

JERSEY / JUDGMENT

Warren and Others v AG [2008]

JCA 135 (11 August 2008)

[2008] JCA 135

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COURT OF APPEAL 11th August 2008 Before : D. A. J. Vaughan, Esq., C. B. E., Q. C.; President; Dame Heather Steel, DBE, and M. S. Jones, Esq., Q. C. Curtis Warren John Alan Welsh James O'Brien Jason Woodward Paul Hunt Oliver Lucas -v- The Attorney General Advocate S. M. Baker for Warren. Advocate S. A. Pearmain for Welsh. Advocate D. J. Hopwood for O'Brien. Advocate D. Gilbert for Woodward. Advocate M. J. Haines for Hunt. Advocate M. L. Preston for Lucas. Crown Advocate J. C. Gollop.

JUDGMENT

JONES JA:

Introduction

1. On 11th and 12th August 2008, we heard an application for leave to appeal a refusal by Commissioner Sir Richard Tucker, following a preparatory hearing, (i) to stay these proceedings as an abuse of process, on the ground that the investigating and prosecuting authorities involved in the case have acted in contravention of the rule of law, failing which (ii) to rule inadmissible certain evidence which was obtained illegally. The Commissioner refused leave to appeal. On 11th August, we announced that we, too, refused leave to appeal and we gave a précis of our reasons for that decision. This is the full Judgment of the court. The Facts 2. The facts of the case which gave rise to the applications before the Commissioner were not materially in dispute and his summary of them was not the subject of challenge. The Commissioner records that the States of Jersey police received intelligence which led them to suspect that the defendants were planning to import a large amount of cannabis into Jersey. It was believed that the defendant Welsh was intending to drive to Amsterdam to collect a consignment and to take it to a port in Normandy whence it would be shipped here. The original plan, it is alleged, was for Welsh to take his own car by ferry to St Malo and to drive it to Amsterdam. 3. The police wished to deploy two surveillance devices in this car: a tracking device which would enable them to follow its progress and an audio recording device which would enable them to listen to and record the conversations of any occupants in the car. 4. The Jersey police and the Law Officers' Department realised that authority would have to be obtained from foreign States for the installation of these devices

and that this would have to cover not simply the vehicle's use in the Island but also its use abroad. This meant that permission would have to be obtained from the French, Belgian and Dutch authorities. As to the tracking device, there was no difficulty; all countries agreed to its use. The audio device gave rise to problems. Although the Attorney General for Jersey authorised its use here, the other countries refused permission for its use within their jurisdictions. This was because of the element of intrusion and violation of privacy, contrary to Article 8 of the European Convention on Human Rights . 5. Another problem then arose because Mr Welsh decided not to use his own car but to hire a car in St Malo for his journey to Amsterdam. If the police were to proceed with their proposed investigations, therefore, different arrangements had to be put in place and additional authorisations had to be obtained. 6. Instead of the devices being installed in the defendant's car in Jersey, this now had to be done in France in a car belonging to the car hire company, subject to the rules of the French jurisdiction and those of the other countries through which the car would be travelling. 7. Letters of request were issued to these countries, but permission for the installation of the audio monitoring equipment was refused. The States of Jersey police had sought the assistance of the Serious Organised Crime Agency in the United Kingdom but it was unable or unwilling to assist. 8. An operational decision was taken by the States of Jersey police that the two devices would be deployed, notwithstanding the refusal of permission by the foreign powers for the use of one of them. This was done on 18 th July. The car hire company was cooperative in that it consented to the installation of the tracking device and the French police were informed, though not of the true nature of the operation. They were not told of the intention to deploy the listening device in the car, and were led to believe that there was only to be a tracking device. Moreover a Jersey police officer was instructed by a Jersey police Sergeant, in the presence of an Inspector, that if the French police raised any questions she was to lie to them. 9. In consequence, after Mr Welsh collected the car and drove it through France and Belgium into Holland, his conversations with various people were monitored and recorded. The Crown submits that this provides crucial evidence in the case against all of the defendants and intends, if possible, to rely on it in any trial of the defendants. The Issues 10. The application for leave to appeal raises a number of important issues for determination. These are:- (i) Whether this court has jurisdiction to entertain an application for leave to appeal a refusal to stay proceedings following a preparatory hearing; (ii) The nature and extent of the court's discretionary jurisdiction to stay proceedings as an abuse of process; (iii) The approach to be taken to the exercise of that jurisdiction in any particular case; and (iv) Whether it can be seriously argued that the exercise by the Commissioner of his judicial discretion in determining the stay and admissibility applications was fundamentally flawed . Whether this court has jurisdiction to entertain an application for leave to appeal a refusal to stay proceedings following a preparatory hearing 11. This is the first occasion on which this question has arisen for decision. Parties are at one in submitting that, having regard to the terms of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE"), we do have such jurisdiction. As the Crown rightly points out, however, jurisdiction cannot be conferred on us by the agreement of the parties, so we must decide the matter. 12. Article 84 of the PPCE

provides, among other things, as follows:- "(1) Where it appears to the Bailiff -

- (b) that a case is so complex or is a case the trial of which is likely to be so long that substantial benefits are likely to accrue from a hearing before the trial and for any of the purposes mentioned in paragraph (2), the Bailiff may order that a hearing (in this Part referred to as a "preparatory hearing") shall be held. "(2) The purposes are those of - (a) identifying issues which are likely to be material to the verdict of the Royal Court or jury; (b) assisting comprehension of those issues; (c) expediting the proceedings before the Royal Court or jury; (d) assisting the management of the trial." For the purposes of this case, references to the Bailiff should be read as a reference to the Commissioner. (Royal Court (Jersey) Law 1948 Article 12) 13. There can no doubt that the Commissioner was entitled to regard this as a case both so complex and likely to be so long that substantial benefits were likely to accrue from a preparatory hearing for the purpose of expediting the proceedings before the Royal Court. As Lord Hope of Craighead observed in *R v H*

[2007] 2 AC 270 , "The purpose which [the provision equivalent to Article 84] was designed to serve is to minimise the risk of interruption and delay during the trial proper by dealing with matters that can conveniently be dealt with in the jury's absence before the trial proper starts". (See paragraph 21.) In the court below, the stay application occupied some four days of court time and, in our opinion, holding a preparatory hearing to determine the matter met the purpose identified by Lord Hope. 14. The question that then arises, therefore, is whether the applicants have a right to apply for leave to appeal to this court. Article 90(1) provides as follows:- "An appeal shall lie to the Court of Appeal from any ruling of the Bailiff under Article 86(3), but only with the leave of the Bailiff or of the Court of Appeal." 15. Article 86(3) of the PPCE is in these terms:- "The Bailiff may make a ruling as to any question as to the admissibility of evidence and any other question of law relating to the case." 16. The determination of the question posed in paragraph , therefore, depends on whether or not the Commissioner's decision on the application for a stay is properly to be regarded as a ruling on a question of law within the meaning of Article 86(3). 17. The determination of an application for a stay on the ground of abuse of process in a case such as this is within the discretion of the judge at first instance. (See *R v. Latif*

[1996] 1 WLR 104 , per Lord Steyn at page 112 .) The focus of Article 86(3), however, is not on the nature of the ruling but on the nature of the issue to be determined. (See *R v H* per Lord Nicholls of Birkenhead, at paragraph 13 and Lord Scott of Foscote , at paragraph 41 and 42.) 18. Article 86 confers wide powers on the Bailiff in the conduct of a preparatory hearing. He may, for example, order the prosecutor to prepare the prosecution evidence and any explanatory material in a form that appears to him to be likely to aid comprehension by the Royal Court or jury and to give it in that form to the court and to each accused. Where he has ordered that to be done, the Bailiff may make an order on the accused in similar terms. Such orders go to the orderly and expeditious management of the case which one would expect to be left to the judge at first instance, and they are excluded from the appeal provisions because they are not properly to be regarded as

rulings as to questions of law relating to the case. In our view, the term "question of law" where it appears in Article 86(3) is used to distinguish what may be generally be described as legal rulings from case management orders. That points towards the conclusion that a stay application ought to be regarded as raising a "question of law". 19. Further, as is observed in *R v. Latif*, there is a "considerable overlap" between the principles applicable to the court's jurisdiction to stay criminal proceedings, and the power to exclude evidence. If the question of the admissibility of evidence is to be regarded as one of law, as the statute expressly provides, in our judgment it falls within the intention of the legislature that an application to stay proceedings as an abuse of process should be regarded, also, as a question of law. 20. Looked at from another perspective having regard to such considerations as fairness, convenience and economy, if evidence is wrongly admitted or excluded by the court, it is understandable that an opportunity should be given to the aggrieved party to seek to have the mistake corrected before trial, as the statute provides, rather than having to wait until the conclusion of the proceedings. An application to stay on the ground of abuse of process goes to the root of the prosecution. It would be odd, in our view, if the legislature intended that the refusal of such an application should not be amenable to review until after trial. 21. For the foregoing reasons we hold that the Commissioner's determination of the application to stay the proceedings was a ruling on a question of law, within the meaning of Article 86(3) of the PPCE and that, consequently, this court has jurisdiction to hear an application for leave to appeal that ruling. The nature and extent of the court's jurisdiction to stay proceedings as an abuse of process 22. As far as we are aware, this is the first occasion on which a criminal court in Jersey has been invited to stay proceedings as an abuse of process, on the ground that the investigating and prosecuting authorities have acted in contravention of the rule of law. Before addressing the particular issues that arise in this case, therefore, we consider that it would be helpful to attempt to identify the nature and extent of the jurisdiction which the Commissioner was asked to exercise. 23. A convenient starting point from which to embark on that exercise is the case of *R -v- Horseferry Road Magistrate's Court ex p. Bennett*

[1994] 1 AC 42 H. L. The defendant was a New Zealand citizen who was wanted for criminal offences which he was alleged to have committed in England. The English police traced him to South Africa. After consulting with the Crown Prosecution Service, the police decided not to request the return of the defendant through the extradition process. It was the defendant's case that, as a result of collusion between the English and South African police, he was arrested in South Africa and returned to England, forcibly and against his will. When he landed in England, he was immediately arrested and detained in custody. For the purposes of determining the appeal before it, the House of Lords assumed the defendant's claims to be true. 24. In due course, he was committed for trial by a stipendiary magistrate, and he brought proceedings for judicial review to challenge the decision to commit him. As a preliminary issue, the Divisional Court considered whether there was jurisdiction vested in it to inquire into the circumstances by which the

defendant had come to be within the jurisdiction of the courts of England and Wales. It held that there was no such jurisdiction and, accordingly, dismissed the application for judicial review. On appeal to the House of Lords, the Divisional Court certified the following question of law:- "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction." 25. In the course of his review of the authorities, Lord Griffiths observed that the reported cases in which a court had had to exercise its jurisdiction to prevent abuse of process were usually confined to circumstances in which the conduct of the prosecution had been such as to prevent a fair trial of the accused. He noticed, however, that "there have also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process". (Page 61B-E, emphasis supplied.) These were where a prosecution was taken in breach of a promise given to the accused by state officials that he would not be prosecuted (*Chu Piu -wing v. Attorney-General*

[1984] H. K. L. R. 411), and where an accused was tried and convicted despite an assurance having been given to him by the police that he would not be prosecuted (*Reg. v. Croydon Justices, Ex parte Dean*

[1993] Q. B. 769). Having looked at these two cases, Lord Griffiths continued:- "Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." 26. The answer to the certified question proposed by Lord Griffiths was as follows:- "The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused." 27. We note that, in considering whether or not the concept of abuse of process should be extended to the assumed circumstances of the case (which, in the event, it was), Lord Griffiths had the notion of fairness at the forefront of his reasoning. Whilst it could not have been said that it would be unfair to try the accused if he had been brought lawfully to England, his unlawful rendition to the authorities there made it unfair to try him. It was for that reason that the proceedings were an abuse of process. 28. Lord Bridge of Harwich agreed with the reasons given by Lord Griffiths as did Lord Lowry, who expressed these views:- "Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try

the accused but not that he is about to receive an unfair trial." 29. Having regard to the passages which we have cited from Bennett , it is clear, in our judgment, that the majority of the Appellate Committee regarded the legal imperative underlying the jurisdiction to stay proceedings as an abuse of process as being the court's duty to protect an accused person from unfairness in the process of which it was seized. In the words of Lord Devlin in *Connelly v. D. P. P.*

- [1964] A. C. 1254, at page 1354, the courts have "an inescapable duty to secure fair treatment for those who come or are brought before them." 30. It is not difficult to envisage circumstances in which it could be said that the actings of the authorities had so affected the position of a defendant that it would be unfair to prosecute him, with the consequence that proceedings should be stayed. The set of assumed facts in Bennett is a good example. Another is the case of *R v Mullen*
- [2000] QB 520 , where it was held that the British authorities, in securing Mullen's deportation from Zimbabwe, had been guilty of "a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts" so that when, many years later, this came to light, his conviction fell to be quashed. 31. In *R v. Looseley and Attorney General's Reference (No 3 of 2000)*
- [2001] 1 WLR 2060 , the defendant in each of these unrelated cases, having been brought to trial on a charge of supplying heroin, complained of having been induced by the police to commit an offence that he would not otherwise have committed. Lord Nicholls of Birkenhead, with whom Lord Mackay of Clashfern , Lord Hoffman and Lord Scott of Foscote agreed, opened his speech with these words:- "... ... every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts." (Page 2063-2064) 32. In considering what police conduct might be regarded as acceptable and what might not, Lord Nicholls said, "Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute." (Page 2069, paragraph 25.) His Lordship regarded these words as being "substantially to the same effect" as those of Lord Bingham of Cornhill CJ in *Nottingham City Council v Amin*
- [2000] 1 WLR 1071, 1076, where his Lordship said this:- "... ... it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer." 33.

The principle laid down in *Looseley* has recently been describe by the Privy Council as being " that it would be unfair and an abuse of process if the defendant had been lured, incited or pressurised into committing a crime which he would not otherwise have committed " (See *Panday*

v. *Virgil* (Senior Superintendent of Police)

[2008] 3 WLR 296 , at page 304, paragraph 27.) 34. To borrow the words of Neill LJ, " (t)his concept of fairness runs as a thread throughout the cases. " (See *R v Beckford*

[1996] Cr. App. R. 94 C. A., at page 101.) In the view of the court in that case:- "The jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the authorities:

- (a) Cases where the court concludes that the defendant cannot receive a fair trial;
- (b) Cases where the court concludes that it would be unfair for the defendant to be tried." (Pages 101-101.) 35. That analysis was quoted with approval by a differently constituted Court of Appeal in *Regina (Ebrahim) v. Feltham Magistrates' Court*

[2001] 1 WLR 1293 , at page 1300. Referring to the second type of case, the court continued:- " In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutor's conduct it would be unfair to him if the court were to permit them to proceed at all. The court's inquiry is directed more to the prosecutor's behaviour than to the fairness of any eventual trial. Although it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all." (Page 1300.) 36. In *R v Grant*

[2006] QB 60 , however, the Court of Appeal (again differently constituted) expressed what may be regarded as a contrary view. The defendant was charged with conspiring with others to murder his wife's lover, who had been shot dead on his doorstep. An application was made before the start of the trial to stay the proceedings as an abuse of the process of the court. The defendant's case was that the police had deliberately tape recorded privileged conversations between him and his solicitor, which took place in the exercise yard of the police station following the defendant's arrest, in the course of the interview process. The trial judge (Astill J.) held that there was no evidence that the defendant's right to legal professional privileged had been deliberately disregarded and that, in any event, since the interceptions had not given rise to evidence on which the prosecution intended to rely at the trial, the defendant had suffered no prejudice. He rejected the defence application, therefore, and the defendant was in due course convicted. 37. The defendant successfully appealed against conviction. In delivering the Judgment of the court, at paragraphs 52 to 56, Laws LJ said this:- "52. Acts done by the police, in the course of an investigation which leads in due course to the institution of criminal proceedings, with a view to eavesdropping upon communications of suspected persons which are subject to legal

professional privilege are categorically unlawful and at the very least capable of infecting the proceedings as abusive of the court's process. So much seems to us to be plain and obvious and no authority is needed to make it good. The only question that requires examination is whether such proceedings ought to be characterised as an abuse of the process, and the prosecution stopped, if the defendant or defendants have suffered no prejudice in consequence of the relevant unlawful acts. "53. In the present case it is said there was no prejudice: nothing was recovered from the illicit intercepts of any value to the prosecution, and nothing so recovered was used as, or led towards, any evidence to be called by the Crown. Astill J stated: "Accordingly, this trial will not involve the investigation of evidence that has its origins in privileged material. The defences have not established prejudice and these applications must be refused." "54. We have concluded that this is a mistaken approach. True it is that nothing gained from the interception of solicitors' communications was used as, or (however indirectly) gave rise to evidence relied on by the Crown at the trial. Nor, as we understand it, did the intercepts yield any material which the Crown might deploy to undermine the defence case. But we are in no doubt but that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected person's right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court." 38. The Court of Appeal appears to derive authority for that approach from Bennett and R v. Latif . In particular, paragraph 56 of the Judgment is in these terms:- "Where the court is faced with illegal conduct by police or State prosecutors which is so grave as to threaten or undermine the rule of law itself, the court may readily conclude that it will not tolerate, far less endorse, such a state of affairs and so hold that its duty is to stop the case. This is well supported by R v Horseferry Road Magistrates' Court, Ex p Bennett

[1994] 1 AC 42 (see, in particular, per Lord Griffiths, at pp 62, 64, and per Lord Lowry, at p 77), to which reference was made in R v Latif

[1996] 1 WLR 104 , 112-113: "The speeches in Ex p Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise." 39. In our judgment, the passages cited by the Court of Appeal in Grant do not warrant the proposition that the jurisdiction to stay proceedings as an abuse of process extends to circumstances in which there has been no unfairness to the accused. Such unfairness was the context in which the nature and extent of the jurisdiction to stay were discussed in Bennett , and the speeches, in our view, should be read in that context. The same is true of Lord Steyn's speech in Latif . 40. It is difficult to identify what purpose was met in Grant by quashing the conviction, other than to mark the court's disapproval of the actings of the police or, perhaps, "pour encourager les autres ". We would not consider it to be in the wider public interest that, for these purposes alone, someone who has been tried fairly and convicted, in circumstances where there was no unfairness in prosecuting

him, should be set free, or that proceedings should be stayed. We agree with the views expressed by Lord Lowry in Bennett in these terms:- "(t)he 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". (Bennett , page 74H) "... ... the court ought not to stay the proceedings merely "pour encourager les autres ." (Bennett , page 75A) 41. In the recent Privy Council case, Panday

v. Virgil (Senior Superintendent of Police)

[2008] 3 WLR 296 , which was not cited to us, the Judicial Committee reviewed the application of what it described as "the Bennett principle". The advice of the Board was delivered by Lord Brown of Eaton-Under-Heywood, who concluded that review with these words:- "It will readily be seen that the factor common to all these cases, indeed the central consideration underlying the entire principle, is that the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the court at all. In the wrongful extradition cases the defendant ought properly not to have been within the jurisdiction; only a violation of the rule of law had brought him here. Similarly, in the entrapment cases, the defendant only committed the offence because the enforcement officer wrongly incited him to do so. True, in both situations, a fair trial could take place. But, given that there should have been no trial at all, the imperative consideration became the vindication of the rule of law." (Paragraph 28, emphasis supplied.) 42. In our view, the effect of the Court of Appeal's decision in Grant was to broaden the court's jurisdiction to stay far beyond the limits envisaged by Lord Devlin in Connelly v. D. P. P and set by the House of Lords in Bennett , and should not be followed in Jersey. 43. In our judgment, what underlies the court's jurisdiction to stay proceedings as an abuse of process is the court's inescapable duty to secure fair treatment for those who come or are brought before it. The court has jurisdiction to stay proceedings in circumstances in which a fair trial is not possible. It has jurisdiction to stay, also, where proceedings have only been made possible by executive action done in breach of the rule of law and where, as a result of such action, it would be unfair to try the accused at all. The approach to be taken to the exercise of the jurisdiction to stay in any particular case 44. In determining whether to stay proceedings where there has been an abuse of executive power, the court has to perform a balancing exercise. "Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process." In reaching that decision in a case such as the present "the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means." (R v. Latif cit. sup., at pages 112 to 113.) Whether it is seriously arguable that the exercise by the Commissioner of his judicial discretion in determining the stay and admissibility applications was fundamentally flawed . The Stay 45. There is no dispute in this case that, in order to succeed in an appeal against a decision reached in the exercise of a judicial discretion, it is for the party

challenging the exercise of that discretion to satisfy the court that it was fundamentally flawed or that the judge at first instance produced a determination that no judge properly directing himself could have produced. (R

v. Jennings

[1994] 98 Cr. App. R. 308, page 312; R v. H cit. sup. , paragraph 41.) 46. In a powerful submission, Advocate Baker criticised the actings of both the prosecuting authorities and the police who were involved in this case, in the strongest terms. In essence, his complaint was of a deliberate, concerted and prolonged abuse of executive power, compounded by deception and concealment. Against that background, he submitted that the exercise by the Commissioner of his discretion to refuse a stay was fundamentally flawed in a number of respects. These included, but were not limited to what were submitted to have been the following errors on the part of the Commissioner:- (i) Failing to give any or any proper weight to the principle that it is for the court to uphold the rule of law; (ii) Regarding the wrongful actings of the executive as amounting to a temporary infringement of one man's right to privacy when, properly analysed, it was a grave violation of the rule of law, and of the principles of international comity stretching over many months; (iii) Failing properly to analyse certain advice given by Crown Advocate Jowitt to the police in July 2007 and failing to hold that that advice was improper, when, on the evidence, that was the only finding open to him; (iv) Wholly ignoring the deliberate violation by the executive of the sovereignty of other states; (v) Not making specific findings in fact on a number important aspects of the case such as the part played by one of the investigating officers, DC Courtness, and the misleading of the Attorney General by the investigating officers; (vi) Failing to analyse the extent of the Crown's bad faith; and (vii) In carrying out the balancing exercise, regarding this as a serious case rather than what Advocate Baker described as "an ordinary conspiracy to import cannabis". 47. We have given very careful consideration to the applicants' written and oral submissions and to all of the other material that has been put before us. We note that the hearing on the application to stay spanned four days. The Commissioner was referred to all of the documents on which the applicants now rely and heard evidence from a number of witnesses, some of whom, including Crown Advocate Jowitt, were subjected to rigorous cross examination. The Commissioner had the advantage of seeing and hearing the witnesses in the witness box. He had before him extensive written and oral submissions in which the issues were fully debated. 48. The Commissioner produced his written Judgement within a week of the hearing on the stay application, when all of the issues were fresh in his mind. In deference to the detailed and lengthy arguments before him, his Judgment is more detailed and his reasons fuller than the law strictly requires. (See Archbold 2008 , Chapter 4, paragraph 53). Because many of the underlying facts were undisputed, he regarded it as unnecessary to review them in detail and he cannot be faulted for that. As we note in paragraph of this Judgment, his summary of the facts has not been the subject of criticism. 49. We note that the actions of the authorities, of which complaint is rightly made, directly involved only the defendant Welsh. Further, as the Commissioner finds, these actions did not induce,

incite, force or persuade Mr Welsh or any of the other defendants to do anything that they would not otherwise have done. All of the applicants represented before us were in Jersey of their own free will. It was not submitted that the very fact of bringing proceedings at all was unfair to any of the defendants or that it would be unfair to allow the proceedings to continue. On the contrary, in the course of the hearing before us, Advocate Baker said, in response to a question from the bench, that it was not his case that there had been such unfairness. The thrust of the argument was that the behaviour of the authorities was such a flagrant breach of the rule of law, in the sense that it was deliberate and prolonged, that the court should not countenance it, and should stay the proceedings for that reason. At one point in his address to us, Mr Baker submitted that a case such as this case falls into a category of its own, and that the court has no discretion not to order a stay. It is true that, after reflection, Mr Baker withdrew that argument and said that this was a case in which the "obvious and only" exercise of the court's discretion was to grant a stay, but the line is illustrative of the fact that we were asked to focus exclusively on the wrongdoing of the authorities, and pay no attention to the question whether, as a result of that wrongdoing, it was unfair to bring these proceedings. 50. In our judgment, in the absence of any suggestion that it was unfair to prosecute the defendants in this case, or that it would be unfair to continue the prosecution, the Commissioner would have been entitled, for that reason, to hold that these proceedings are not an abuse of process. That was not, however, how the Commissioner was invited to approach the stay application, and we turn now to what, in the event, he did. 51. We are of the opinion that the Commissioner properly analysed the evidence in the case bearing on the issues that he was invited to determine. We are clearly of the view that, on the evidence, he was entitled to make the findings that he did. In particular, and we single it out for mention because it was the subject of detailed scrutiny by the defence, he was entitled to hold that Crown Advocate Jowitt was not guilty of any impropriety or criminality or of acting recklessly or in disregard of the law. 52. We are not persuaded that it can be said that the exercise of the Commissioner's discretion was fundamentally flawed by his failing to take into account any material consideration. Nor can it be said that he reached a result that no judge properly directing himself could have reached. 53. We do not agree that, in carrying out the balancing exercise, the Commissioner was wrong to regard this as a serious offence. The prosecution case is that the applicants were principals in an international conspiracy to import commercial quantities of controlled drugs into Jersey, over a period of time. That is, in our view, a serious offence. 54. The Commissioner has characterised the executive actings as "most reprehensible" "unlawful" and "most regrettable". We agree. We also agree with Advocate Baker that these actings and the bad faith that lay beneath them are not to be condoned. In our opinion, however, a refusal to stay proceedings based on sound legal principles and following a proper exercise of the trial judge's discretion does not signify that the "end has justified the means". (See Bennett, at page 54.) 55. Leave to appeal will not be given "unless it is seriously arguable, not that the discretionary jurisdiction might have been exercised differently, but that it was unreasonable for it to have been exercised in the way that it was." (See, e.g., R v B

[2008] EWCA Crim 1144 .) In our opinion, that cannot be said in this case, and we refuse leave to appeal the decision on the application to stay. Admissibility 56. At the conclusion of the hearing on the application to stay proceedings, the defence submitted that, failing the grant of a stay, the evidence obtained by the use of the audio device installed in the French car should be excluded. The reasons advanced were, first, because it was obtained in the face of the Dutch refusal to assist, and, second, because Dutch consent to its use at trial has not been forthcoming. At a continued hearing on the application to exclude that evidence, it was submitted that the evidence should be ruled inadmissible under the provisions of Article 76(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 , which provides as follows:- " Subject to paragraph (2), in any proceedings a court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would so adversely effect (sic) the fairness of the proceedings that the court ought not to admit it." 57. On the consent point, the defence relied on the terms of Article(4)4 of the Criminal Justice (International Co-operation) (Jersey) Law 2001 , which provides:- "Except with the consent of the court, tribunal or authority that supplied the evidence, evidence obtained by virtue of a letter of request shall not be used for any purpose other than that specified in that letter." 58. In this case, so the argument went, the evidence in question was not obtained by virtue of a letter of request because the request was refused and there is, therefore, no consent from the Dutch to its use. The prosecution authorities ought not be allowed to take advantage of their having flouted the provisions of the International Co-operation Law by adducing evidence at trial that they would not be allowed to adduce had they complied with the terms of the statute. 59. In support of their argument, the defence relied on the case of R v. Gooch

[1998] 2 Cr. App. R. 130. There, the Court ruled that the use of evidence for a purpose other than that specified in the letter of request in response to which it was supplied contravened section 3(7) of the Criminal Justice (International Co-operation) Act 1990 , and ought not to have been admitted at trial . The Commissioner took the view that Gooch was distinguishable on its facts because there the court was simply applying the mandatory terms of the statute in question. 60. In our view, the Commissioner's approach was correct. The terms of the International Co-operation Law were not engaged. On a proper analysis, the evidence under consideration had been improperly obtained and the question for the Commissioner to determine was whether, having regard to all of the circumstances specified in Article 76(1) of the PPCE, "the admission of the evidence would so adversely effect the fairness of the proceedings that the court ought not to admit it". 61. Advocate Baker submitted that the phrase " fairness of the proceedings " should be given a wider meaning than fairness of the trial itself. He gave instances of the exclusion of evidence which, although reliable, was obtained by trickery or oppression. (See R v Mason

[1988] 86 Cr. App. R. 349, and Matto v DPP

- [1987] Road Traffic Reports 337.) As the Commissioner observed, however, in each of these cases the conduct complained of was such as to cause, compel or induce the defendant to do or say something to his disadvantage and prejudice. In this case, the defendants were not caused, compelled or induced to do or say anything. (See also *R v. Chalkley and Jefferies*
- [1998] 2 Cr App R 79) 62. It was also submitted to the Commissioner that the bad faith and unlawful conduct of the prosecuting authorities was so grave and so prolonged that the fairness of the proceedings would be adversely affected by the admission of the audio device evidence. The Commissioner rejected that submission and, in our judgment, he was right to do so. The unlawfulness of the conduct and bad faith on the part of the authorities are the starting point for the Article 76 application. These were part of the circumstances to which the court had to have regard. The Commissioner was well founded in holding that it was a matter for him to determine whether the admission of the evidence would so adversely affect the fairness of the proceedings that he ought not to admit it. He considered that the fairness of the trial would not be so adversely affected and, in the exercise of his discretion, he decided that it would be admitted. 63. In our judgment, the Commissioner applied the correct legal tests in approaching the admissibility application, and we hold that it is not seriously arguable that it was unreasonable for him to exercise his discretion as he did. Consequently, leave to appeal on the admissibility point is refused. *Authorities European Convention on Human Rights. Police Procedures and Criminal Evidence (Jersey) Law 2003. Royal Court (Jersey) Law 1948. R v H*
- [2007] 2 AC 270 . *R v. Latif*
- [1996] 1 WLR 104 . *R -v- Horseferry Road Magistrate's Court ex. p. Bennett*
- [1994] 1 AC 42 H. L. *Chu Piu -wing*
- v. *Attorney-General* [1984] H. K. L. R. 411. *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q. B. 769. *Connelly v. D. P. P.* [1964] A. C. 1254. *R v Mullen*
- [2000] QB 520 . *R v Looseley and Attorney General's Reference (No 3 of 2000)*
- [2001] 1 WLR 2060 . *Nottingham City Council v Amin*
- [2000] 1 WLR 1071. *Panday*
- v. *Virgil (Senior Superintendent of Police)*
- [2008] 3 WLR 296 . *R v Beckford*
- [1996] Cr. App. R. 94 C. A. *Regina (Ebrahim) v. Feltham Magistrates' Court*
- [2001] 1 WLR 1293 . *R v Grant*
- [2006] QB 60 . *R v. Jennings* [1994] 98 Cr. App. R. 308. *Archbold 2008. R v B*

[2008] EWCA Crim 1144 . Criminal Justice (International Co-operation) (Jersey) Law 2001. R v. Gooch [1998] 2 Cr. App. R. 130. Criminal Justice (International Co-operation) Act 1990. R v Mason [1988] 86 Cr. App. R. 349. Matto v DPP [1987] Road Traffic Reports 337. R v. Chalkley and Jefferies

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