mechanism to pursue such points.

[36] In the result we must dismiss the applicant's application.