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Ref: GIL10397

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

Delivered: 21/9/2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

v

**PAUL DOHERTY
(ON BEHALF OF CAMPSIE SAND AND GRAVEL LIMITED),
PAUL DOHERTY, GERARD MARTIN FARMER
(ON BEHALF OF CITY INDUSTRIAL WASTE LTD) AND
GERARD MARTIN FARMER AND GERARD O'MALLEY**

Respondents.

Before: Gillen LJ, Weatherup LJ and Deeny J

GILLEN LJ (delivering the judgment of the court)

Application

[1] This is an application for leave to appeal the ruling of the Recorder of Londonderry ("the judge") staying proceedings against the respondents as an abuse of process pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2004.

[2] The above-named respondents were charged in their own capacity and as directors of companies on an indictment containing 28 counts alleging various offences under the Waste Contaminated Land (NI) Order 1977 and the Proceeds of Crime Act 2002.

[3] The offences allege that the respondents unlawfully deposited and kept controlled waste on lands at Mobuoy Road, Londonderry, between 2007 and 2013.

[4] The respondents were returned for trial to the Crown Court on 15 January 2015.

[5] Applications were made before the judge on 8 and 9 September 2016 by counsel on behalf of the respondents submitting that a stay of the proceedings should be granted on the grounds that:

- (a) the respondents would be unable to receive a fair trial because of adverse media coverage prior to the trial, and
- (b) that it would be unfair to try the defendants because of manipulation by the prosecution in what amounted to an abuse of process.

[6] In a written judgment of 9 December 2016 the judge concluded that it would be wrong to allow this matter to proceed since he was satisfied that not only had the prosecution effectively manipulated the proceedings but had colluded with the BBC whilst an investigation was still to be completed. The judge refused leave to appeal in the course of an ex tempore ruling.

[7] Mr Mooney QC appeared on behalf of the appellant with Mr Magee. Mr Mulholland appeared on behalf of the first and second-named respondents with Ms Phillips. Mr O'Donoghue QC appeared on behalf of the third, fourth and fifth respondents with Mr Dunlop.

Background Facts

[8] In the course of skeleton arguments all counsel in this case agreed that the background facts had been accurately set out by the judge in the course of his written judgment between paragraphs 11-34. We have therefore borrowed from that extract of the judgment and set out the salient background facts as follows:

- (i) The Northern Ireland Environment Agency (NIEA) has been carrying out a criminal investigation into the detection of what it alleged was a substantial illegal landfill site from 2012.
- (ii) The judge had before him a memo from Ms Anne Blacker, the Chief Investigating Officer of NIEA, to the relevant Minister of 28 June 2012 ("the memo") indicating that this criminal investigation was being carried out, that the matter might attract significant media attention if it became public knowledge, and that Freedom of Information implications and requests might be applicable.
- (iii) The memo asserted that this was "the largest illegal landfill site detected to date in Northern Ireland". Significantly, at paragraph 17 the memo recorded:

"You are also recommended not to make any statements about the investigation in order to avoid the risk of prejudicing a major criminal investigation."

[9] The respondents, together with Margaret Doherty (wife of Paul Doherty) were interviewed under caution in November 2012 and early 2013. The final interview which involved Gerard O'Malley occurred on 3 October 2013.

[10] During this period there was interest from the local media organisations and on 21 June 2013 Anne Blacker was quoted on BBC Online in relation to the revocation of a Waste Licence for City Industrial Waste as follows:

“It would be deeply inappropriate for me to enter into discussions pertinent to the case in the media ... due to the ongoing investigation I am unable to comment in detail about the issues that NIEA are aware of ... The facts of the matter will become a matter of public record in due course.”

[11] On 30 September 2013 Anne Blacker contacted her superior mentioning that BBC Spotlight were intending to do a documentary and saying that the NIEA would need to think about how to co-operate safely. In a later email of the same date she asserted that the BBC wanted to have an “off-the-record” conversation and that if the BBC went through the Press Office they would get no assistance. She described this as a “big public interest story”.

[12] On 7 October 2013 the BBC lodged a Freedom of Information (FOI) request to the Planning Service. This was referred to Ms Blacker.

[13] On 9 October 2013 a meeting took place between two BBC representatives and Ms Blacker at a hotel in Belfast. Ms Blacker later made a statement about this dated 18 September 2015 in relation to the issues of disclosure. Within that statement she stated:

“I explained that as a criminal investigation was ongoing I could not discuss the site or suspects or any elements of the NIEA investigation.”

[14] On the same date the BBC made a number of further FOI requests.

[15] The BBC sought a further interview with a representative from NIEA with reference to the programme they were making about waste management. The BBC indicated that they intended to look at the illegal dump at Campsie. Subsequently, a meeting between Ms Blacker and the BBC occurred at BBC Headquarters in Belfast together with a press officer, Philip Maguire. Mr Maguire asserts that he emphasised to Ms Blacker the need to avoid telling the BBC about the ongoing criminal investigation and this could curtail what could be said.

[16] The judge outlined that it seemed to him that Ms Blacker then arranged for the BBC to have some film footage of water bubbling on the site delivered to the BBC on 29 November 2013.

[17] The BBC "Spotlight" programme on this matter was broadcast on 18 February 2014 ("the broadcast") despite the receipt of letters of concern and complaint from solicitors representing the respondents. The BBC did give the NIEA notice by e-mail that they would be screening the programme. Mr Maguire, the Press Officer of NIEA, congratulated the BBC on the programme following transmission.

[18] In November 2014 proceedings commenced at Londonderry Magistrates Court against the respondents. Following the defendants being returned to the Crown Court, the respondents' legal advisers sought disclosure of documentation that might assist them in mounting an abuse of process application based on the transmission of the BBC Spotlight programme.

[19] Notes were sought from Ms Blacker regarding her meetings with the BBC. She denied having any contemporaneous notes from the meetings and her recollection was that no information was provided which could have compromised the criminal investigation.

[20] Ms Blacker then made a further statement dated 18 September 2015 the purpose of which was "to describe the communications between myself and BBC personnel who were producing a Spotlight programme about waste management focussing on the Mobuoy case".

[21] Mr Blacker claimed in her statement that the first meeting discussed waste crime in general, advised that FOI requests to be made and gave general information regarding the availability of information.

[22] In relation to her second meeting with the BBC on 11 November 2013 she asserted that she again refused to provide any material that formed evidence in the investigation although she did agree to provide some film footage of landfill gas bubbling in a ponded area.

[23] The press officer of NIEA, who was present at this second meeting, claimed that he had no notes and declared that it was not his practice to keep notes as he was involved in very many meetings. He asserted that he was happy for Ms Blacker to answer any questions that the BBC had, that he was confident with her vast experience that she knew what she could and could not say, that in any event he was severely hard of hearing and when he attended meetings involving more than two people he had difficulty picking up much conversation.

[24] On 30 September 2015 the Press Office in response to enquiries concerning the engagement between NIEA and the media in relation to criminal investigations indicated that the media could be briefed on what was found, where it was found

and when it was found but not on anyone that was suspected of having perpetrated the crime.

[25] There then followed an email from Ms Blacker to management of 2 October 2015 indicating that she was reluctantly put forward to meet with BBC Spotlight producers while the case was under investigation on the instructions of senior management supported by the Press Officer of the DOE. She claimed that she agreed with the suggestion that this should not have happened and then went on to speak of existing tensions with the Press Office.

[26] Further disclosed emails illustrated disagreement as to whether Ms Blacker's first meeting with the BBC was authorised or not. Of particular importance to the judge was that she claimed potential evidence from the criminal investigation was provided to the BBC. Indeed, she had already provided a witness statement to that effect dated 18 September 2015.

[27] In order to support the case for a stay of proceedings, the respondents' solicitors sought disclosure of all relevant documentation surrounding contacts between NIEA and the BBC. The former made little or no disclosure regarding these meetings and Ms Blacker compiled an additional statement of 18 September 2015 to that effect.

[28] Third party disclosure orders were then obtained against the BBC in relation to contacts with NIEA. Documentation was disclosed regarding the two meetings that had taken place on 9 October 2013 and 11 November 2013.

[29] Disclosure also brought to light what appears to have been a telephone call between a representative of the BBC and Ms Blacker prior to the first meeting on 9 October 2013.

[30] A summary of the meeting of 11 November 2013 was compiled by the BBC which showed that considerable detail had been passed to the BBC consisting of identities of proposed defendants, the potential amount of waste and attitudes being taken during the interviews.

[31] At the time of these meetings, prior to the programme being broadcast, the NIEA were in the middle of interviewing the respondents and the interview process was ongoing.

[32] The judge found that there was little in the notes to indicate that Ms Blacker was reluctant to provide information. This contrasted with what she had said in her statement of September 2015 and what she had outlined to the Minister in her memo of 28 June 2012. The judge concluded that it appears she supplied information contrary to the very policy that she was telling the Minister to abide by in relation to this matter.

[33] Once the documentation from the BBC was disclosed there was an acknowledgement by the DOE in a memo of 9 February 2016 that:

“These notes and records have, prima facie, contradicted a statement made by a former NIEA staff member who is central to the proceedings and the previous interaction with the BBC. The disclosure by the BBC has further revealed records which have not previously been captured as part of the disclosure case. In turn this provides the defendants with evidence with which to reason that material may have been deliberately withheld.”

[34] The judge commented that this assertion was broadly correct and no evidence had been put before the court to challenge this.

[35] The judge went on to record that disclosure had become an important part of the application and had not been dealt with satisfactorily by the prosecution. It had been piecemeal and had caused delays.

The decision of the Judge

[36] The judge came to the following conclusions:

- It was clear that the NIEA, through Ms Blacker, gave information to the BBC whilst that investigation was at its height in that the respondents were caught up in the process of being interviewed. Some had already been interviewed and some were still to be interviewed.
- As a result of the information given the BBC were able to put together a programme in which the defendants were shown being approached and being asked for their comments.
- One particular matter that might remain with the watcher of the programme was the defendant Doherty being approached while in the middle of a game of golf.
- Disclosure of documentation from the BBC made clear that Ms Blacker had met with those involved in the programme on two occasions together with a telephone conversation prior to the first of those two meetings on 9 October 2015. That meeting was not authorised by management.
- There was an absence of notes kept of contacts from the NIEA side. Once the BBC's notes became available it was clear that NIEA had supplied the BBC with a great deal of information and that the written statement of 2015 from Ms Blacker was patently incorrect.

- Whilst a fair trial could take place, the judge carried out the balancing exercise earlier referred to. He referred to the allegation that this was the largest illegal dump discovered in Northern Ireland, the costs of which to clean up had been estimated in some documentation as being as high as £100m. He also recognised that an essential pre-requisite of the criminal justice system is that those who face serious crime and who are allegedly involved in serious crime should be prosecuted.
- Set against that he took into account that the NIEA had liaised with the BBC whilst the investigation was ongoing and the BBC was supplied with details of this.

[37] The judge concluded that he was satisfied that not only had the prosecution effectively manipulated the proceedings, whether deliberately or otherwise was not known, and had colluded with the BBC whilst the investigation was still to be completed. Disclosure was also very unsatisfactory.

[38] The judge concluded:

“One could possibly foresee a situation where the balance of competing interests could allow the matter to proceed but the final matter of concern is the conduct of the NIEA’s Chief Investigating Officer who I am satisfied has been less than frank with this court. These are proceedings of a serious nature but in all the circumstances I have very reluctantly come to the conclusion that they should be stayed.”

The relevant Legislation

[39] Article 20 of the Criminal Justice (Northern Ireland) Order 2004 has provisions dealing with the determination of prosecution appeals by the Court of Appeal.

[40] Article 20 provides as follows:

“(1) On an appeal under Article 17, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates.

(2) Paragraphs (3) to (5) apply when an appeal relates to a single ruling.

(3) Where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is

the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.

(4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following:

- (a) order that the proceedings for that offence may be resumed in the Crown Court.
- (b) order that a fresh trial might take place in the Crown Court for that offence;
- (c) order that the defendant in relation to that offence be acquitted of that offence.

(5) But the Court of Appeal may not make an order under paragraph (4)(a) or (b) in respect of an offence unless it considers it necessary in the interests of justice to do so."

[41] Article 26 provides as follows:

"[26] The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied –

- (a) that the ruling was wrong in law;
- (b) that the ruling involved an error of law or principle; or
- (c) that the ruling was a ruling that it was not reasonable for the judge to have made."

[42] Article 20(6) provides:

"[6] Paragraphs (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings."

[43] This legislation, and in particular Article 26, reflects the spirit and approach that should be adopted by an appellate court in reversing the ruling of a judge that has been made in the exercise of his discretion.

[44] In Regina v B [2008] EWCA 1144, Sir Igor Judge at [19] said:

“When the judge has exercised his discretion or made his judgment for the purposes of and in the course of a criminal trial, the very fact that he has carefully to balance conflicting considerations will almost inevitably mean that he might reasonably have reached a different, or the opposite conclusion to the one he did reach. ... No trial judge should exercise his discretion in a way which he personally believes may be unreasonable. That is not to say that he will necessarily find every such decision easy. But the mere fact that the judge could reasonably have reached the opposite conclusion to the one he reached, and that he acknowledges that there were valid arguments which might have caused him to do so, does not begin to provide a basis for a successful appeal, whether, by the prosecution, or when it arises, by the defendant.”

[45] It was common case that the task of the prosecution in this application is to satisfy this court that the judge’s determination was one that it was not reasonable for him to have made.

Principles governing the power to stay proceedings

[46] There was general agreement at the hearing before the judge and in this appeal as to the applicable general principles. Counsel rehearsed an extensive list of authorities which included Bennett v Horseferry Road Magistrates’ Court [1993] 3 All ER 138, DPP’s Appeal [1999] NI 106, R v Latif [1996] 1 WLR 104, R v Warren [2012] 1 AC, AG v MGN Ltd & Anor [2011] EWHC 2074, R v Maxwell [2010] UKSC 48, R v McCauley [2014] NICA 60 and R v Mullen [2004] 2 Cr App R 290.

[47] From these well-trodden authorities we have distilled the following principles relevant to the present application.

- (i) Proceedings may be stayed in the exercise of the judge’s discretion not only where a fair trial is impossible (and where no balancing exercise is required) but also where it would be contrary to public interest and the integrity of a criminal justice system that a trial should take place.
- (ii) The judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried on the one hand and on the other the competing public interest in not conveying the impression that courts will adopt the approach that the end justifies the means. Each of course will be fact specific but essentially the court has to decide as to what the interests of justice requires.

- (iii) Where because of factors such as delay or some other issue such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected the court must intervene.
- (iv) The impugned conduct must be viewed in its entirety. The court will take into account, such factors as the seriousness of any violation of the defendant's rights, whether the prosecution have acted in bad faith or maliciously or with improper motive, whether the conduct was committed in circumstances of urgency, emergency or necessity, the availability or otherwise of a direct sanction against the persons responsible for the misconduct, the seriousness of the offence with which the defendants are charged. Similarly the existence of motive and comparative involvement need to be considered.
- (v) As Mr O'Donoghue pointed out, much consideration has been given to the "but for" test. We are satisfied that this is no more than one of a number of relevant factors to be taken into account in the overall decision of whether the interests of justice require a stay. It is not determinative of the question of whether a stay should be granted in the interests of justice.
- (vi) In short there is no prescriptive checklist but the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons where it found to be necessary to do so.
- (vii) The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised to express the court's disapproval of the conduct of an official.

The submissions of the applicant

[48] Mr Mooney's argument can be summarised as follows:

- (i) The judge exercised his discretion in a manner that was unreasonable. He was wrong in law in that he misapplied the appropriate principles and failed to apply the proper legal test.
- (ii) There is a strong presumption that a trial will proceed unless there are exceptional circumstances compelling a stay. Whilst disclosure was unsatisfactory, that failure does not go to the issue of whether the respondents can have a fair trial.
- (iii) By the time of the time of the meetings and the broadcast the illegal activities of the respondents had been established. The scale of the activity on the lands of the respondents was so vast it was impossible to conceal. The respondents were at the relevant period the owners and occupiers of the land with day to day management of the lands. The only further matter that was required in the investigation was the completion of the interviewing process.

- (iv) The alleged unlawful benefit to the defendants is several millions of pounds.
- (v) The judge:
- Failed to take into account that the information given to the BBC had not resulted in their ability to put a programme together since it had already begun their preparations for the programme and identified personalities who were to be the focus of their investigative journalism.
 - Failed to take into account that the programme did not involve the investigative process or any decision to prosecute.
 - Failed to identify the effect of any alleged manipulation that had occurred.
 - Failed to identify the motive.
 - Failed to take into account that even if there had been manipulation, it had no bearing on the investigation or the prosecution.
 - Failed to consider whether the “manipulation” was inspired by malice and a desire to prejudice the applicants rather to avail of an opportunity to promote the image of NIEA.
 - Failed to take into account that the alleged criminal activity had been completed and that the evidence was strong and not contaminated by any manipulation.
 - Failed to take into account that whilst the behaviour of Ms Blacker was unacceptable, it had not impinged on the proceedings.

The submissions of the Respondents

[49] Leaving no point thoroughly un-pressed over the course of 70 pages of skeleton arguments augmented by oral submissions, the salient respondents’ arguments can be summarised as follows:

- (i) Confidential information had been made available to the BBC which formed an integral part of the programme that was later televised.
- (ii) This behaviour arose mid-investigation of the respondents.
- (iii) The NIEA sought to cover up their involvement with the disposal of any internal documents/memos that would speak to the meetings and passing of information and which might speak to the underlying purpose for so doing.

- (iv) When detected by the legal representatives for the respondents, the NIEA through Ms Blacker had sought to mislead the defence, prosecution and the court.
- (v) In real terms the material furnished by NIEA to the BBC included confidential details involving the names of suspects, statements made at interviews, directions on how to obtain information that previously was not being relied upon by NIEA, evidential difficulties and other substantive details regarding the ongoing investigations. This sought to circumvent the required admissibility criteria that the prosecution would have been required to overcome to introduce such material.
- (vi) The NIEA deliberately and knowingly failed to follow proper standards of professionalism and independence by taking these steps. It knowingly provided confidential material to the media which assisted with a compilation of information that could be used to advance criticism of the respondents, identify their homes and families and legal representatives.
- (vii) The NIEA deliberately and knowingly sought to cover up their wrongdoing.
- (viii) The judge properly weighed all the necessary considerations of policy and justice in the exercise of his discretion and followed all the appropriate legal principles.
- (ix) Appellate courts are bound to recognise the right of judges of a lower court to exercise their discretion freely and independently in the absence of an error of law or *Wednesbury* unreasonableness. The court is being invited in this instance to reverse the ruling of a highly respected and experienced criminal judge determined over two days of legal argument.
- (x) The judge had given this matter anxious thought in circumstances where the prosecution had not called any evidence to challenge the respondents' assertions. The judge had more than enough evidence before him to come to the conclusion at which he arrived. In short he had identified the impugned conduct, identified and applied the balancing exercise, took into account all the relevant authorities, summarised his task and reluctantly came to the conclusion that a stay was appropriate.

Conclusion

[50] We have determined that the stay imposed in this matter should be set aside and that we must accede to the application made by the applicant in this instance. We are satisfied that it is necessary to do so in the interests of justice.

[51] Our reasoning for concluding that it was not reasonable for the judge to have imposed this stay is as follows. First, we fail to see any reasonable basis for the

judge concluding that the prosecution had “effectively manipulated the proceedings”.

[52] The fact of the matter is that the proceedings were brought on foot of what appears to be clear prima facie evidence against the respondents. On the applicant’s case there is foundation for Mr Mooney’s contention that by the time of the impugned meetings with the BBC and the broadcast, the alleged illegal activities of the respondents had already been established. The scale of the activity on the lands in question was on a huge scale and the only matter outstanding at that stage in terms of the investigation was the completion of the interviewing process.

[53] The fact that Ms Blacker had acted in a wholly reprehensible manner during the course of these proceedings does not come within any acceptable definition of “manipulation of the process”. The revelation of confidential information to the BBC, her subsequent denial of this behaviour and the reticence in producing discovery of the relevant material has had, in the event, no appreciable effect on the criminal proceedings which are to be the subject of the future trial. The proceedings have not been manipulated and we consider that the finding to the contrary by the judge - which in many respects was the *raison d’être* for his grant of the stay - was not reasonable. We note that Ms Blacker will have no further role in the prosecution as she is no longer employed by the Agency.

[54] Secondly, if these charges are proven, they constitute an extremely grave set of offences involving potentially the largest illegal dump discovered in Northern Ireland. Those responsible for these offences thus face very serious criminal charges. It is in the public interest that such offences are not only detected but robustly prosecuted. This is an important factor in this case in terms of the balancing exercise that had to be carried out which, unreasonably, was not accorded sufficient weight in this instance.

[55] Thirdly, it is common case that there can be a fair trial of these charges. This broadcast, in advance of trial, will not adversely affect the trial process itself as the judge himself recognised. It will have no impact on the evidence at trial. Indeed even memory of the publicity which was generated will have faded with time by the advent of the trial. Doubtless the presiding judge will ensure that this remains the case with appropriate directions to the jury.

[56] Fourthly, we consider that the judge has failed to view the impugned conduct in its entirety. The court must take into account such factors as the seriousness of any violation of the defendants’ rights (in this case such a violation will have no material effect on the respondents at their trial) and the uncertainty whether Ms Blacker acted maliciously fuelled by a motivation to damage these respondents or whether she was simply wishing to elevate the profile of the NIEA. In addition there is still the availability of a direct sanction against Ms Blacker. She has already forfeited her job as a result of this.

[57] Fifthly, in this context these are serious offences with which the respondents are charged and, if the prosecution case is correct, they are heavily involved in these offences. It is impossible to say that but for the behaviour of the NIEA these proceedings would not have been brought. In any event, as we have already indicated, we are satisfied that this would have been no more than one of a number of relevant factors to be taken into account.

[58] Sixthly, we do not consider that this matter could be reasonably characterised as an example of where the ends – a trial of the respondents – justified the means namely the disclosure to the BBC etc. In short we find no logical connection between the means employed in this case and the prosecution and trial of these respondents.

[59] Finally, the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons where it is necessary to do so. It required a steeper climb than occurred in this instance. We find the reasoning of the judge to be less than compelling in this case. Reading through his characteristically carefully drafted judgment, we are concerned that there is, at least subliminally, a strain of disciplinary action against Ms Blacker operating as a factor in his reasoning. Whilst we express our profound disapproval of her conduct and her floundering incompetence on this occasion, we must be cautious not to lose appropriate perspective. We must ensure that the stay does not contain any element of disciplinary jurisdiction or be seen as a vehicle to express the court's disapproval of the conduct of an official.

[60] In conclusion therefore we have determined it was not reasonable for the judge to have made this ruling. We therefore accede to the application before us, remove the stay in this matter and order that a fresh trial take place in the Crown Court for these offences.

[61] We shall hear the parties on the question of costs.