**Neutral Citation No. [2002] NIQB 61**

*Ref:* **WEAB3237**

*Judgment: approved by the Court for handing down*

*Delivered:* **8/11/2002**

*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**------**

IN THE MATTER OF AN APPLICATION BY BRIAN GLENN BY HIS MOTHER AND NEXT FRIEND MARGARET GLENN FOR JUDICIAL REVIEW OF A DECISION BY NORTH ANTRIM MAGISTRATES' COURT

------

**WEATHERUP J**

[1] The applicant applies for judicial review of a decision of the Resident Magistrate sitting at North Antrim Magistrates' Court on 23 January 2002 refusing to stay proceedings against the applicant as an abuse of process by reason of the loss of evidence by the police.

[2] The applicant faces three complaints of assault and one complaint of theft arising out of events occurring at a petrol filling station at Bushmills Road, Portrush, County Antrim on 22 January 2001. The complaint of theft was alleged to have occurred inside the filling station and the complaints of assault concerned the filling station owner, his daughter and an employee who were all involved with the applicant on the forecourt of the filling station and inside the filling station. A closed circuit television camera recorded events occurring on the forecourt of the filling station and the investigating police officer was provided with a videotape of the events occurring on the forecourt.

[3] On the day of the incident the police officer viewed one minute of the videotape which showed a part of the incident on the forecourt of the filling station involving the applicant. He stated on affidavit that the evidential value of the video was minimal as the CCTV was located some twenty to twenty-five feet from the incident and all that could be observed was a struggle involving the filling station staff and the applicant. The police officer did not view the start of the incident and could not report who had started the struggle or how it had started nor at a range of twenty to twenty-five feet could he report who was doing what to whom as he described the view on the videotape as being just a general struggle.

[4] On 20 September 2001 the police officer telephoned the applicant's solicitor to inform him that the videotape had been lost. The applicant then gave notice of application to the Magistrate's Court for a stay of the three complaints of assault for abuse of process by reason of the police having lost the video evidence. The Resident Magistrate dismissed the application on 23 January 2002. In paragraph two of his affidavit, filed in this application, the Resident Magistrate stated –

> "I believe that no allegation of mala fides was made in respect of the conduct of the police but I was told that the investigating officer had simply lost a video recording which, it was alleged, would be relevant to any proceedings in respect of the applicant. I was not told what the video depicted or how it would assist the applicant's defence. Nor was I told which summons or summonses it related to. I ascertained in the course of the application that there were nine witnesses who would give evidence in the proceedings in respect of the incidents referred to in the summonses and in view of this I considered that there was no reason to believe that as a result of the video recording being lost the applicant could not receive a fair trial. Certainly nothing in the submissions placed before me satisfied me on the balance of probabilities that this was so. Accordingly I did not order any stay of proceedings and the matter was left to proceed in the ordinary way."

[5] The applicant seeks an order quashing the decision of the Resident Magistrate on the grounds that –

(i) The Resident Magistrate erred in failing to take into consideration that the applicant would not, in any event, have a fair trial regardless of the evidence that would be produced at trial.

(ii) The Resident Magistrate failed to ensure that he did not breach the provisions of Article 6 of the European Convention of Human Rights and Fundamental Freedoms; specifically, that when he was informed that the prosecuting authority had misplaced crucial, independent video evidence, he failed to afford the applicant the right to a fair trial by refusing to stay the proceedings.

(iii) The Resident Magistrate did not set out his approach to the applicable facts or governing legal principles.

(iv) The Resident Magistrate failed to have regard to the approach of the investigating officer, which impliedly acknowledged the unfairness of proceedings against the applicant in the absence of the misplaced video evidence.

(v) The said decision is in breach of the applicant's Article 6 right to a fair trial within a reasonable time in that the passage of time to date has resulted in the loss of crucial independent video evidence.

[6] The respondent submitted that the proper approach to this application was to determine the matter in accordance with the material put before the Resident Magistrate. Accordingly, it was submitted that certain material available to the Court on the application for judicial review but not available to the Resident Magistrate should not be taken into account in reviewing the decision of the Resident Magistrate. The material available to the Resident Magistrate was outlined in the respondent's skeleton argument as follows -

(a) The police statements of five witnesses to the incident and the statements of four medical witnesses and the statements of the applicant and the investigating police officer together with a written record of the applicant's interview by police were not available to the Resident Magistrate;

(b) The Resident Magistrate was not told what the video depicted or how it would assist the applicant's defence;

(c) The Resident Magistrate was not told which summons or summonses the video related to;

(d) The application was made to the Resident Magistrate in broad-brush terms.

[7] The police were under a duty to retain the video evidence. Section 23 of the Criminal Procedure and Investigations Act 1996 provides that the Secretary of State shall prepare a Code of Practice containing provisions designed to secure inter alia that information which is obtained in the course of a criminal investigation, and which may be relevant to the investigation, is retained. The Code of Practice issued by the Northern Ireland Office for the purposes of Section 23 of the 1996 Act provides at paragraph 5.1 - "The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation".

The loss of the video evidence by the police in the present case represents a breach of the duty to retain relevant material.

[8] Mr Larkin QC for the applicant relied on Article 6(3)(d) of the European Convention on Human Rights which provides that everyone charged with a criminal offence has the right –

> "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

In relation to the first part of 6(3)(d) concerning to the examination of witnesses against him the applicant's complaint was that the witnesses to events at the filling station could not be challenged by reference to the video evidence. In relation to the second part of 6(3)(d) concerning the attendance and examination of witnesses on his behalf the applicant again relied on the absence of the video evidence of events. The missing evidence relates not only to the credibility of witnesses but also amounts to direct evidence of events.

[9] The applicant contended that the effect of Article 6(3)(d) was equivalent to a defendant's right to present "full answer and defence" as applied in Canada. Reliance was placed on the decision of Supreme Court of Canada in R v Carosella (1997) 1 SCR 80 where the non disclosure to the defence of relevant evidence was found to amount to a breach of the right to full answer and defence.

The Canadian Charter of Rights and Freedoms at Section 7 provides that-

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with he principles of fundamental justice."

As appears from R v Carosella the principles of fundamental justice have been developed to include the right to full answer and defence and that may include the disclosure of material relevant to the defence of a criminal charge. Section 24 of the Charter provides that for a breach of rights guaranteed by the Charter the court grants an appropriate and just remedy.

[10] In R v Carosella the defendant faced a charge of sexual assault and had no access to notes of an interview of the complainant completed by a social worker before police became involved. The social worker had destroyed the interview notes further to a policy of shredding files with police involvement. It was held that there was a breach of the defendant's right to make full answer and defence as there was a reasonable possibility that the information contained in the notes was logically probative of an issue at the trial as to the credibility of the complainant. Further it was held that a stay of proceedings was the appropriate remedy.

[11] However it is apparent from the majority judgment in R v Carosella that the central feature of the case was the deliberate destruction of evidence. The Supreme Court stated (para 56)–

> "The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make. Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the court. It is this feature of the appeal in particular that distinguishes this case from lost evidence cases generally".

[12] The deliberate interference with the justice system also influenced the decision in R v Carosella that a stay of proceedings was the appropriate remedy. The Supreme Court had regard to the events being 30 years old and the lost evidence being the result of deliberately destructive action when the credibility of the complainant was the basis of the prosecution case. A further factor was the irreparable prejudice to the integrity of the justice system if the prosecution were continued when material had been destroyed by a publicly funded agency whose activities were scrutinised by the provincial government.

[13] There was a separate application for a stay of proceedings for abuse of process in R v Carosella but that issue was not considered in view of the finding of a breach of the defendant's Charter rights and the grant of a stay of proceedings as the appropriate remedy.

[14] The Supreme Court of Canada distinguished the facts of R v Carosella from lost evidence cases generally. The approach of the Canadian courts' to lost evidence cases generally appears from R v La (1997) 2 SCR at 860. The defendant was charged with sexual assault of a thirteen-year-old girl. The complainant's conversations were taped in preparation for a secure treatment application and not for any criminal proceedings. The police misplaced the tape. The Supreme Court of Canada refused a stay of proceedings. The approach of the Supreme Court was that where the prosecution lose evidence that ought to have been disclosed there arose a duty to explain the loss. If the trial judge was satisfied that the evidence has not been destroyed or lost owing to unacceptable negligence the duty to disclose would not have been breached. However if the trial judge was not so satisfied the right to present full answer and defence would be impaired and Section 7 of the Charter would have been breached. Further the loss of evidence may also amount to an abuse of process where there was deliberate destruction of material or other serious breach of the duty to preserve evidence and "in some cases an unacceptable degree of negligence conduct may suffice". In addition there may be "extraordinary circumstances" where the loss

of a document may be so prejudicial that it would impair the right of an accused to receive a fair trial. In the three situations set out above the court would consider the appropriate remedy and it would only be in the rarest of cases that a stay of proceedings would be ordered (paras. 20-23).

[15] I reject the applicant's argument that R v Carosella should guide the court's approach to the present case as it was not intended to apply to lost evidence cases generally. Further, the right to full answer and defence as applied in Canada does not have the breadth of operation for which the applicant contended, as loss of evidence may not amount to a breach of the right to full answer and defence and in any event a breach will rarely lead to a stay of proceedings. The operation of Article 6(3)(d) will be addressed after consideration of abuse of process.

[16] In this jurisdiction abuse of process applications have been considered by a Divisional Court in Re Director of Public Prosecutions for Northern Ireland's application for Judicial Review (1999) NI 106 where at page 116g Carswell LCJ stated –

> "Our conclusion from our examination of these authorities is that there are only two main strands or categories of cases of abuse of process –
>
> (a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected (we regard these words, which were used in *Re Molloy's Application* [(1998) NI 78], as the appropriate formulation of the criterion);
>
> (b) those, like the ex-parte *Bennett* case, [(1994) 1 AC 42] where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all."

More general considerations in relation to such applications were stated as follows –

> "(1) The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons; see the ex-parte *Bennett* case (1994) 1 AC 42 at 74 per Lord Lowry.

> (2) The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct; see Lord Lowry's dictum referred to above.
>
> (3) The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, or a fortiori if he has admitted the offences, there may be little or no prejudice; see the ex-parte *Broo's* case (1984) 80 Cr.App.R. 164 at 169 per Sir Roger Ormrod."

[17] The approach to applications for abuse of process arising from the destruction of videotape evidence have been considered by the Divisional Court in England in R (Ebrahim) v Feltham Magistrates Court (2001) 1 WLR 1293. The Divisional Court set out a two-stage inquiry by the court considering an abuse application that relevant material was no longer available. The first stage of the court's inquiry was to determine whether the prosecutors had been under a duty to obtain and/or to retain the material of whose disappearance or destruction a complaint was made. If there was no such duty then there could be no question of abuse of process. However if there had been a breach of duty the court would consider the exceptional course of a stay of proceedings. The second-stage involved consideration of the two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction. As set out by Carswell LCJ in the DPP's application the two categories of cases are first, cases where the court concludes that the defendant cannot receive a fair trial, and secondly cases where it concludes that it would be unfair for the defendant to be tried (paras. [16]–[18]).

[18] The Divisional Court considered the "category two cases" in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. The question is not so much whether the defendant can be fairly tried, but rather, whether for some reason connected with the prosecutors conduct it would be unfair to him if the court were to permit them to proceed at all. The court's enquiry is directed more to the prosecutors behaviour than to the fairness of any eventual trial (paras. [19]-[20]).

[19] In relation "category one cases" the Divisional Court referred to all courts with criminal jurisdiction being possessed of power to refuse to try a case, but only where it was clear that otherwise the defendant could not be fairly tried. An

unfair trial would be an abuse of the court's process and a breach of Article 6 of the European Convention. The circumstances in which any court would be able to conclude with sufficient reasons that a trial of a defendant would inevitably be unfair are likely to be few and far between (paras. [24]-[26]).

[20] On the particular issue of missing evidence the Divisional Court stated (para. [27]) –

> "It must be remembered that it is a common place in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video-film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

[21] The Court of Appeal (Criminal Division) in England considered an application for a stay of proceedings for abuse of process by reason of the loss of evidence in R v Sadler (unreported, 20 June 2002). The appellant was convicted of wounding with intent to do grievous bodily harm arising out of events occurring at a nightclub. The abuse of process application arose because of the destruction by the police of certain exhibits being a broken bottle neck found at the club, the defendant's shoes and socks and the victim's clothing. The trial judge had rejected an allegation that the police had been acting in bad faith. Keane LJ stated-

> "It is true that there are dicta in the authorities to the effect that even in the absence of bad faith, serious failings on the part of the police or prosecution may make it unfair to try an accused person. Where there may be instances of such, it will in our judgment be rare for such cases to arise where there has not been serious misbehaviour…
>
> All of this envisages, normally, conduct involving some degree of deliberate manipulation of the pre-trial process by the police or prosecution.

> Certainly the negligent failings of the police in the present case, thoroughly reprehensible though they were, fall far short of making it unfair to try this man.
>
> That means the question is whether what happened prejudiced the defendant in such a way that he could not receive a fair trial – what has been described in argument as the first potential basis for an abuse of process ruling." (paras. [19]-[20]).

Having reviewed the matter as a "category one case" the Court of Appeal decided that there was no material prejudice to the appellant.

[22] Mr Larkin sought to distinguish Ebrahim and Sadler on the basis that they had not involved consideration of Article 6 of the European Convention and he submitted that the approach of this Court should be to adopt the approach in R v Carosella and import a right to make full answer and defence as an aspect of Article 6(3)(b) of the Convention, and thereby stay the proceedings. First of all it is clear that Ebrahim and Sadler did take account of Article 6 of the European Convention as express reference was made to Article 6 and in any event the issue arising in the cases was assessed by reference to the requirement for a fair trial as provided by Article 6. Secondly, as discussed above, R v Carosella was concerned with loss of evidence through a policy that involved deliberate interference with the justice system and that is not the background to the present case. The Canadian approach to lost evidence cases generally appears from R v La, and in the circumstances of that particular case the loss of evidence was found not to involve a breach of the right to full answer and defence or to amount to an abuse of process or to interfere with the right to a fair trial.

[23] Article 6(3)(d) provides that the applicant may examine witnesses against him. The applicant may exercise that right in relation to the prosecution witnesses in the present case although not by reference to the video, which may in any event have contained material that was against him. Further the applicant will be entitled to call witnesses on his behalf and again it cannot be assumed that the evidence on the video would have been in his favour. Such evidence as is available from the police on the contents of the video suggests that it showed a general scuffle, although the start of the incident was not observed by the police officer.

[24] As Lord Hope observed in R v A [2001] 3 All ER 1, the right of an accused under Article 6(1) of the Convention is the fundamental and absolute right to a fair trial, to which the rights listed in Articles 6(2) and 6(3) are supplementary. Article 6(3)(d) is not one of the rights that is set out in absolute terms "and it is open, in principle, to modification or restriction so long as this is not

incompatible with the absolute right to a fair trial in art 6(1)." While this was stated in the context of statutory restrictions on the right to cross-examine it serves to emphasise the essence of the consideration of Article 6(3)(d) as being to achieve a fair trial. This is the standard that is applied in the consideration of lost evidence cases as an aspect of abuse of process. I apply the approach adopted in the DPP'S Application in relation to abuse of process generally and that adopted in Ebrahim and Sadler in relation to abuse of process involving lost evidence.

[25] The first stage of the inquiry by the court considering the abuse of process application is to determine whether there was a duty to retain the material that has been lost. Before the Resident Magistrate matters appear to have proceeded on the basis that there had been a breach of the duty to retain relevant material. I have held that in the present case there was such a duty and that there has been a breach of that duty. Having established a breach of duty the second stage of the inquiry is to consider whether the court should take the exceptional course of staying the proceedings for abuse of process on that ground.

[26] The "category two cases" arise where there is bad faith or serious misbehaviour by the authorities. Before the Resident Magistrate there was no allegation of bad faith. The applicant referred to the lost evidence as amounting to "manipulation of the prosecution process" but the failings that occurred resulting in the loss of the videotape by the police officer do not amount to serious misbehaviour such as would render it unfair for the prosecution to proceed and this is not a category two case.

[27] The "category one cases" arise where a trial of the defendant will inevitably be unfair so that the trial process itself cannot prevent such unfairness. The Resident Magistrate was not satisfied on the balance of probabilities that the applicant would not receive a fair trial in the circumstances. To frame the question as the Divisional Court in Ebrahim (para. [27]) - Is there sufficient credible evidence remaining to be presented to the court, which, if it were believed, would justify a safe conviction? The Resident Magistrate knew there were nine witnesses relevant to the assault charges (he was not told the charges to which the videotape related, but as the videotape related to all assault charges nothing turns on this). However he did not know the contents of the witness statements because the applicant objected to their disclosure to the Resident Magistrate. The witness statements were available to this court, and as far as statements can do so, they present credible evidence which, if accepted by the court hearing all the evidence on the summonses, would justify a safe conviction, subject to the prosecution failing to persuade the court as to the fairness of the proceedings in the light of the lost evidence. The Resident Magistrate stated that the issue of fairness could be dealt with at the hearing. As has been repeated in the authorities, the trial process itself is equipped to deal with issues of unfairness and any alleged unfairness can be dealt with in the appropriate manner, if necessary by a stay of proceedings in exceptional cases. In the present

case it was not established that the proceedings will be unfair or that a stay of proceedings is required at this stage.

[28] The applicant relied on five particular grounds. The applicants first ground was that the Resident Magistrate failed to take into account that the applicant would not receive a fair trial. It is apparent from the remarks of the Resident Magistrate as set out above that he approached the application by reference to the yardstick of a fair trial.

To the extent that this ground proceeds on the basis that the loss of this evidence will lead to an unfair trial I reject that contention as set out above. In particular the applicant objected that he would not receive a fair trial because there is no independent evidence in this case in that the non-medical witnesses are family or friends of the owner of the filling station. Such connections between all the prosecution witnesses are not in themselves a basis for concluding that the applicant cannot receive a fair trial and there are no indications in the available evidence that the witnesses are inherently unreliable. Their reliability and the effect of the absence of the video evidence can be addressed on the hearing of the summonses.

[29] The applicant's second ground was that the Resident Magistrate failed to protect the applicant's Article 6 rights. The approach of the court to the abuse of process application was based on examining compliance with the right to a fair trial and that is to assess the issues by reference to the requirements of Article 6. As neither of the two species of unfairness that arise in abuse of process applications arise in the present case there has been no breach of the applicants right to a fair trial. A fair trial can be achieved in the circumstances and upon the hearing of the summonses the Resident Magistrate can address allegations of unfairness arising from lost evidence.

To the extent that this ground incorporates the argument based on Article 6(3)(d), an argument that remained undeveloped before the Resident Magistrate, I have found above that the limitations in the evidence by reason of the loss of the videotape as outlined by the applicant do not, in the present case, involve any breach of the right to a fair trial.

[30] The applicant' third ground was that the Resident Magistrate failed to give reasons for his decision to refuse a stay of the proceedings. I adopt the outline of the duty to give reasons in this context as set out by Kerr J in Re McFadden's Application (2002) NI 183 at 189h to 193h. As a general rule reasons should be given where a final determination is made. A successful application to stay proceedings for abuse of process would bring proceedings to an end. If the application is unsuccessful a brief statement of reasons should be given.

To the extent that the Resident Magistrate did not outline the reasons for his decision he has rectified that position in the affidavit filed in this application for judicial review and the applicant has had the opportunity to address the reasons given by the Resident Magistrate.

[31] The applicant's fourth ground was that the position of the investigating police officer was not taken into account. The applicant referred to an attendance note made by his solicitor on 10 October 2001 where it was recorded that the police officer indicated that he had spoken to the complainants with a view to dropping the assault cases. However in his affidavit the police officer stated that at no stage had he in mind the dropping of all charges of assault against the applicant. The Resident Magistrate took this matter into account but did not consider it to be of substantial weight. There is a difference between the solicitor and the police officer but in any event the views of the police officer on the issue cannot determine the outcome.

[32] The applicant's fifth ground was that there had been delay in proceeding with the summonses against the applicant for such a period that extended to the time of the loss of the videotape, resulting in prejudice of the applicant. There was no general complaint of a breach of the reasonable time requirement under Article 6 and this ground was relied on as an added element of prejudice in the complaint of lost evidence. This ground does not add anything to the consideration of unfairness arising from the lost evidence.

[33] Whether regard is had only to the information available to the Resident Magistrate or also to the information available to the court I do not consider in all the circumstances that it would be unfair to the applicant to continue the proceedings or that the applicant will receive an unfair trial.

The arguments relied on by the applicant are rejected and the application is dismissed.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**------**

IN THE MATTER OF AN APPLICATION BY BRIAN GLEN BY HIS MOTHER AND NEXT FRIEND MARGARET GLEN FOR JUDICIAL REVIEW OF A DECISION BY NORTH ANTRIM MAGISTRATES' COURT

------

**J U D G M E N T**

**Of**

**WEATHERUP J**

**------**