MARK ANDREW BLOOMFIELD

COURT OF APPEAL (Lord Justice Staughton, Mr Justice Ian Kennedy and Judge Crane): June 25, 1996

PROCEDURE

Abuse of process

Prosecuting counsel indicating no evidence would be offered—Judge ordering case to be relisted "for mention"—Prosecution subsequently continued—Whether abuse of process.

The defendant was charged with possession of a Class A controlled drug. At a plea and directions hearing at the Crown Court prosecuting counsel indicated to defence counsel that the Crown wished to offer no evidence because it was accepted that the defendant had been the victim of a set-up. Owing to the presence in court of certain people it would have been embarrassing to the police and prosecution if no evidence were offered that day so counsel spoke to the trial judge in his room. An order was then made in open court to adjourn the case and relist it "for mention". The Crown Prosecution Service subsequently arranged a conference with new prosecuting counsel and thereafter informed the defence solicitors that the Crown intended to continue the prosecution. An application at the trial to stay the proceedings as an abuse of process having failed, the defendant pleaded guilty and was sentenced to three months' imprisonment. On appeal against conviction on the question (1) whether it was an abuse of process for the Crown to revoke a previous decision, communicated to the defendant and the court, to offer no evidence and, if it could be an abuse of process, whether (2) it made any difference if prosecuting counsel had made that decision and communicated it to the defendant and the court without authority:

Held, allowing the appeal, (1) that whether or not there was prejudice to the defendant, it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason being given as to what was wrong with it, particularly as it was made *coram judice* in the presence of the judge; and (2) that neither the court nor the defendant could be expected to enquire whether prosecuting counsel had authority to conduct a case in court in any particular way and they were therefore entitled to assume in ordinary circumstances that counsel did have such authority.

Croydon Justices, ex p. Dean (1994) 98 Cr.App.R. 76, D.C., applied.

[For abuse of process, see *Archbold* (1995), paras. 4–41, *et seq.*]

Appeal against conviction.

On May 23, 1996, in the Crown Court at Luton (Judge Findlay Baker) the

appellant pleaded guilty to the possession of a Class A controlled drug. He was sentenced to three months' imprisonment. The facts appear in the judgment.

G. G. W. Birch (assigned by the Registrar of Criminal Appeals) for the appellant.
Ian Wade for the Crown.

STAUGHTON L.J.: Mark Bloomfield pleaded guilty at Luton Crown Court, before Judge Findlay Baker, to an offence of possession of a Class A controlled drug. On May 23, 1996 he was sentenced to three months' imprisonment. He was aged 33 at the time. He had some previous offences recorded against him. But there is no renewed appeal against sentence today and, in any event, the document produced by the Hertfordshire police computer is virtually incomprehensible.

The prosecution case against the appellant was that on the evening of May 31, 1995 police officers arrested him on suspicion of possession of drugs. Asked if he had any drugs on him, he agreed that he had, and a bag containing 100 Ecstasy tablets was removed from his pocket. When interviewed he said he had bought the tablets for his own use and to share with his girlfriend. He was released on bail.

He requested a further interview on July 23. He stated that a woman, whom he named, had purported to give him the drugs for safekeeping as she was about to be raided by the police. He felt that he had been set up.

The appellant's view of this matter is set out in his counsel's opinion. He says that at about 8 p.m. on May 31 he had a phone call from a named woman who said she had heard over the police scanner that her house was going to be raided and asked him to pop up and see her. He went to her house and she gave him these Ecstasy tablets, and asked him to keep hold of them till the next day. He returned home at about 8.45 p.m.—that is three-quarters-of-an-hour after the initial telephone call—and when he got there he was arrested. He was subsequently charged with the offence of possession with intent to supply in relation to the Ecstasy tablets, and released on bail.

An additional and lesser charge of simple possession was added later and the original charge of possession with intent to supply was withdrawn.

Following committal the case was listed for plea and directions on December 20, 1995 at Luton Crown Court before Judge Marshall. When they got there prosecuting counsel approached defence counsel and indicated, in the clearest of terms, that the Crown wished to offer no evidence against the defendant on the charge of possession. This was because the prosecution accepted the defendant's account as to how he came to be in possession of the 100 Ecstasy tablets. They accepted that he had been the victim of a set-up.

We can add to that what Mr Wade has told us today, for the prosecution; there was nobody from the Crown Prosecution Service present, only police officers, and prosecuting counsel was inexperienced.

We continue with the defendant's account. He says that it was further explained that because of the presence at court of certain other people it would be embarrassing to the police and prosecution if no evidence were to be offered that day. It was therefore suggested that if the plea and directions hearing could be adjourned to a later date, then no evidence would be offered at that adjourned hearing.

Counsel then went to see the trial judge in his room. A transcript of what was said in the judge's room has been obtained. What prosecuting counsel said was:

> "What I would like to do today is to adjourn the plea and directions hearing and re-list it for mention to offer no evidence."

The judge, with the approval of the defence, subsequently made that order in open court. The defendant was fully informed and he was naturally very happy to co-operate.

We do have the transcript of what took place that day. Prosecuting counsel said:

> "I want to offer no evidence, but I do not want to do it today for the very simple reason which is that someone else who is involved in the wider police operation is present in this court building today. He is someone who is aware of certain police practices and is likely to smell a rat if I stand up and offer no evidence today at this plea and directions hearing."

Then she continued:

> "What I would like to do today is just adjourn the plea and directions hearing and re-list it for mention to offer no evidence.
> Judge Marshall: All right."

There are certain further facts that should be mentioned. On January 9, 1996 defence counsel was told, apparently in chambers, by somebody for the prosecution, that the Crown Prosecution Service had decided not to adopt the course indicated on December 20. He got in touch with his solicitors and asked them to seek clarification, which they did by a letter to the Crown Prosecution Service on January 12.

The next thing that happened was that there were two letters from the Crown Prosecution Service, one of January 17 and one of January 24. Those said, as we understand it, that the Crown Prosecution Service had arranged a conference with new prosecuting counsel and would thereafter inform the defence solicitors of the Crown's stance. That was done on February 8 when the Crown Prosecution Service, by letter, indicated that the Crown intended to continue the prosecution.

There was a request by the defence solicitors for reasons, and the answer

was that prosecuting counsel at the hearing on December 20 had no instructions from the Crown Prosecution Service to indicate that the Crown would offer no evidence.

There was an application at the trial before Judge Findlay Baker to stay the proceedings as an abuse of process. That was dismissed. Following the failure of that application, Bloomfield pleaded guilty and was sentenced to three months' imprisonment.

He applied for leave to appeal against conviction. That was granted by a single judge. He is recorded as saying that there was no argument in favour of an appeal, but it is agreed that he probably meant that there was an argument.

The application for leave to appeal against sentence failed and has not been renewed.

What Judge Findlay Baker said in his reasons for dismissing the application to stay was, in essence, as follows:

> "One must necessarily ask whether there has been any prejudice to the defence in the course of the proceedings. One must separately ask whether it would be manifestly unfair to the defendant in the circumstances to continue with the proceedings and one must also ask whether it would bring the administration of justice into disrepute among right thinking people if the proceedings were to continue.
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> I have asked all those questions of myself and I have been addressed upon them.
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> I have come to the conclusion that although the defendant is understandably disappointed by the change of direction which this case has taken there is no prejudice to him by the continuation of the proceedings other than that inherent in the fact that he once again faces a criminal charge.
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> I ask myself whether it would be manifestly unfair in the circumstances to continue with those proceedings and I conclude that it would not and I ask myself whether it would bring the administration of justice into disrepute if the change of course which the prosecution wish this case to take is permitted. I think if anything the reverse is the case, but I do not have to go as far as that."

The judge refused the application.

There are, as it seems to us, two questions which have to be asked. First, can the Crown Prosecution Service—if you like, in the person of the Attorney-General himself—revoke a previous decision which he has made and has communicated to a defendant and the court to offer no evidence. Or is it capable of being an abuse of process if the Crown seeks to do that? The second question: if the answer to the first question is that it may be an abuse of process, does it make any difference that it was not the Attorney-General himself, or the Director of Public Prosecutions, but prosecuting counsel who made that decision and communicated it to the defendant in court without authority to do so?

Taking the second question first, we have been referred to the Farquharson Committee's recommendations on the role of Prosecuting Counsel and her relationship with the Crown Prosecution Service. This is a topic of interest and importance, but we do not think that it is one that we need enter on today. Whether prosecuting counsel was, or was not, doing the right thing, *vis-à-vis* those instructing her—that is to say the Crown Prosecution Service—and whether she had the discretion to act on her own views or not is not what we have to consider. The question is whether the court, and for that matter the defendant, were entitled to assume that she had authority to say what she did say. We are of the view that prosecuting counsel has ostensible authority to conduct a case in court in any ordinary circumstances. There is some discussion on the topic of the authority of counsel generally in *Halsbury's Laws of England*, (4th ed.) Vol. 3(1), paras. 520 and 521, but this does not deal with the specific topic of the authority of prosecuting counsel in a criminal case.

We do not see how the court can possibly be expected to enquire whether prosecuting counsel has or has not authority to say what she says in court. Nor can a defendant be expected to enquire whether counsel prosecuting him has authority to say what she does say. We would say that the court and the defendant are entitled to assume that she does have authority.

Therefore we turn to the first question: can the Crown Prosecution Service revoke a decision such as that that was taken in this case? Mr Wade submits that the Crown has an unfettered right to prosecute, even if it has previously been said that the Crown does not intend to do so. However, he concedes that there may be circumstances when the exercise of that right is capable of being an abuse of process. In his submission prejudice is an essential feature of there being an abuse of process in such a case.

We have been referred to three cases, and one more is before us. The first is a decision of one member of this Court, together with Buckley J., in the Divisional Court, *R. v. Croydon Justices, ex p. Dean* (1994) 98 Cr.App.R. 76; [1993] Q.B. 769. That was a case where a young man aged 17 had been told that he would not be prosecuted for a particular crime, that he would be a prosecution witness, and where he had given considerable assistance to the police thereafter. It was then sought to prosecute him for the offence of doing acts with intent to impede the apprehension of another. The Divisional Court held that this was an abuse of process and that the committal should have been quashed. At pp. 777 and 778, in giving my judgment in that case, I referred to a number of authorities, both in this Court and in other jurisdictions. In particular I referred to a case in the Hong Kong Court of Appeal, *Chu Piu-wing v. Attorney-General* [1984] H.K.L.R. 411, where McMullin V.-P. said at p. 417:

> "... there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain."

Next we were referred to the case of *Attorney-General of Trinidad and Tobago v. Phillip* [1994] 3 W.L.R. 1134. We do not find anything in that case which is of any assistance.

There is another case from Hong Kong, *Harris* [1991] 1 H.K.L.R. 389. That was a case of a man employed in the Attorney-General's chambers who was accused of some misdemeanour of a sexual nature. He had been told at a meeting with the Attorney-General himself and the Director of Public Prosecutions (see p. 393):

> "... that there was to be no criminal prosecution and—although this is wrongly set out in the trial judge's ruling, the only flaw in an otherwise excellent and commendable transcript and reasons—he was further told that if his conduct had been found to amount to being criminal then a prosecution would have been brought. He was told that his position in Chambers was untenable.
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> The appellant's services were later terminated by mutual resolution of contract. It is unnecessary to go into the details of that as it is not suggested by Mr Scrivener, who with Mr Plowman, appeared for the appellant in this Court that the appellant has suffered real prejudice by the subsequent mounting of the prosecution."

The Court of Appeal of Hong Kong held that the prosecution in that case had rightly been allowed to go ahead. At p. 397 in the judgment of Silke V.-P. there are these two passages. First he said:

> "I accept that a court is entitled to safeguard its process from abuse. But it is a grave and serious matter for a court to refuse jurisdiction."

Later:

> "I would accept that it is unnecessary for the appellant in order to succeed to prove prejudice."

The fact that a judge accepts something may mean simply that it is unnecessary to decide. It is not necessarily an authority for the proposition which is accepted.

Finally, there is the case of *Mahdi*, in this Court on March 15, 1993 before Lord Taylor C.J. and Pill and Sedley JJ. That was a case with a considerable history. There was delay. Eventually there came a time when it came before Judge Clarkson, and it was still not ready. He said:

> "... it is to be recorded that this is the last time that there will be an adjournment for the benefit of the prosecution."

On the papers the judge wrote:

> "I indicated to parties no further adjournment would be granted to the prosecution and that the case must be ready at the resumed hearing or else."

Some time later the case came back again and was still not ready, this time before Judge Sich. He said:

> "I am afraid that I see no alternative but to implement the clear intention of Judge Clarkson of August 27. I therefore invite the prosecution to consider their position very carefully, and in the light of that I think the only proper course for them is to offer no evidence on this indictment. If they choose not to do that, then I think the defence will have to apply for a stay of proceedings on the grounds of abuse of process."

He did not do that on the same day, and the case came back a third time before an assistant recorder. He, according to the judgment, approached the matter on the basis that the case should go forward unless it could be demonstrated by the appellant that he would be seriously prejudiced if the trial proceeded. Lord Taylor said:

> "We have considered the circumstances of this case with some anxiety. We have been referred to the well-known authorities on the issue of abuse of process. In our judgment this case does not come within the scope of those authorities. Nevertheless, we feel that in the very special and exceptional circumstances of this case the submission made by Mr Akinjide ought to be upheld. We consider that had the assistant recorder been fully and properly informed of the course which had been taken before by two senior judges he would in all probability have followed the course which each of those learned judges indicated they would have followed had the matter come back before them.
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> We are not, in saying this, seeking to establish any precedent, nor do we seek to bring this particular case within any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was inadvertently done to this appellant by reason of the lack of accurate information placed before the assistant recorder."

So the conviction was quashed.

Mr Wade has also referred us to the Code for Crown Prosecutors. This is authorised, and required, by section 10(1) of the Prosecution of Offences Act 1985, which says:

> "The Director shall issue a Code for Crown Prosecutors giving guidance on general principles . . ."

That, as it seems to us, is not law. It is not even delegated legislation. It is what it says: a Code giving guidance on general principles for Crown Prosecutors issued by the Director.

The Code says, in para. 10.1:

> "People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells

a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.

10.2 These reasons include:

(a) rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;

(b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again;

(c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later."

We do not know whether this case comes into any of these categories. Nobody has shown to us that the original decision was clearly wrong. Nobody has attempted to show to us that the original decision was clearly wrong. All that we have been told is that it was unauthorised.

Before we regard ourselves as required to approve and follow the Code of Crown Prosecutors, we should at least be told something more than that the decision was unauthorised. In the absence of any information, we are faced with the fact that the decision was taken and then revoked without any reason being given as to why the earlier decision was wrong.

The next point taken by Mr Wade was that once the application to stay had been refused, the defendant pleaded guilty. That, he says, shows that it cannot have been an abuse of process to prosecute him. There is the case of *Schlesinger and Others* [1995] Crim.L.R. 137, which may be said to show that it does not fail to be an abuse of process merely because a defendant pleads guilty; but the facts there were somewhat different. On the other hand, as Ian Kennedy J. pointed out in the course of the argument, it is often the case that a defendant pleads guilty when some application made on his behalf fails, and that is not a bar to him appealing. And as Judge Crane pointed out, it cannot be right that he had to plead not guilty in order to preserve his right of appeal against the refusal of a stay.

Finally we were referred to section 23 of the Prosecution of Offences Act 1985 which provides, in subsection (9):

> "The discontinuance of any proceedings by virtue of this section shall not prevent the institution of fresh proceedings in respect of the same offence."

The answer to that is, first, that it only applies to magistrates' courts and, secondly, it refers to discontinuance rather than offering no evidence and, thirdly, it contains express provision in subsection (7) that the defendant can oppose discontinuance and insist on the prosecution continuing. If that

had happened in this case it would seem certainly possible, and perhaps even likely, that no evidence would have been called seeing that the Crown were embarrassed by the presence of somebody in court.

Looking at the case in the round, it seems to us that this is an unusual and special situation. The decision to defer the trial on December 20 was taken for the benefit of the prosecution in order that they would not be embarrassed when it was said in court that no evidence was being offered. The statement of the prosecution that they would offer no evidence at the next hearing was not merely a statement made to the defendant or to his legal representative. It was made *coram judice*, in the presence of the judge. It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was.

Of course the circumstances of each case have to be looked at carefully, and many other factors considered. As the Court said in the *Mahdi* decision, we are not seeking to establish any precedent or any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was done to this appellant. In those circumstances the appropriate course is to allow the appeal and quash this conviction.

Appeal allowed.
Conviction quashed.

Solicitors: Crown Prosecution Service.