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(subject to editorial corrections)

Delivered: **10.12.02**

F. B. NOLAN CHIEF INSPECTOR Complainant PATRICIA MARION COOPER Defendant F. B. NOLAN CHIEF INSPECTOR Complainant SAMUEL ERNEST COOPER Defendant	Petty Sessions District of Newry and Mourne County Court Division of Armagh and South Down

Ruling on Defendants' Applications; To Stay Proceedings on grounds of Abuse of Process

1. These prosecutions arise out of allegations about neglect of animals at farmlands within this petty sessions district and detected on 15th March 2000. On that date Police, veterinary personnel from the Department of Agriculture and a USPCA Animal Health and Welfare Inspector attended at a farm at Crieve House, Monks Hill Road, Newry. There they found what would appear to have been a most distressing scene. The carcasses of several cattle and sheep were lying throughout the farm area, some covered with black polythene, some not. More carcasses were to be found in the outhouses, as well as live animals which were without food or water. Ten dogs in a distressed state were penned in a yard and feeding on a large group of yet more dead cattle. There were more sheep carcasses in the rear of vehicles and more cattle carcasses littered about adjoining fields. Next day, 16th March 2000, the Police and others attended on other land at Derryleckagh Road. At that location were found the carcasses of two dead horses, one in a field, one in an outhouse.

2. The police understood that the first defendant, Mrs. Patricia Cooper, was the herd keeper for the animals at Crieve House farm, while likewise they understood

that the second defendant, her husband, was the owner of the nearby land at Derryleckagh Road and the owner of the two horses. On 17th April 2000 Constable Dougan, the investigating officer, took possession of Mrs. Cooper's herd records, which served to verify that she was responsible for the animals in question.

3. On 16th June 2000 Constable Dougan, along with Mr. Daniel Gray, Enforcement Officer at the Department of Agriculture, embarked upon a formal interview of Mrs. Cooper, under caution and in the presence of her solicitor, Mr. Ted Jones, at Banbridge RUC Station (as it was then termed). The interview had to be terminated prematurely, however, due to Mrs. Cooper's indisposition. It was re-commenced on 29th June 2000, when all the usual processes were this time completed, including a taped interview, although it did involve Mrs. Cooper handing over a prepared Statement of 10 pages. It is only fair to record here that Mrs. Cooper's response was by way of a vigorous denial of all culpability.

4. While the difficulties were not made entirely clear to me, the fact is that police did have trouble making contact with the second defendant and, in fact, were to chance upon him while he was walking along the Monks Hill Road on 27th July 2000. He was made aware of the nature of the police enquiries and formally cautioned. However, Mr. Cooper's response was simply to refer the police to his solicitor. He cited both legal advice and medical treatment for not making any statement and walked on. Constable Dougan took his own leave by informing Mr. Cooper that the former would be reporting to his authorities in respect of the offences of cruelty to animals detected on 13th (sic) March 2000 at Crieve House farm and on 16th March 2000 at Derryleckagh and other related matters involving animals, with a view to prosecution of Mr. Cooper.

5. Constable Dougan made his own formal Statement about all this on 27th July 2000. To that one need only add that, at the close of the interview of Mrs. Cooper, upon it being asked whether Mrs. Cooper would in fact face prosecution, she was told that this was a matter for higher authorities, to whom the investigating constable would be making his report. In other words, the response at that time was non-committal.

6. The next significant event was the laying of information – the making of the Complaint – on 7th September 2000, a week or so short of 6 months from the date of detection of the offences. The police file was then passed to the Director of Public Prosecutions (the DPP), but the summonses, all in respect of purely summary offences, were not issued until 26th July 2001, more than 10 months later.

7. Given that, in addition, these prosecutions have yet to come to trial, getting on for 3 years since detection, there is, on the face of it, and without detailed enquiry, a real cause for concern that the right of each Defendant to a trial within a reasonable

time may have been abrogated[1]. However, by common accord, it is thought appropriate that I first consider whether the act of making the Complaints against each defendant before the formal direction of the DPP to prosecute and/or the failure to proceed with issue and service of the summonses in or around September 2000 constitutes an abuse of process under our domestic law, as it stood prior to commencement of The Human Rights Act, 1998.

8. Mr. Harvey, Q.C. contended that, on the facts, Mrs. Cooper was informed during interview by Const. Dougan, on 29th June 2000, that the decision whether to prosecute her was not for the constable, but for the DPP. In later discussions with his instructing solicitor, Mr. Jones, the directing officer in the DPP, Mr. Buchanan, made it clear that no decision had been taken to prosecute [albeit that this was long after the laying of the Complaint], but that he would be recommending that there be no such prosecution of Mrs. Cooper. Even on 23rd March 2002, it was clear that no decision to prosecute could be said to have been taken. (That was the point at which there was a consultation with counsel, with a view to the latter completing preparation of his opinion on the merits of prosecuting each of the defendants, respectively). The personal considerations with regard to Mrs. Cooper (the subject of periodic dealings between Mr. Jones and Mr. Buchanan, from at least October 2000 and continuing through to June 2001, were matters which could [and, implicitly, should] be deferred until after the decision to prosecute, but were not.

9. Mr. Harvey spoke of a deliberate delay, designed to accommodate the DPP's administrative convenience. There was a deliberate attempt to manipulate the time limits. It could not conceivably be found that there had been a decision to prosecute at the time the Complaint was made against his client. There had been a deliberate act frustrating the intention behind the six months' provision. On the other hand, in contending that such conduct was deliberate, he would say that it was not necessary for this impropriety to be conscious.

10. Mr. McNally, Solicitor, on behalf of Mr. Cooper, formally associated himself with all argument submitted by Mr. Harvey. Mr. McNally likewise asserted that it was an abuse of process to lay information when one had not decided to prosecute. The act complained of was precisely the same as in *Ex P. Wong.*[2]

11. He drew my attention to three particular ways in which the instant case could be distinguished, on its facts, from the situation addressed in *Re Molloy's Application*[3]. First, the file, in *Molloy,* had been sent to the DPP within the six months. Second, only one further month elapsed before the formal direction issued from the DPP.

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[1] See *Procurator Fiscal, Linlithgow v (1) John Watson and (2) Paul Burrows,* Privy Council DRA. No. 1 of 2001

[2] *R v Brentford JJ, ex p Wong* [1981] QB 445

[3] *Re Molloy's Application* [1998] NI 78

Third, the case had been taken as far as it could in the hands of the police and no further action or investigation was required of the DPP.

12. In addition, Mr. McNally advanced a distinctive argument on behalf of his client, Mr. Cooper. It was contended that, on 7th September 2000, when the Complaint was made, there was "not one scintilla of evidence" against his client. Mr. McNally invited me to study the Statements and other documents tendered with the summonses against Mr. Cooper. It was contended that no evidence was disclosed in respect of Mr. Cooper prior to what was gathered in February 2001, upon the directions of the DPP. The case was allocated to Mr. Buchanan on 27th September 2000, but no action whatsoever was taken in respect of Mr. Cooper until February 2001. At that point, there was a direction to obtain further Statements. And it is very evident, according to Mr. McNally's submission, that this was for no other reason than to obtain evidence tying Mr. Cooper in with the ultimate charges. Further, the real abuse is that, when one looks at those additional Statements, they do not bring the case against Mr. Cooper any further. This prosecution has continued against Mr. Cooper without any proper evidence. Overall, the main thing that stands out is prevarication. An opinion from counsel is sought in March on the very issue as to whether one could legitimately prosecute Mr. Cooper. That opinion is received in March 2001, but still nothing was done in respect of Mr. Cooper, until the following June.

13. The point which Mr. Ramsey, Q.C. wished to make with greatest force was that he entirely repudiated the suggestion that there had not been a decision to prosecute in September 2000. Const. Dougan had "plenty of time" [and no-one can deny that much] in which to make a firm decision to prosecute. There had been an intention to prosecute formed by 7th September. What followed thereafter was pursuant to that intention. There was no abuse of process, no manipulative conduct thereafter in giving ear to submissions on Mrs. Cooper's behalf, prior to the formal direction to prosecute.

14. Sergeant Dougan, as he now is, was called to give evidence before me. In this respect, one must bear in mind that the parties were agreed that the separate matter of possible breach of the reasonable-time Convention right was not being explored. Sgt. Dougan's evidence was not adduced with regard to any suggestion of delay on the prosecution's part, but rather with regard to the issue as to intention and/or decision to prosecute.

15. Sgt. Dougan confirmed the details of his interview with Mrs. Cooper in June and of his chance meeting with Mr. Cooper in July 2000. He informed Mr. Cooper of an intention to report the matter, with a view to prosecution. He had recommended prosecution of both defendants. In respect of Mrs. Cooper, he had recommended that she be prosecuted for allowing dogs to feed on carcasses, cruelty to animals, causing failure to isolate a diseased animal, namely a tuberculosis reactor

bull. In respect of Mr. Cooper, he had recommended prosecution for causing unnecessary suffering to animals, failing to provide them with adequate water, cruelty to animals, causing unnecessary suffering to animals and failing to dispose of dead animals.

16. This officer also explained that, if a matter was for the police to prosecute, as with the standard summary prosecution, he, as investigating officer, would prepare a Report for the Inspector and he decides, on behalf of the Commander, whether a prosecution should take place. In a case like the instant, however, his recommendations would be written on by his supervising officer. It was put to the DPP after Sgt. Dougan had spoken with his supervising officer. .

17. He confirmed that on 7th September 2000 he had taken out a Form 1 Complaint against each Defendant and had filed his Report, recommending that each be prosecuted. Being cross-examined with regard to Mr. Cooper, in particular, he confirmed that he felt at that time that he had made out a case against him. This view had been formed by virtue of his own observations, plus the evidence of the other agencies that attended at the scene on 15th and 16th March 2000, the police photographs and the video evidence. He prepared his Report on 7th September and submitted it on 12th September 2000, whereafter it was forwarded to the DPP.

18. He was cross-examined as to his intentions toward both defendants in regard to any prosecution. He could not deny that he may have told Mrs. Cooper at interview that it was not for him, but for the DPP to make the decision as to whether she should be prosecuted.

19. The DPP were not made aware of the investigations at an early stage. He had only dealt with Mr. Buchanan, whom he learnt to be the directing officer, after the file had been forwarded to the DPP. He was not aware that Mr. Buchanan had recommended no prosecution against Mrs. Cooper, albeit on the basis that the decision, in turn, rested with higher [DPP] authorities.

20. The sergeant was quite clear, even emphatic; he prepared a Report in such a matter, but it was for higher authorities to decide whether a prosecution should take place. As the investigating officer he could make no decision to prosecute, he could make only recommendations.

21. In cross-examination by Mr. McNally, Sgt. Dougan confirmed that his own authorities were aware of the matter at the time the Complaint was made. His Report had not been settled, but his authorities were aware of its recommendations. The go-ahead had been given to him.

22. So far as the case against Mr. Cooper was concerned, it was his property upon which the acts took place, his family home. There was that, together with his

silence, which informed the prosecution view. (At this point, Mr. Ramsey rose to point out that the test with regard to making a Complaint, was that the complainant "suspected" the commission of an offence). Sgt. Dougan went on to confirm that the evidence as to ownership of the property came from Mrs. Cooper, his wife and co-accused.

23. At this stage, the sergeant sensibly avoided being drawn, whether by me or others, into academic debate about admissibility of evidence at trial. He responded that, as a police officer, he could only put the evidence to his superiors.

24. For my own part, I asked something as to how this prosecution came to be a matter for the DPP. Sgt. Dougan explained that this was because of the nature of the offence, the severity of the cruelty, the fact that Mr. Cooper was previously disqualified from keeping animals, Mrs. Cooper's profession and high public profile – all of these were matters bringing it into the public interest category, whereby the DPP made the decision to prosecute.

25. Finally, Sgt. Cooper confirmed that he was aware at all times that these were exclusively summary offences under investigation.

26. One of the matters in which I remain especially interested is the conduct of the Central Process Office, Gough, in making the Complaints in September 2000 on Const. Dougan's behalf. That office must have either expressly or discretely seen to it that no summonses were issued by a justice of the peace forthwith. That approach, one of making the Complaint within time, but seeing to it that the issue of the summons was deferred in circumstances which occasioned significant delay, for whatever reason, was strongly deprecated by our Court of Appeal, led by the Lord Chief Justice, as long ago as 1979, when he expressed the hope that legislation might be introduced to ban the practice.[4]

27. In the course of submissions, the prosecution helpfully produced a copy of the relevant Appendix to The Prosecution of Offences (NI) Order 1972. It was explained that the instant case came under paragraph 25, being;

> Any other cases of unusual interest, difficulty, doubt or importance.

28. In this specific regard, Mr. Harvey contended that the DPP had failed to accommodate the particular time constraints associated with summary prosecutions in the working out of arrangements under that provision. There was nothing to prevent the making of arrangements whereby the DPP was engaged well within the six-month time period, so that the decision to prosecute could be made timeously. As Mr. Ramsey pointed out, though, the fact is that the file was not forwarded to the

[4] See *Maguire v Murray* [1979] NI 103, discussed below, pp. 18 *et sequi*.

DPP anyway until after the six months had already expired. I understood Mr. Ramsey to mean by this intervention that, if there were any fault in regard to engaging the DPP, it rested with the police.

29. The starting point, in regard to the relevant statutory provisions, was set out by Carswell, LCJ in *Re Molloy's Application.*[5]

> The process of initiating a prosecution for a summary offence is governed by art 20 of the 1981 Order[6], para (1) of which provides:
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> > "Upon a complaint being made to a justice of the peace for any county court division that a person has, or is suspected of having committed a summary offence in respect of which a magistrates' court for that county court division has jurisdiction to hear a charge the justice may issue a summons directed to that person requiring him to appear before such court to answer to the complaint."
>
> The time limit in respect of summary offences is fixed by art 19(1)(a):
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> > "Where no period of limitation is provided for by any other enactment – (a) a magistrates' court shall not have jurisdiction to hear and determine a complaint charging the commission of a summary offence other than an offence which is also triable on indictment unless the complaint was made within six months from the time when the offence was committed or ceased to continue …"
>
> It was held by the Court of Appeal in *Maguire v Murray* [1979] NI 103 that a magistrates' court has jurisdiction to hear and determine a complaint charging the commission of a summary offence if the complaint is made to a justice of the peace within the six-month period, even though the summons may have been served outside the period. As Lowry, LCJ stated (at 109), jurisdiction arises from the information or complaint and, while the decision whether to issue a summons is a judicial act, the issue of the summons is an administrative means of informing the defendant of the charge against him and telling him when and where his case will be heard. Delay in issuing the summons cannot deprive the court of jurisdiction, but the court adumbrated the possibility, referring to *R v Fairford JJ, ex p Brewster* [1976] QB 600, that there might be a means of controlling the exercise of that jurisdiction if any abuse occurred.

30. The facts in the *Molloy* case are conveniently set out in the head note.

> Between 10 and 13 August 1996 the applicant participated in a protest against the routing of a parade through Bellaghy. His activities in respect of that protest were investigated by the Royal Ulster Constabulary (RUC) who suspected that he had committed an offence contrary to art 20 of the Public Order (Northern Ireland) Order 1987 by willfully obstructing traffic or

[5] *Re Molloy's Application* [1998] NI 78.
[6] The Magistrates' Court (Northern Ireland) Order, 1981.

> willfully hindering or seeking to hinder lawful activity. The RUC officer who was conducting the investigation sustained an injury on duty on 13 October 1996, which kept him off work until 13 January 1997. Another officer took over the investigation, but did not submit his report to his sub-divisional commander until 4 January 1997. The latter forwarded the report and his recommendations on 6 January 1997 to RUC headquarters. It was sent on to the Director of Public Prosecutions (DPP) on 28 January 1997, with the recommendations of the officer of RUC crime branch who dealt with the case. On the same day that officer gave instructions to police in Magherafelt to lay complaints, and on 4 February 1997, just a few days inside the expiry of the six-month period prescribed for the initiation of summary prosecutions under art 19(1)(a) of the Magistrates' Courts (Northern Ireland) Order 1981, a complaint was laid before a magistrate in respect of the applicant. The DPP considered the police investigation file during February and on 28 February 1997 gave a formal direction to prosecute. A summons was not issued immediately as the RUC was engaged in negotiations with the local community in an attempt to reach a satisfactory arrangement with them in respect of the 1997 parade season to prevent a repetition of the problems that had occurred the previous year. The summons was eventually issued on 7 May 1997 and served during that month.

31. On a Judicial Review of the Resident Magistrate's refusal to stay the proceedings for abuse of process, the Divisional Court dismissed the application. While emphasing[7] that the more appropriate remedy would have been by way of requiring the Resident Magistrate to state a case for the opinion of the Court of Appeal on a point of law, the Divisional Court dealt with the core issues as follows[8];

> In our opinion these authorities lead to the conclusion that the resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory jurisdiction may nevertheless be regarded as an abuse of process of the court if, but only if, it operates to affect adversely the fairness of the trial. It is necessary in every case to look at the circumstances of the case, and it lies within the discretion of the court to decide whether the procedure operates against the interests of the defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in *Ex p Bennett* (at 63) that it is to be "most sparingly exercised" and that of Viscount Dilhorne in *DPP v Humphries* [1977] AC 1 at 26, that it should be exercised only "in the most exceptional circumstances."
>
> We have referred to the reasons why the police did not send the results of their investigations and their recommendations about proceedings at an

[7] At page 86,j.
[8] At page 85, e, *et sequi.*

earlier date to the DPP. It is evident, however, that when they did so on 28 January 1997 they had taken the matter as far along the road as they could and regarded the case as one in which proceedings should be issued, as testified by the instruction given to lay complaints forthwith. The resident magistrate concluded, having heard the evidence placed before him, that, as he stated in para 7 of his affidavit:

> 'In the absence of any evidence to the contrary, I was satisfied that the laying of the complaint had not been carried out for any improper purpose. I considered, rather, that this act was indicative of an intention to prosecute and I rejected the contrary assertion of the Applicant's solicitor.'

The resident magistrate went on to consider the second limb of the applicant's submission, based on the holding back of the issue and service of the summonses while negotiations were in progress about the holding of parades in the Bellaghy area the following summer. He did not consider that this was indicative of any improper manipulation of the court's process by the police.

He concluded by considering the extent of the delays in the prosecution of the applicant and drew upon his own experience of cases where longer delays had not been found to produce unfairness to the accused. He was of opinion, as stated in para 9 of his affidavit, that—

> '… there was nothing to indicate that the Applicant might be deprived of a fair trail owing to the matters of which he complained. No specific prejudice was asserted on his behalf and none was found by me.'

In our opinion the resident magistrate did not misdirect himself or decide the matter by reference to any incorrect considerations. In relation to the first limb of the applicant's argument, he found that the laying of the complaint before the decision to prosecute was given by the DPP had not been carried out for any improper purpose, but was indicative of an intention to prosecute. This in itself would suffice to distinguish the decision in *Ex p Wong*, of which the resident magistrate was aware when determining the matter. It is also inherent in his decision that he did not regard the course adopted as giving rise to any unfairness. We consider accordingly that he was entitled to reject this ground of the application before him, and indeed we have little doubt that this was the correct view of the facts and an entirely sustainable exercise of his discretion.

In the same way, he was in our opinion entitled to regard the delay in serving the summonses as a proper course, adopted for responsible reasons connected with the encouragement of agreement over the sensitive issue of seasonal parades. We for our part consider that it is quite justifiable for police acting bona fide for such a reason to hold back service of summonses, in order to serve the wider public interest, so long always as

> the individual interests of the defendant are not prejudiced. The resident magistrate satisfied himself on this last point, addressing himself to the possible effects of the delay on the applicant's case, and we do not think that his decision can be faulted.

32. These quoted passages begin by enunciating a principle whereby the resort by the prosecuting authorities to a procedure which does not deprive the court of its jurisdiction (i.e. their action in making the Complaint (just) within the 6 months permitted, but before the DPP's decision to prosecute and then holding back service of the summons) can properly be regarded as an abuse of process if, but only if, it adversely affects the fairness of the trial.

33. I cannot see that the caveat enunciated by the Divisional Court – that prejudice must be shown – can be confined only the second limb of the applicant's case, *viz.,* the delay, as such, in proceeding to serve the summons. At every turn, the Court would seem to be at some pains to emphasise that prejudice must be established, whether one be considering instances of delay, as such, or of a manipulative tactic embarked upon by the prosecution in a fashion which does not rob the magistrates' court of jurisdiction. At page 84, for example, Carswell LCJ, having considered a series of authorities, including *Ex p. Wong,* points out that "… in all of which the question of the unfairness involved is at the heart of the decision."

34. There are two categories of abuse case, only one of which requires that prejudice to the Defendant must be found. Indeed, as expressed by Lowry, L in *R v Horseferry Road Magistrates' Court, ex p Bennett*[9]*,* such prejudice is the defining feature of that one;

> '… (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.'[10]

35. Matters were clarified further by the Divisional Court, also lead by Carswell, LCJ in *Re The Director of Public Prosecutions for Northern Ireland's Application for Judicial Review*[11] of the following year, 1999.

36. The judgment serves as a valuable companion to that in *Re Molloy's Application,* because it involved the stay by a magistrate for abuse of process in proceedings on indictment, as compared to purely summary proceedings.

37. In *DPP for NI's Application:-*

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[9] [1994] 1 AC 42.
[10] *Ibid.,* p.74; quoted with approval by Carswell, LCJ in *Re Molloy's Application,* at p.85.
[11] [1999] NI 105.

> The respondent, M, was charged with various offences relating to the evasion of customs and excise duty on hydrocarbon oil. He was interviewed in connection with the first alleged offence on 1 July 1995 and interviews in connection with other alleged offences took place in October 1995 and January 1996. He made a number of clear admissions in the course of the interviews. The Customs officer in charge of the case completed the investigation report in October 1996 and it was sent to the office of the Director of Public Prosecutions (the DPP) in November 1996, but no directions to prosecute were given until 21 July 1998. Proceedings were commenced by service of a summons on 31 July 1998. At the committal hearing, M applied for an order staying the prosecution and the hearing was adjourned to enable the DPP to provide information about the delay in processing the prosecution. When the hearing resumed on 17 September 1998 the magistrate held that it was not necessary to find that delay had caused or was likely to cause injustice to a defendant before ruling that proceedings should be stayed, and ordered that the proceedings against M be stayed as an abuse of process on the ground of the delay and its effect on him[12].

38. Upon reviewing the authorities, Carswell, LCJ proceeded[13];

> It may be seen from these decisions that the jurisdiction is firmly rooted in the obligation of every court to give a fair trial to a defendant appearing before it. It was on their authority that we said in this court in *Re Molloy's Application* [1998] NI 78 at 85, in the context of the resort by the prosecution to a procedure that the defendant claimed to be unfair, that it was to be regarded as an abuse of the court 'if, but only if, it operates to affect adversely the fairness of the trial'.
>
> The decision in *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 forms another and quite separate strand in the jurisdiction to stay proceedings for abuse of process. It contains authority for the proposition that the courts have jurisdiction to grant a stay where a fair trial of the accused person could be held but it would constitute an abuse of process because of antecedent events to put him on trial. In that case the appellant, instead of being extradited by due process, had been brought to England by a subterfuge, the result of a conspiracy between English and South African police, and on his arrival at Heathrow had been arrested, charged and committed for trial on fraud charges. The House of Lords regarded this action as a serious abuse of power and held that the concept of abuse of process should be extended to cover such behaviour. As Lord Griffiths expressed it (at 62) '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.'

[12] Quoted from the headnote.
[13] *Ibid.,* p. 113.

39. And, again[14];

> 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*, as the appropriate formulation of the criterion);
> (b) those, like the *Ex p Bennett* case, 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.

40. The case made by Mr. Harvey, supported by Mr. Liam McNally on behalf of the second defendant, was, in effect, that the facts in the instant case were more properly those addressed in *R v Brentwood JJ, ex p. Wong* [1981][15].

41. In *Wong,* the English Divisional Court was also dealing with a case concerning a summary offence and in which the information was laid shortly before the expiry of the 6 months' time limit, in July 1979. No decision to prosecute had been taken and the information was laid purely as a protective measure. The decision to prosecute was taken in October 1979 and the Applicant informed of that by letter. The summonses were not served until December of the same year.

42. In the Affidavit filed by the Applicant's solicitor it was recounted that, upon the matter coming before the justices, counsel for the Applicant asked the court to decline to hear the matter.

> "on the grounds that the delay was prejudicial to the applicant in a matter of this sort that depends on the recollection of witnesses and that for the police to lay an information on the last possible day in order to give them longer than the statutory six months to decide whether or not to prosecute amounted to an abuse of the process of the court."

43. It is apparent, then, that in the *Wong* case prejudice to the Applicant was asserted from the very outset. Indeed, Donaldson, LJ was at some pains to point out, immediately before quoting this extract from the Affidavit, that the allegation of prejudice went unchallenged by both prosecution and the justices. The judgment, therefore, cannot properly be cited as an instance where abuse of process was found to be available where prejudice to the defendant had not been established.

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[14] *Ibid.,* at p. 116
[15] [1981] QB 445.

44. In reviewing that limited number of authorities available at that time, Donaldson, LJ quoted the following obiter from May, J in *R v Newcastle-upon-Tyne JJ, ex p. John Bryce (Contractors) Ltd* [1976][16] ;

> In my view the six months' limitation provision in section 104 of the Magistrates' Courts Act 1952 is to ensure that summary offences are charged and tried as soon as possible after the alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by magistrates' courts throughout the country of the summary offences brought before them to be tried. … But where …[the power to permit amendments of an information] … can be so exercised, where an information can be amended, even to allege a different offence, so that no injustice is done to the defence, I for my part can see no reason why the justices should not so exercise it even though the amendment is allowed after the expiry of the six months' period from the commission of the alleged offence.

45. For the purposes of the immediate enquiry, I simply note it is apparent that the reasoning of May, J was very much one of considering the late action by reference to potential prejudice to the defendant. Only if such prejudice were not going to arise was he prepared to countenance an amendment to the summons beyond the expiry of the six months.

46. Donaldson, LJ next turned to the judgment of Lord Widgery, CJ in *R v Fairford JJ, ex p. Brewster* [1976][17], concerning the issue of fresh summonses beyond the six months' time limit and to replace earlier ones which had been incorrect in form. The following passage was quoted;

> For my part this important point can be disposed of in this way. I cannot believe that the situation is such that whatever the delay, and however unreasonable and however great the prejudice to the defendant, yet delay is wholly irrelevant when it occurs between the laying of the information and the issue of the summons. There must be power in the court to control excesses of this kind as there is in most other similar features of procedure, and I do not for a moment think that the courts are powerless in that regard. But having regard to authority, or the lack of it perhaps is more important here, and having regard to the fact that in the present case there is really no suggestion whatever of prejudice on the part of the applicant, it seems to me that in the present case it is quite impossible for us to hold that the delay in this matter, which I have described in some detail, is sufficient to deprive the justices of jurisdiction and thus to authorise us to order prohibition against them.

[16] [1976] 1 WLR 517, at p. 520.
[17] [1976] QB 600, at p. 604.

47. While much of the latter part of that passage is about the matter of delay after a summons has been issued (and thus, on any proper approach, requiring that prejudice be shown before an abuse of process can be found), it does nonetheless appear to include the concept of prejudice to the applicant as an inherent element in all that Lord Widgery, CJ would find objectionable.

48. The foregoing, and a little more, is the context set by Donaldson, LJ before he proceeds to his own core passage[18];

> For my part, I think it is open to justices to conclude that it is an abuse of process of the court for a prosecutor to lay an information when he has not reached a decision to prosecute. The process of laying an information is, I think, assumed by Parliament to be the first stage in a continuous process of bringing a prosecution. Section 104 of the Magistrates' Courts Act 1952 is designed to ensure that prosecutions shall be brought within a reasonable time. That purpose is wholly frustrated if it is possible for a prosecutor to obtain summonses and then, in his own good time and at his convenience, serve them. Of course there may be delays in service of the summonses due perhaps to the evasiveness of the defendant. There may be delays due to administrative reasons which are excusable, but that is not so in this case.

49. It seems to me, then, that whereas *R v Brentford JJ, ex p. Wong* [1981] does identify a particular type of conduct, or procedural device, that would entitle justices to find that there has been an abuse of process, namely the laying of an information before reaching a decision to prosecute, it is implicit in the reasoning that the justices must feel that such an act has caused prejudice to the applicant – either proven or inferred – before being entitled to refuse jurisdiction.

50. In the instant case, it is quite apparent that there was no decision to prosecute at the time of the making of the Complaints against these two defendants. There cannot be said to have been a decision, as such, because the power to make that decision, in this case, had been assigned to the DPP, which office knew nothing about the matter at the material time.

51. Mr. Ramsey submitted that there had clearly been a decision to prosecute at the time the Complaint was laid against each defendant. I think he meant by this that the Complaint would not have been made without a decision to prosecute having been formed in the investigating constable's mind. Well, as Sgt. Dougan stated in evidence taken before me on the point, he had most definitely not made a decision that each or either defendant should be prosecuted. At its height, he had decided that there was reasonable cause to suspect that each had committed the offences contained in the respective complaints. As Mr. Ramsey pointed out, such reasonable suspicion is sufficient to render the making of the Complaint a proper

[18] At p. 450.

act, in itself. Equally, it is sufficient to preserve the jurisdiction of the magistrates' court. But it is not a decision to prosecute. I am not aware that a decision upon the existence of reasonable grounds for suspicion was not also made in the case of *R v Brentford JJ, ex p. Wong* [1981] prior to the laying of the information. That much, however, was insufficient to protect the prosecution from being open to the court's discretion to find abuse of process. Whether the justices ultimately did so, I do not know. The reported decision by the Divisional Court was simply that the justices had the discretion to exercise their power in that respect.

52. In *Re Molloy's Application,* the Divisional Court did not rule that it was perfectly in order to lay a complaint before a decision to prosecute was made. It did determine that such a circumstance did not automatically rob the magistrates' court of jurisdiction and that *R v Brentford JJ, ex p. Wong* [1981] had not, in law, held to the contrary.

53. The Divisional Court in *Re Molloy's Application* reasoned that it was a perfectly proper exercise of the magistrate's discretion not to stay proceedings for abuse of process on that limb of the applicant's case because (a) the decision to prosecute followed shortly, with a continuing intention to do so being in existence throughout the intervening period (in other words, the delay in the making of the decision until after the Complaint was purely administrative), (b) the decision to delay issue of the summons was taken by reference to the public interest, and (c) there had been no impact upon the fairness of any trial.

54. On the authority of *R v Brentford JJ, ex p. Wong* [1981] I hold that it is the decision to prosecute which must be in existence at the time of making the Complaint, if the prosecution is not to be at risk of being found to have engaged in an abuse of process.

55. In the instant case, the facts as I find them to be are materially different from those found in *Re Molloy's Application*. The sequence of relevant events begins in much the same way. The investigating officer, his supervisor and others who may have been involved on the police side, had a bona fide intention to see both defendants prosecuted. The complaint laid in each case was grounded upon reasonable suspicion, as the law requires. As in the *Molloy* case, however, no decision to prosecute had yet been made, that being a matter for the DPP.[19]

56. Things however took a very different course here, quite distinctive in character, once matters passed under the control of the DPP. There was no rubber-stamping of the police case. Indeed, at the moment, I am not at all clear that the matter was

[19] There is a slight difference on the facts, in that, in *Re Molloy's Application,* the complaint was laid after the file had been sent to the DPP.

closely considered for quite some time. The prosecution did have the opportunity, at hearing before me, to adduce evidence as to just what was being done in the DPP during the months between September 2000 and February 2001, but did not avail of it.[20] Consideration was certainly given to representations from Mrs. Cooper's solicitor from time to time, with regard to whether, irrespective of the legal merits of any prosecution, such prosecution should be undertaken against her for other, wider reasons. And I suppose that there exists an argument along the lines that, as a case which has been referred to the DPP for reasons of "unusual interest, doubt or importance", consideration of a petition on behalf of Mrs. Cooper is actually a legitimate part of a consideration of whether or not to prosecute, as opposed to a distinct issue which ought to be addressed, and need be addressed, only after a decision to prosecute has been made. However, such considerations seem to have been undertaken only on and about 16th October 2000 and, again, on or about 7th December. There was nothing otherwise put before me, with regard to meaningful consideration of the file by the investigating officer for the period between 21st September 2000 and 9th February 2001. The directing officer ultimately recommended, on 22nd February 2001, after further enquiries with representatives of the Department of Agriculture which took place between 9th and 21st February 2001, that there be no prosecution against Mrs. Cooper. It was not made clear whether he did recommend prosecution against Mr. Cooper, but I infer as much.

57. According to the prosecution's Chronology Of Events, this was still not a decision, merely a recommendation. Under a protocol which seems to have mirrored that between police and DPP, "internal office practice" required that the Director should be made aware of the case before a Direction issued, because of "… the nature of the case and the occupations of the parties involved."

58. When it got as far as the Senior Assistant Director, on 27th February, considerations of "… the nature and complexity of the case…" led him to direct, on 6th March 2001, that the advices of experienced counsel be taken "… as to whether there existed a reasonable prospect of the conviction of either Mr. Cooper or Mrs. Cooper in respect of each proposed charge."

59. At Hearing, Mr. Ramsey submitted that this was a complex case. In this regard, he cited the need to consider photographic and video evidence and the input from Department of Agriculture personnel. I trust that I remain open to persuasion in that respect.

60. Abridging the terms of the prosecution's Chronology somewhat, counsel duly advised the DPP on 29th March 2001. A minute went from the Senior Assistant Director to Director on 8th June, noted by the latter on 11th June. Time was then

[20] While I am not here addressing issues as to burden of proof, I do not think it is for me to fill in the blanks in ease of the prosecution.

taken for "correspondence with solicitors for USPCA for information purposes" between 14th and 25th June, whereupon the Direction to prosecute was signed.

61. On those facts, it simply cannot be said that there was a continuing intention to prosecute the defendants, from September 2000 to June 2001. If, as I think right, one regards police and DPP as being in partnership, together forming "the prosecution" in this matter, then the prosecution can be seen to have resiled from the original, positive, intention of September 2000 very shortly thereafter, moved to a disposition not to prosecute, at least, Mrs. Cooper, after returning to the issues some 5 months later, undertook a comprehensive review of the whole idea of prosecuting either, through February 2001, may or may not have formed a positive disposition in respect of prosecuting both, after receipt of counsel's opinion, in March, took another period, from then until June, to address additional representations on behalf of Mrs. Cooper, had dealings with USPCA, and then, finally, make the decision to prosecute in June 2001.

62. In regard to the absence of a continuing intention to prosecute, the instant case is manifestly distinguishable from *Re Molloy's Application.* The prosecution here secured the jurisdiction of the magistrates' court, having made the Complaints just within time. Having done so, it then proceeded to take full advantage of the time thereby gained in order to consider, without any apparent haste, whether or not to issue summonses. Whereas that step is supposed to be merely a follow on, merely consequential notification to the defendant as to when and where to appear in court (and was always regarded as such by the prosecution in *Re Molloy's Application*), it was here put off whilst the prosecution decided whether or not they were really going to prosecute the defendants at all – or both defendants in any event. There was no apparent regard for the fact that this behaviour frustrated entirely Parliament's intention that summary offences should be heard and determined with particular expedition. In these respects, the facts are not just on all fours with those in *R v Brentford JJ, ex p. Wong* ; the license taken by the prosecution here was a good deal more gross and objectionable.

63. In other words, by the time one gets to a decision to prosecute in June 2001, concerning detections made on 15th and 16th March 2000, this case had parted company, long since, with all normal timescale characteristics of a summary prosecution.

64. Mr. Harvey would say that such abuse of the process was deliberate, though he would appear to concede that it may not have been conscious. For my part, I do not think that the DPP were deliberately manipulating the process in order to gain time, to buy time. I think that the police, in the first instance, did not gather in such proofs on file as would have allowed a proper and informed decision to prosecute within the six-month limit. I agree with Mr. Harvey's contention that the police practice in cases of partnership with DPP in the consideration of summary

prosecutions requires that the latter be consulted much sooner than 5 or 6 months on. The DPP, in turn, simply failed to prioritise sufficiently its consideration of the file so as to reflect that fact that one was put to mitigate the failure to make the relevant decision within time by applying a degree of urgency to the task of doing so once the file had been transferred. It simply does not appear to have kept sufficiently in mind that this was at all times a summary prosecution. It would be over-simplistic to view the history as one where either the police or the DPP deliberately set about flaunting the 6-month time limit.

65. On the other hand, I do not think that much turns upon whether the prosecution behaviour is found to be deliberate, as in *R v Brentford JJ, ex p. Wong* , or is considered something little more than an administrative stumbling, which appears to have been the view in *Re Molloy's Application.* I am satisfied, upon a review of the relevant authorities that it is not appropriate for a magistrate to stay proceedings by reason of an abuse of process of this kind unless he takes the view that the prosecution action has adversely affected the defendant's right to a fair trial.

66. I must also deal here with Mr. McNally's contention that the police had not a scintilla of evidence against his client, Mr. Cooper, at the time of making the Complaint against him. By this, he means of course evidence which would be admissible in court, upon a trial. He may also be thinking of direct, as opposed to circumstantial evidence. And, in any event, he is not referring to whether the police would or could have had a reasonable suspicion, on 7th September 2000, that his client had been guilty, on 15th March 2000, of permitting 47 carcasses to remain unburied at Crieve farm and in places to which dogs could gain access. In addition, Mr. McNally has made clear that he grounds his assertion exclusively by reference to matters contained in the tendered evidence.

67. With regard to the specific issue as to whether the prosecution have any admissible evidence whatsoever against Mr. Cooper I believe that to be something which in this case could only be properly examined in the course of a trial.

68. In *Maguire v Murray* [1979][21] the Court Of Appeal addressed a situation where a road traffic offence occurred on 24th June 1978 along with a related offence. The summons was issued on 29th June 1979, returnable on 5th September 1979. The complaint had been laid before a justice of the peace on 11th September 1978, well within the six-month limit and there was no suggestion of there not having been made a decision to prosecute. However, the JP was asked not to issue the summons on 11th September, but merely to note the complaints. This request was related to certain disciplinary matters then pending against a member of the RUC who was involved in detecting the alleged offences, but in no way connected therewith.

[21] [1979] NI 103

69. It was the ensuing judgment of Lord Lowry, LCJ which stands as authority for the proposition that the jurisdiction of the magistrates' court arises from the information or complaint and that, while the decision whether to issue a summons is a judicial act, the issue of the summons is an administrative means of informing the defendant of the charge against him.[22]

70. Mr. Harvey contended that one could take it with some certainty that, had Lord Lowry to address the same facts today, his decision would be quite different, insofar as he determined that "… a delay, of whatever length, in issuing the summons cannot deprive the magistrates' court of jurisdiction to enter upon the hearing of a complaint made within time." Well, the point is entirely conjectural in nature, but I think not.

71. In line with the authorities later laid down by his successor, in *Re Molloy's Application* [1998] and *Re The Director of Public Prosecutions for Northern Ireland's Application for Judicial Review* [1999] Lord Lowry, LCJ showed himself entirely alert to the critical limitation upon access to the remedy sought by applicant.

72. Thus;

> Since the matter has not arisen for our decision in the case stated and also because it would be unwise to go into any detail without the benefit of argument, I prefer to say nothing about the possibility of controlling the exercise of jurisdiction by the inferior courts which Lord Widgery, CJ refers to at p. 604 of his judgment in *Brewster's* case.[23]

73. In that last-mentioned point, Lord Lowry, LCJ was alluding back to what he had stated at p. 105 of his judgment;

> It was, however, conceded [by the Crown] that there may be a discretionary remedy for the delay, perhaps enforceable by judicial review, in cases where the defendant has been or may have been prejudiced.

74. I understand that Mr. Harvey was asserting that the judgment in *R v Brentford JJ, ex p. Wong* allowed a resident magistrate, upon finding that there had been a deliberate, including deliberate in the sense of objective, manipulation of the process by the prosecution, whereby a Complaint had been made before a decision to prosecute, to rule, in his discretion, that the case should be stayed by reason of such abuse of process, without more. I find myself bound to reject that submission.

[22] *Ibid.* p. 109
[23] *Ibid.* p. 110.

75. Mind you, it is quite apparent that Lord Lowry, LCJ did not reach his conclusion in the precedent case with any great satisfaction. He concluded with these remarks;[24]

> This is a most unsatisfactory situation and ought in my view, to be remedied by legislation. Although little evidence exists that avoidable delays have occurred, it is completely contrary to the spirit of legislation which insists on a complaint being made within six months to think that the hearing of the complaint and even its notification to the accused could be indefinitely delayed. Indeed I hope that, having established their legal point, the authorities will take full account of the defendant's unenviable experience in deciding whether they ought to proceed against him further.

76. It has not been asserted – there was an explicit waiver of an opportunity to so assert - and I am not otherwise able to find, that the defendants' right to a fair trial has been prejudiced by reason of the consequential delay in the instant case.

77. Lord Lowry, LCJ's hope that the situation might be changed by legislative intervention was not to be realised for very many years. However, the advent of The Human Rights Act 1998 has brought into our domestic law a right of redress where a defendant has been denied a trial within a reasonable period, being a right which is not dependent upon a finding of prejudice, and distinct from the right to a fair trial.

78. One must therefore turn now to consideration of the Human Rights issue.

Dated this 10th day of December, 2002

John I Meehan, RM
Newry Petty Sessions

[24] *Ibid.* p. 110.