Neutral Citation no. [2007] NICC 38 | *Ref:* **2007NICC38**

Judgment: approved by the Court for handing down | *Delivered:* **18/10/07**

*(subject to editorial corrections)**

The Queen-v-Emma Louise Jamison

Ruling

Abuse of Process

Judge Piers Grant

1. The accused Emma Louise Jamison is charged with two counts of perverting the course of justice, contrary to Common Law and Misconduct in a public office, contrary to Common Law. The first two counts relate to the process of a fixed penalty notice issued to Dean Freeman on the 19th November 2005. It is alleged that the defendant falsified an entry in a document known as Witness Form 55/9 to the effect that Dean Freeman had produced his driving documents to Coleraine Police Station within the seven day requisite period from the date of issue of the Fixed Penalty Notice. The third count alleges that the accused on the 17th March 2006 contacted the owner of premises which had sustained damage and told him that the damage to the premises would be paid for if the charge against one Dean Freeman was dropped.

2. The defence has now made an application to me that I stay all further proceedings on foot of this indictment on the grounds of Abuse of Process because of the alleged interference by Detective Sergeant John Sayers, the principal investigating officer, in these proceedings. It is contended by the Defence that this interference amounts to very serious misconduct on the part of the investigating officer, prejudices the defendants right to a fair trial and created

such gross irregularity in the proceedings that a stay should be granted.

3. The defendant having pleaded not guilty a jury was sworn in Antrim Crown Court on the 1st October 2007. The court was informed that a number of preliminary issues were required to be dealt with and the jury was sent away to return on Tuesday 2nd October 2007. The court heard a number of applications and rose at 2.44pm on Monday afternoon. On Tuesday the 2nd October Mr. McCrudden QC moved his application on behalf of the defendant submitting that the previous afternoon a very serious incident had occurred involving Detective Sergeant Sayers and the defence team. I held a voir dire in relation to these issues.

4. It is common case that Sergeant Sayers was asked for and provided to the defence a book containing a number of 55/9 forms. This book was marked JS1 and was exhibited to the deposition of Detective Sergeant Sayers. The defence sought to examine these forms in the course of their consultation which was to be attended by an Inspector Wisner, an inspector at Coleraine PSNI Station who at some stage had been the defendant's senior supervising officer. Again it is common case that at approximately 4.00 pm Detective Sergeant Sayers knocked on the door of the consultation room, put his head round the door and asked when the defence might be finished with the 55/9 book. He indicated that his car was on a parking meter that had expired and he was concerned to know whether he would need to pay for further time. He was informed that the defence would need the book for a further half hour or so and he then left the consultation room.

5. The defence claimed that a short time later, Mr. Loughrey, the defendant's solicitor left the consultation room in order to answer a mobile telephone call. To do this he entered the public area outside Court 2. This area being just off the corridor leading down to the consultation room. There he encountered Mr. Sayers, who immediately asked him: 'Is that Inspector Wisner in there?' Mr. Loughrey indicated that he replied 'You tell me' before returning to the consultation room.

6. Mr. Loughrey informed me that he left the consultation room a short time later and was again approached by the Detective Sergeant who said' I hope Inspector Wisner is sticking to his statement?' Mr. Loughrey knew of no statement by Inspector

Wisner and replied ‘I’m sure he is’ To this Detective Sergeant Sayers responded ‘I certainly hope he is not helping the defence’. Mr. Loughrey said that Detective Sergeant Sayers had a smile on his face and he responded by smiling back. Mr. Loughrey then returned to the consultation room, checked the depositions and on confirming that these contained no statement from Inspector Wisner asked Inspector Wisner in the presence of Counsel whether Inspector Wisner had made any statement. Inspector Wisner responded that he had not made any statement.

7. Mr. Gavin Cairns BL gave evidence that a short time later he left the consultation room taking the book, containing the 55/9 forms, intending to give it back to Detective Sergeant Sayers. On returning the book he enquired about other 55/9 books and Detective Sergeant Sayers said these were available but would have to be obtained from Coleraine. Mr. Cairns described how he informed the Detective Sergeant that these would be required and at that point Mr. Sayers held up the returned book (JS1) and asked: ‘Did Inspector Wisner touch this book?’ Mr. Cairns was surprised and said that he would not answer such a question. In evidence he told me that Detective Sergeant Sayers responded: ‘I can get it fingerprinted if you want, it does not matter.’ Mr. Cairns then returned to the consultation room where he informed Senior Counsel and his instructing solicitor of what had occurred.

8. Inspector Wisner informed me that he had been called by the defence to attend a consultation but at the time was unaware what role he might play in the trial. Before attending, he spoke with his Chief Inspector, Chief Inspector Thompson who, authorized him to go ahead with the consultation but instructed him to speak to Professional Standards Department before entering the consultation. Detective Sergeant Sayers is part of the Professional Standards Department which is the department that investigates allegations of misconduct on the part of Police Officers. When he arrived at the court he could not find anyone from the Professional Standards. He did not, prior to this, know Detective Sergeant Sayers. He described that when he left the consultation room he approached Detective Sergeant Sayers and informed him that he had been asked to speak to him and related the advice that had been given by Chief Inspector Thompson. Mr. Sayers asked him, in an aggressive way, why he hadn’t spoken to him earlier and Mr. Wisner replied that he could not find anyone from Professional

Standards and this was his first opportunity to speak to him or anyone from Professional Standards.

9. Mr. Sayers appeared annoyed and asked Mr. Wisner if he had looked through the book of 55/9's. Mr. Wisner replied that he had been present when the book had been considered. The Detective Sergeant then asked Inspector Wisner if he had looked through the list of witnesses during the consultation. He described that he was taken aback by the content, tone and manner of this questioning and felt he was being accused of doing something wrong. He stated 'I could see he was annoyed at my being there. I felt under stress because I felt I had done something wrong. I felt this because of the way I had been spoken to. I personally did not think that I had done anything wrong, but felt that the Detective Sergeant was saying that I had done something wrong. I felt very stressed.'

10. Inspector Wisner described that he felt upset by this encounter and under stress and informed Senior Counsel of what had been said. He left the court building and telephoned Chief Inspector Thompson and described the incident to him. He said that he felt real concern as to what he was permitted to say in Court and whether he could give evidence about the contents of the book or the list of witnesses.

11. Chief Inspector Thompson gave evidence that he was contacted by Mr. Wisner prior to his attending the consultation. He was advised that Mr. Wisner had been called to court to give evidence on behalf of the defence but did not know why he was being called. Mr. Thompson advised him to go to court and to contact someone from Professional Standards if they were available. He advised Mr. Wisner that he should attend the consultation and that his evidence was a matter for his own judgment. He confirmed that at approximately 4.30 pm he received a call from Inspector Wisner who described an encounter with Detective Sergeant Sayers who had challenged his presence at the court. In this conversation Inspector Wisner recounted that he had been asked whether he had touched the book of 55/9's and whether he had looked at the list of witnesses contained in the depositions. He and Mr. Wisner then discussed the name of a witness who appeared on the list of witnesses and whose name had been discussed in the consultation. He said that Mr. Wisner expressed concern and upset about what had occurred and he felt that the Inspector was genuinely upset and concerned that he was being accused of wrongdoing.

12. The Chief Inspector recounted a further conversation that he had later that evening in a telephone call from Superintendent Colin Taylor of Professional Standards. The Superintendent wanted to know whether Mr. Thompson was aware of what had happened that afternoon and advised Mr. Thompson to tell the Inspector that the following day he should go to court and speak to the crown lawyers and ask them what his role was in the trial proceedings. Mr. Thompson later spoke to Inspector Wisner and passed on this advice. He also reassured the Inspector that he had done nothing wrong.

13. I heard evidence from Detective Sergeant Sayers that he had approached the consultation room to find out how long the defence would require the book of 55/9's. This was some time just after 4pm. He was concerned about parking and on being advised that the book would be needed for some further time he left and purchased another parking ticket. He later returned to the public waiting area outside Court room 2. He next encountered the Defence Solicitor Mr. Loughrey who was speaking on his mobile phone; this was at approximately 4.20pm. He concedes that he asked if Inspector Wisner was in the consultation room and concedes that he said 'I hope he's not assisting the Defence.' He said he made this comment as a joke. He claimed that no further conversation took place and denies making any comment about Inspector Wisner sticking to a statement. He was asked why he had enquired about the Inspector and said that he had been told that Inspector Wisner would be called for the Defence, had never met him before and wished to confirm who he was. He was concerned about Mr. Wisner's presence at Court and believed that police officers must seek permission from their own authorities before attending court or giving evidence.

14. He confirmed that Mr. Cairns BL spoke to him in the waiting area, returned JS1 the book of 55/9's and asked about a number of other books. He said he would enquire about them and have them produced. He agrees that he asked if Inspector Wisner had touched the book and on Mr. Cairns indicating that he would not answer such a question he accepts that he said 'I can have it fingerprinted.' He said that this remark was made in a sarcastic way. He further confirmed that Mr. Wisner came out of the consultation room and that he immediately asked the Inspector if he had sought permission to attend court. Mr. Wisner told him that he had been

in contact with Chief Inspector Thompson, had been given permission to attend, but had been advised to speak with a member of Professional Standards Department.

15. He accepted that he asked Mr. Wisner whether he had looked through the book JS1 of 55/9's and explained that he was concerned in what capacity the Inspector had been called. Had he been called as a civilian, or as a police witness? He confirmed that Mr. Wisner did ask him whether he had done the right thing, or whether he had done anything wrong. At that point the defence lawyers arrived and a heated discussion took place. He denies at any time asking Mr. Wisner whether he had looked at or gone through a witness list during the consultation.

16. Mr. Sayers was subjected to quite lengthy cross-examination by Mr. McCrudden during which his evidence in chief was closely scrutinized, as was a witness statement that he prepared relating to this issue. This was contrasted with the cross-examination by Mr. Weir Q.C., based on the instructions given by Detective Sergeant Sayers. There were a number of discrepancies and conflicts revealed in the evidence laid before the court. Mr. Weir Q.C. had very clearly and properly informed the defence where there was a conflict between his instructions from the Detective Sergeant and the evidence being given from the witness box.

17. I do not intend to rehearse all the cross-examination of the Detective Sergeant or highlight the discrepancies in his evidence. I take the view that it is sufficient to say that where his evidence is in conflict with that of the defence witnesses, I prefer the evidence of Mr. Loughrey, Mr. Cairns B.L., Inspector Wisner and Chief Inspector Thompson.

18. In summary I am satisfied that Mr. Sayers did say to Mr. Loughrey that he hoped that Inspector Wisner was sticking to his statement. I am satisfied that he was confrontational and aggressive to the notion of Inspector Wisner giving evidence on behalf of the defence and made the enquiry whether the Inspector had handled the book and then implied threat that the book could be subjected to fingerprint examination. I am also satisfied that he was aggressive and hostile to Inspector Wisner about his attendance and appearance at the consultation and that he specifically enquired of the Inspector whether the witness list had been considered in the course of the consultation. In this regard it should be borne in

mind that the exchange that took place between Mr. Sayers and Mr. Wisner was an exchange between a junior officer and a more senior officer, of the rank of Inspector.

19. I have little doubt that Inspector Wisner felt under attack by Detective Sergeant Sayers, was made to feel very uncomfortable and uncertain of his position and this upset him to the extent that he required assurance from his Chief Inspector. I have little doubt that this encounter could have affected his ability to give evidence on behalf of the defence and might have deterred a less robust individual from even attending court. I asked a number of questions from the Inspector and he assured me that he was perfectly capable of giving evidence, and appreciated that he had done nothing wrong. I assured him that the court would not hesitate to offer him the court's protection so that he could give his evidence freely and fairly. He accepted this reassurance and I have no doubt he will be in a position to give and will give his evidence in this case if required.

20. Mr. McCrudden on behalf of the defendant advanced this application on three fronts. First he contended that the actions of Detective Sergeant Sayers in enquiring about the presence of Inspector Wisner, his handling of the book of 55/9's, his threat to have that book subjected to forensic examination, and his questioning of the Inspector as to his presence at the consultation amounted to a gross interference with the conduct of the defence. He contends that this was calculated to embarrass and upset the Inspector and to put pressure upon him not to give evidence on behalf of the defendant. Second he contends that all matters that occurred during the course of the consultation and anything discussed within that room was subject to legal professional privilege and any enquiry as to what occurred in that room from Detective Sergeant Sayers challenges the defendant's right to legal professional privilege. Such challenge compromises the integrity of legal professional privilege and denies the accused, her right to it. Third, Mr. McCrudden contends that the conversation between the Detective Sergeant and Mr. Wisner concerning the consideration of the witness list in the course of the consultation is of great significance. He argues that this establishes that the D/Sgt eavesdropped on that consultation and that this is a grave breach of the accused's rights

21. There is no doubt that the witness list was considered in some detail in the course of this consultation, it was considered in the company of Inspector Wisner and he appears to have contributed to that discussion. It is difficult to place the point at which this item was discussed, but it appears from the evidence to have been discussed at a fairly early stage in the consultation. The defence contends that the witness list itself, has no particular significance in the context of the overall evidence. It should have no special significance to the defence or prosecution. They submit that by asking about it, Sergeant Sayers invests it with a very high degree of significance. It is clear that it was discussed in the course of the consultation and the question immediately arises as to why the Detective Sergeant raised it with Inspector Wisner. The witness list is not something that is routinely discussed and considered in every consultation. There is nothing in the general evidence which would point to it as a subject for discussion, yet it was discussed in this consultation. Mr. McCrudden submits that the only reason it was and could be raised on this occasion is because Mr. Sayers knew it had been discussed in this consultation. Furthermore Mr. Sayers could not know that it had been discussed in this consultation unless he heard it being discussed and was listening in to the defendants consultation.

22. Mr. Sayers denies that he listened in to the consultation or any part of it and of course denies that he discussed the witness list or referred to it in his comments to Mr. Wisner. It follows from this that he could offer no innocent explanation for raising the witness list with Inspector Wisner or any innocent basis for any awareness of it being discussed in the course of the consultation. For example he did not contend that on approaching the consultation room to enquire about the 55/9 book he accidentally and momentarily heard reference to a witness or a witness list. He was resolute that he heard nothing from the consultation room and resolute that he did not discuss it with Inspector Wisner.

23. Mr. McCrudden submits that this is misconduct in the course of these proceedings which is so serious on the part of the senior investigating officer who has conduct of the investigation that it infringes the defendant's right to a fair trial, is an attempt to manipulate the court process and causes serious prejudice to the accused. On this basis alone he argues that the prosecution should be stayed.

Legal Principles

24. It is well settled that the court has a power, developed under the common law, to intervene and safeguard the accused from oppression and to prevent prosecution when it would be unjust to permit the prosecution to proceed. This jurisdiction can be exercised in a wide range of circumstances although from the authorities, two principal situations emerge.
(a)The first is where by reason of some circumstance the defendant would be denied a fair trial.
(b)The second is where because of some circumstance it would be unfair to try the defendant.

25. The first situation is more frequently encountered as for example where due to delay or the absence of important evidence the defence is prejudiced and the defendant would thereby be denied a fair trial. In the second category it is well recognized that where there has been such grave misconduct on the part of the police, executive, or prosecution which undermines or threatens the rule of law, the court may and sometimes should intervene even where a fair trial can take place.

26. The rationale behind this approach is that the court should act so as to show its disapproval and that it will neither tolerate such conduct nor appear to endorse it. Carswell LCJ relying on the principles enunciated by Lord Lowry in ex parte Bennett [1994] 1 AC 42 at page 74 reminded courts that the jurisdiction to stay should be used sparingly, only for very compelling reasons and should not be exercised as part of a disciplinary jurisdiction see: In re DPP for Northern Ireland [1999] NI 106 paragraph 33. This was a case where the defence application was founded on delay and I interpret Carswell LCJ's dicta in that context. I believe that he was expressing the view that the court should not use the stay procedure to punish the authorities for dilatory action but I do not consider that these remarks take away from the settled principle that where the court is satisfied that there has been very grave misconduct the court may and sometimes should move to show it's disapproval and grant a stay; see R v Schlesinger and others 1995 Crim. LR. 137

27. The authorities on this aspect of the jurisdiction to stay proceedings were reviewed by Kerr J in R v McComish 1996 NI 466. At Pages 473-474 he said

“Before considering these arguments it is appropriate to say something about the concept of abuse of process and the circumstances in which criminal proceedings should be stayed on account of it. In an article entitled 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] Crim LR 864, Choo suggests that the use of the term 'abuse of process' may be regarded as unfortunate since the discretion to stay criminal proceedings extends well beyond the power to stay prosecutions which constitute a misuse of the legal process. Choo states (see p 865):

'The stay of a criminal prosecution is justified if there is a sufficient danger either that the accused will be convicted even if innocent, or that the continuation of the proceedings will undermine the moral integrity of the criminal process.'

28. These two strands were clearly recognized by the House of Lords in the case of R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42. Lord Griffiths said (at 61–62):

'As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused … There have, however, 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 … 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 proceedings. 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. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law.'

In the same case Lord Lowry said (at 74)—

'… I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (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.'

It is to be noted that Lord Lowry's formulation of the circumstances in which a stay for abuse of process (other than where a fair trial was impossible) is more widely drawn than that of Lord Griffiths who considered that 'judicial intervention' should occur when executive action 'threaten[ed] basic human rights or the rule of law'. But Lord Lowry was careful to point out that this was a power which should only exceptionally be exercised. He said (at 74):

'I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons.' "

He continued:-

"…….I accept Mr. McCrudden's first submission that the impossibility of a fair trial is not prerequisite to the grant of a stay. It is to be noted, however, that Lord Griffiths in the Bennett case considered that the power would normally be exercised in such circumstances. Moreover he suggested that only a 'serious abuse' would justify invoking the power to stay.

The House of Lords in *Bennett* was not required to consider whether the abuse complained of was calculated to cause disadvantage to an accused. I was strongly urged by Mr. McCrudden that this was not needed. It is not necessary for me to decide this point but I incline to the view that it need not be shown that the executive action was deliberately aimed at the accused.

It appears, however, that absence of bad faith may be a reason for refusing a stay—R v Milton Keynes Magistrates' Court, ex p Roberts [1995] Crim LR 224 and R v Old Street Magistrates' Court, ex p Davies [1955] Crim LR 629.

In the former of these cases, the Divisional Court in England held that the jurisdiction to restrain a prosecution was to be sparingly exercised, and only if the misconduct in the proceedings was shown to be so serious that to allow the prosecution to proceed would be tantamount

to endorsing behaviour which undermined or degraded the rule of law or because the court's process was being manipulated in a manner which caused serious prejudice to the accused."

29. In Attorney General's reference (No. 2 of 2001) [2003] UKHL 68 the House of Lords recognized a category of cases where a fair trial is possible but a degree of unfairness to the defendant renders a stay appropriate. At para 25 Lord Bingham said

"25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42, but Mr. Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (Martin v Tauranga District Court [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."

30. From this portion of Lord Bingham's speech I discern the following propositions:

First, that there exists a category of cases where the bad faith, unlawful conduct or executive manipulation towards the defendant is so grievous that a stay is appropriate notwithstanding that a fair trial can be achieved.

Second, that it is unhelpful to attempt to define these cases in advance. They will stand out and be recognisable when encountered because they will be very exceptional.

Third, that a stay will not be justified if an alternative lesser remedy exists.

31. In the present case, after careful consideration of all the evidence I have concluded that D/Sgt Sayers did eavesdrop and listen in to the consultation that took place between the defence lawyers and Inspector Wisner on the afternoon of the 1st October 2007. I accept the defence evidence that the witness list and the Book of 55/9's were discussed during that consultation. I prefer the defence evidence concerning the questions which Inspector Wisner said the D/Sgt asked him about the witness list and concerning his handling the book. I am satisfied that these questions were asked. The fact that he asked about the book is not at this stage of great moment. He knew it was being considered by the defence and could draw the simple conclusion that it was being considered by Inspector Wisner as he observed the Inspector in the room. The reference to the consideration of the witness list is altogether different. Mr. Sayers would have no basis for expecting or concluding that the list would be or had been considered by the defence team unless he had some awareness of what was going on in the consultation room. On the evidence before me he can only have become aware of this if he eavesdropped on the conversation taking place in the consultation room. I am driven to the conclusion that he did.

32. This consultation and all that was said therein was covered by legal professional privilege.

33. Legal professional privilege has held a hallowed status in our jurisprudence. In R v Derby Magistrates Court ex p. B 1996 AC 487 Lord Taylor CJ after reviewing the historical development of legal professional privilege said:

> "Legal professional privilege is… much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests."

34. The importance of such privileged status has been recognised in the jurisprudence of the European Court:-see Lanz v Austria 24430/94, S v Switzerland 14 EHRR670, Niemitz v Germany 16 EHRR97, and Brennan v UK 2001 EHRR. In this last case the Court expressed the opinion that an infringement of the right to confidential legal advice, even though it is not shown that in consequence the accused cannot

have a fair trial, may constitute a breach of Article 6 of the European Convention on Human Rights.

35. I have concluded that on this occasion there was a deliberate violation to the defendant's right to legal professional privilege. The full extent of this violation is impossible to determine because D/Sgt Sayers denies the breach and it is impossible in the face of such denial, to determine the duration of the eavesdropping. In the same way it is impossible to determine with any certainty what was overheard and the degree to which the prosecution, in the form of D/Sgt Sayers may have obtained an advantage. Similarly it is impossible to determine any prejudice that might be suffered by the accused. Although the extent of any evidence obtained by D/Sgt Sayers cannot be ascertained this does not mean that the defendant has not suffered prejudice. On the contrary the accused and her advisers are left in the position where they remain uncertain what was overheard and such uncertainty must serve to undermine their confidence in her defence.

36. If I was satisfied that the matters overheard could be ascertained, that these were of little or no moment and could be isolated and not used against the defendant's interests, I would continue to hold the view that this conduct amounts to a very serious and unlawful breach of the accused's right to the protection afforded by legal professional privilege.

37. Breach of this right was considered by the English Court of Appeal in R v Grant [2005] EWCA 1089. This case arose out of a major criminal investigation involving sophisticated eavesdropping and surveillance under the provisions of the Regulation Investigatory Powers Act 2000 ("RIPA"). The court concluded that there had been very serious breaches of the defendant's right to legal professional privilege although no prejudice could be found. Laws LJ set out the approach of the court:

(55) "Now, it is not in general the function of criminal courts to discipline the police. Not every misdemeanour by police officers in the course of an investigation will justify a stay on grounds of abuse. And plainly there are cases where prejudice or detriment to the defendant must be shown; indeed the case where the defendant is denied a fair trial by the prosecutor's act or omission may be thought a paradigm of abuse of process. Where a fair trial remains possible, faced with an application for a stay on grounds of abuse the court has a balance to strike. On the one hand public confidence in the criminal

justice system has to be maintained; and where misconduct by the police or prosecution is shown, that will favour a stay of the proceedings. On the other hand, it is the court's duty to protect the public from crime, especially serious crime; that consideration may militate in favour of refusal of a stay.

(56) 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. Bennet*t*, to which reference was made in Latif:

"The speeches in 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."

(57) We are quite clear that the deliberate interference with a detained suspect's right to the confidence of privileged communications with his solicitor, such as we have found was done here, seriously undermines the rule of law and justifies a stay on grounds of abuse of process, notwithstanding the absence of prejudice consisting in evidence gathered by the Crown as the fruit of police officers' unlawful conduct…….. As for prejudice, it is a particular vice of the police conduct in such circumstances as these (as, again, Newman J recognised in Wheel) that the court cannot know whether the police misconduct has in fact yielded fruit in the form of evidence, whether directly or indirectly, without enquiry as to what the covert surveillance revealed; but that would further violate the suspect's right of legal professional privilege. As Newman J said

"The defendants having an absolute right not to waive the privilege, it cannot be right that the court can force them to do so in order to prove the case for a stay, for to do so would be to effectively take away the very fundamental right which the law has conferred."

(58) .In all these circumstances, we conclude that there was abuse of the process here…….”

38. Earlier in this ruling I set out some detail of the experience of Inspector Wisner as he attended this consultation and encountered D/Sgt Sayers. This formed the basis of Mr. McCrudden' s first submission that a stay should be granted because the D/Sgt had by his hostile and aggressive approach to the Inspector interfered with the court process and breached the accused's right to a fair trial. As I have said I have no doubt that the Inspector was upset and concerned by these exchanges and in a less robust individual this might have created a fear or reluctance to give evidence on behalf of the defence. I am satisfied that Inspector Wisner is resolute in his intention to give evidence if required and I am satisfied that his ability to give evidence will not be impaired. To that extent I am satisfied that no prejudice will be suffered by the defendant.

39. A defendant's freedom and ability to marshal and call all available admissible evidence is a fundamental element in the right to a fair trial. It is so self evident and established a right, that it does not require authority to be cited in support of it. Any interference with that right, by the police or prosecution is a serious interference with the trial process and will attract the disapproval of the court.

40. In this case I am concerned that the conduct of D/Sgt Sayers might have had that effect. I am not satisfied that he set out to deliberately impede the defence in calling Inspector Wisner but have concluded that his attitude towards the Inspector reflects a cultural approach in the police, to police officers giving evidence on behalf of an accused. In my view if a police officer can give evidence, helpful to the defence case, he or she should be as available to the defence as any other witness. Indeed it is arguable that such witnesses should be more available. No restriction should be placed on any officer, who is not already part of the crown case and they should be free to speak with the defence lawyers if in possession of relevant evidence. This case demonstrates that officers in that situation do not enjoy that unfettered freedom.

41. I concluded that D/Sgt Sayers resented Inspector Wisner's involvement with the defence and perceived him as not being part of the team. He told the court that there existed a rule that officers could not speak to the defence or attend a consultation without permission from there superiors.

42. This approach is to some extent reflected in the advice given by C/I Thompson when he advised Mr. Wisner to contact someone from

Professional Standards branch on arrival at court and before speaking to the defence. Furthermore, after the incident with D/Sgt Sayers C/I Taylor of Professional Standards advised Mr. Wisner, through C/I Thompson, that he should report to the crown lawyers on Tuesday and discuss the issues with them. I can conceive of no reason why a police officer, able to give relevant admissible evidence to the defence, should be required to seek permission before doing so. Neither is it appropriate to ask them to speak to the Crown before or after consulting with the defendant's advisers. Such a witness should, if called to consultation, attend the consultation and allow the defendant's lawyers the opportunity to determine if the witness can give relevant admissible evidence. In saying this, I recognise that senior officers are entitled to know where their staff are at any given time, and I am of the view that a requirement, that officers inform there superiors, that they have been called to a consultation with the defence would be perfectly reasonable and would not conflict in any way with the overriding principle. I take the view that this message should be fully disseminated within the force to counter any perceived chill factor.

43. Although I am concerned that witnesses must not be prevented, or however subtly, dissuaded from assisting the defence, I am satisfied that in this case any concerns held by Inspector Wisner have now been assuaged and that he is confident about the propriety of his actions and his freedom to give evidence. I do not consider that my earlier concerns would warrant the grant of a stay on this ground. Having said that, this element does add support to the criticism made by the Defence, of the actions of a police officer with an important role to play in this prosecution.

44. I have considered whether an alternative lesser remedy than a stay is available to be deployed in this case. I have concluded that there is no alternative suitable remedy to meet the serious wrong in this case and accordingly I grant the Defence application and order that all further proceedings against the accused under this Bill of Indictment be stayed.