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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JAMES MURRAY, BRIAN GOODMAN and ASHOK BRIAN KUMAR

Before Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal by the prosecution under article 17 of the Criminal Justice (Northern Ireland) Order 2004 from a decision of Deeny J sitting in the Crown Court at Belfast whereby he ordered that proceedings against the defendants, James Murray, Brian Goodman and Ashok Brian Kumar should be stayed. Mr Murray and Mr Goodman were jointly charged with dealing with dutiable goods with intent to defraud contrary to section 170 of the Customs and Excise Management Act 1979. Mr Kumar was charged separately with three offences under the same provision. Other defendants were charged on the same indictment but it is not necessary to rehearse the charges against them at this stage. Some observations as to their involvement in the matter will be required later.

Factual background

[2] On 3 July 2002 nearly three million cigarettes were found in a shed at Breezemount Storage in Carryduff, County Down. The Crown case is that Mr Murray delivered the cigarettes to that address and that they were there looked after by Mr Goodman. Cigarettes were also found at both their homes and the prosecution alleges that duty had not been paid in respect of these. On the same date something over one million cigarettes were found in two containers at the same location. These containers had been leased to Mr

Kumar. The first charge against him relates to his alleged failure to pay duty on these cigarettes. On 7 August 2002 a vehicle driven by Mr Kumar was stopped in Belfast city centre and some 61,000 cigarettes and £7000 in cash were found. The second count relates to the failure to pay duty on those cigarettes. On the same day a search of a van at Mr Kumar's home revealed one million odd cigarettes and almost fifteen kilograms of hand roll tobacco. The third count against him relates to this find.

[3] Mr Kumar was arrested in August 2002. Mr Murray and Mr Goodman were charged in March 2003. There was a series of remand hearings and towards the end of 2004 the defendants were informed that, instead of holding a preliminary inquiry, the prosecution would transfer their cases to the Crown Court under article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988. Transfer papers were served on 8 March 2005 and all three defendants appeared before the Crown Court within a few days of that. These defendants were charged with four others on the same indictment and on 25 January 2006 a number of preliminary hearings in respect of all seven defendants began before Deeny J. Those hearings continued until 27 February 2006. Four defendants, including Mr Goodman, applied to have the charges against them dismissed under article 5 of the 1988 Order on the basis that the evidence was not sufficient for a jury properly to convict them. It was argued on behalf of all defendants that the transfer under article 3 was not effective and all seven applied for an order staying the proceedings against them by reason of alleged abuse of process, including delay, on the part of the prosecution.

[4] Deeny J refused to quash the transfers but found that there had been a number of defects in the manner in which they had been carried out. In particular, the officer in the Public Prosecution Service who had directed the transfer had not made the decision that the second and third counts on the indictment should be transferred. The officer who made that decision had not signed the certificate in respect of those charges as required by article 3 (1) (c) (ii). Moreover the decision to transfer was made before the final form of the charges was known and Deeny J considered that this constituted an irregularity. The learned judge concluded that, although these irregularities were not sufficient to warrant the quashing of the transfer, they should be taken into account in deciding whether proceedings should be stayed for abuse of process.

[5] On the applications under article 5, Deeny J dismissed the charges preferred against one of the accused in the second third and fifth counts in the indictment and against another accused in respect of the tenth count. The prosecution has not appealed those decisions. In respect of the applications for a stay on the basis of abuse of process the judge refused the applications in the case of four of the defendants and granted a stay to the three respondents. That decision was given on 26 May 2006. Application for leave to appeal

those decisions was refused by Deeny J on 1 June 2006. The application for leave was renewed to this court on 2 June and we deferred a decision on that issue until the full hearing which took place on 22 June 2006.

The issues arising on the appeal

[6] Three issues arise on the appeal. The first is whether Part IV of the 2004 Order (which makes provision for prosecution appeals) has been validly brought into force. The commencement order which purported to bring the relevant provisions into operation refers to the Secretary of State having recourse to powers conferred by article 1 (2) of the 2004 Order when, in fact, his power to do so derived from article 1 (3).

[7] The second issue concerns the question of retrospectivity. If the right to appeal has been validly brought into force, it came into operation on 18 April 2005 which was, of course, some six weeks after the respondents first appeared in the Crown Court. They argue that if appeals against Deeny J's rulings are permitted, these may only take place by giving retrospective effect to the 2004 Order and that this should not be allowed. The third issue is whether the learned judge was correct to grant a stay.

Has Part IV of the 2004 Order been brought into operation?

[8] Article 1 (2) of the Criminal Justice (Northern Ireland) Order 2004 provides: -

> "(2) The following provisions of this Order shall come into operation on the expiration of one month from the day on which this Order is made –
>
> (a) this Part;
>
> (b) Articles 14, 15, 32, 33, 34 and 36."

[9] Article 1 (3) provides: -

> "(3) The other provisions of this Order shall come into operation on such day or days as the Secretary of State may by order appoint."

[10] Prosecution appeals are dealt with in Part IV of the Order (articles 16 to 33). It is clear therefore that this part of the Order (apart from articles 32 and 33) is to be activated by the Secretary of State under the power conferred by article 1 (3). The Criminal Justice (Northern Ireland) Order 2004 (Commencement No. 2) Order 2005 (made on 9 April 2005) purports to bring

into force articles 16-20 and 26-31 of the 2004 Order on 18 April 2005. The preamble to the Order states, however: -

> "The Secretary of State, in exercise of the powers conferred on him by Article 1(2) of the Criminal Justice (Northern Ireland) Order 2004, hereby makes the following Order: …"

[11] In *Bennion, Statutory Interpretation* 4th Edition it is stated at page 354: -

> "Where the proof is overwhelming that the drafting has been bungled, and the public interest is at stake, the courts will not hesitate to apply a blunt instrument, regardless of the niceties of the language."

[12] The drafting has indeed been bungled here. Article 1 (2) contains no power for the Secretary of State to bring into force any of the provisions of the 2004 Order. Clearly that power is contained in article 1 (3). But what effect does this blunder have? In our judgment, none. The Secretary of State plainly had the power to make the commencement order. If no mention had been made of the provision under which he purported to act there could have been no question of the validity of the Order. Reference to a provision that does not contain that power cannot, in our judgment, invalidate it.

Retrospectivity

[13] The right of the prosecution to appeal rulings such as are involved in this case is contained in article 16 of the 2004 Order. It provides: -

> "**16.** - (1) In relation to a trial on indictment, the prosecution is to have the rights of appeal for which provision is made by this Part.
>
> (2) But the prosecution is to have no right of appeal under this Part in respect of –
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> (a) a ruling that a jury be discharged; or
>
> (b) a ruling from which an appeal lies to the Court of Appeal by virtue of any other statutory provision.
>
> (3) An appeal under this Part is to lie to the Court of Appeal.

(4) Such an appeal may be brought only with the leave of the judge or the Court of Appeal."

[14] Article 17 (1) confers a general right of appeal in respect of rulings and applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment. Applicable time is defined in article 17 (13) as "any time (whether before or after the commencement of the trial) before the time when the judge starts his summing-up to the jury".

[15] Identical provisions that apply to England and Wales are found in sections 57 and 58 (1) of the Criminal Justice Act 2003. But the provisions relating to the transitional effect of the respective provisions differ. Article 34 of the 2004 Order provides that any order made by the Secretary of State under the Order may contain any transitory, transitional or saving provision which the Secretary of State considers necessary or expedient. A similar provision in relation to the 2003 Act is to be found in section 330 of that Act. The provisions relating to prosecution appeals in the 2003 Act (Sections 57 to 61, 67 to 72 and 74) came into force in England and Wales on 4 April 2005 by virtue of paragraph 4 of Schedule 1 to the Act. As we have observed in paragraph [10] above, the relevant parts of the 2004 Order were brought into operation on 18 April 2005.

[16] Whereas the Secretary of State in England and Wales has exercised his power to make transitional provisions in Northern Ireland this has not happened. The effect of paragraph 3 of Schedule 2 to the Criminal Justice Act 2003 (Commencement No 8 and Transitional Saving Provision) Order 2005 is that no right of appeal vests in the prosecution in respect of cases where before 4 April 2005 the defendant had been committed for trial; or the proceedings had been transferred to the Crown Court; or an order had been made by a magistrates court that the accused be sent for trial for an indictable only offence under section 51 of the Crime and Disorder Act 1998; or a bill of indictment had been preferred by the direction or with the consent of a judge of the High Court. No such provision is to be found in the Criminal Justice (Northern Ireland) Order 2004 Commencement No 2 Order 2005.

[17] If a similar provision to that contained in paragraph 3 of Schedule 2 to the 2005 Order in England and Wales was in force in Northern Ireland it is accepted that the prosecution would have no right of appeal because proceedings had been transferred to the Crown Court in March 2005.

[18] The respondents argue that, absent any transitional provision, the Northern Ireland Commencement Order can only have effect in relation to proceedings begun after 18 April 2005. To permit the prosecution to appeal in relation to trials where proceedings against the defendants had begun before

that date would give retrospective effect, they submit. They further argue that since the changes brought about by the 2004 Order affect their substantive rights there is a presumption against the legislation having retrospective effect.

[19] We do not accept that the recognition of a right of appeal in the prosecution in respect of the rulings of Deeny J involves giving the 2004 Order retrospective effect. The Commencement Order of 2005 brought the relevant provisions into *current* effect. In our judgment the Commencement Order in England and Wales was not designed to capture cases that would otherwise be excluded from the effect of the 2003 Act. On the contrary, the language of that Order makes clear the intention of the legislature to remove from the ambit of the legislation proceedings to which it would otherwise apply. We are satisfied, therefore, that the respondents' argument that it is necessary to give retrospective effect to the 2004 Order in order to allow the prosecution appeal the rulings of Deeny J must fail. In those circumstances it is unnecessary for us to consider the secondary issue whether the conferring of a right of appeal on the prosecution constitutes a procedural or substantive change in the law.

Should the judge have stayed the proceedings?

[20] Deeny J held that the respondents could receive a fair trial, notwithstanding that the requirement that there should be a trial within a reasonable time (as required by article 6 of the European Convention on Human Rights and Fundamental Freedoms) had been breached. He concluded, however, that it would be unfair that the respondents should be tried. His reasons for this conclusion in the case of Mr Goodman appear to be that he could have been prosecuted immediately after the cigarettes were found in July 2002. In this context the judge said, "It seems to me quite unfair to try somebody for a single offence committed more than four years before unless there is some particular and convincing reason to do so." Much the same reason was given by the judge for acceding to the application for a stay in the case of Mr Murray and Mr Kumar.

[21] The judge relied on the decision of the House of Lords in *Attorney General's reference (No 2 of 2001)* [2004] 1 All ER 1049 and quoted from Lord Bingham's opinion in that case. He suggested that the effect of the decision was to recognise that there was a category of general unfairness that could justify the grant of a stay. Mr Thompson QC for the prosecution criticised this approach, suggesting that Lord Bingham had made it clear that those cases where a fair trial was possible but it would otherwise be unfair to allow the prosecution to continue were wholly exceptional. There was nothing in the least exceptional about these cases, Mr Thompson suggested. Indeed, he pointed out, the learned trial judge had accepted that the delay in the case

was not of an order that was in the least unusual. At paragraph [35] of his judgment Deeny J said: -

> "The events here took place between 1 August 2000 and 12 March 2003. Counsel for some defendants contended that their clients had little memory for their movements or even their documents of that time and that a fair trial would be impossible. I reject that argument. It is intended to try this case in the autumn of 2006 and I see nothing remotely impossible about events 3-6 years previously being considered in evidence. No doubt counsel, and indeed the judge will point out to a jury that one's recollection of events, particularly if unremarkable, may well be impaired. A jury may think that an obvious matter but may well expect people to have some memory of such events and some understanding of their own documents. Since the hearing of these applications I have heard, among other matters, civil actions relating to events nine years ago in one case and in another case of medical negligence 27 years ago. No one suggested that it was impossible to do justice in those cases. Cases of historic sexual abuse are also tried in the courts, after decades, albeit with caution."

[22] Mr Thompson suggested that the category of cases where a stay should be granted because of unfairness to the accused falling short of making his trial unfair must be confined to those where allowing the case to continue would obviously offend all notions of justice – to what he described as the 'outrage' category. This was plainly not such a case, he argued. Moreover, it is clear that the breach of the respondents' article 6 rights could be vindicated in a manner other than by staying the proceedings against them. He submitted that the learned trial judge had failed to consider this possibility and on that account alone his judgment should not be upheld.

[23] It is, we believe, important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is possible but some other species of unfairness to the accused makes a stay appropriate. We therefore set out in full paragraph [25] of his opinion: -

> "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 *Bennett v*

> *Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [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 State* (2000) 8 BHRC 662 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 DC* [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."

[24] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith, unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's convention right is possible, a stay will *never* be appropriate.

[25] We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not.

[26] In our opinion, the learned trial judge failed to recognise that, where a fair trial was possible, exceptionality was a fundamental requirement before a stay could be granted on the ground of other unfairness to the accused. Had he done so, it seems to us inevitable that he would have refused the application since, as we have said, the only reason he gave for granting the

stay was that four years had elapsed since the offences had been detected. The judge did not suggest that this was exceptional; indeed in the passage that we have quoted at paragraph [21] above, he explained why it should not be so regarded. What the judge appears to have done is to assume that a delay of four years was *ipso facto* unfair unless there was "a particular and compelling reason" to continue the prosecution. This appears to us to depart from the approach of Lord Bingham who stated that unfairness in this category would only arise if there were some exceptional circumstances. The appeal must therefore be allowed.

[27] To the question of a lesser remedy being sufficient to vindicate the respondents' convention rights, the learned judge made only one somewhat elliptical allusion when he said (at paragraph [49] of his judgment) in relation to Mr Kumar: -

> "It seems to me that, although Mr Kumar has been on bail, in all the circumstances, including his personal circumstances to which counsel drew my attention, the alternative remedies which at the very least would need to be applied here would render largely futile any continued trial of the accused."

[28] In so far as this may be taken to suggest that the penalty that could be imposed on Mr Kumar, in light of the failure to adhere to the reasonable time requirement, was so insignificant that his trial should not be allowed to continue, we consider that the statement was erroneous in point of principle. As we have said, Lord Bingham has made it clear that a stay should not be granted where a defendant's convention rights can be vindicated by some lesser remedy. That consequence should not follow because the trial might be considered futile. The judge does not appear to have considered whether a lesser remedy would have been sufficient to reflect breach of the respondents' right to an expeditious trial. If he had done, we are of the view that he would have concluded that that right could have been vindicated other than by staying the proceedings against them, for example by way of mitigation of sentence if convicted. On that account also the appeal against his decision must be allowed.

Conclusions

[29] We have concluded that the learned trial judge failed to properly apply the second limb of the test articulated by Lord Bingham in paragraph [25] of the *Attorney General's reference (No 2 of 2001)* and that he failed to consider whether a lesser remedy would have been adequate to vindicate the respondents' convention rights. We will therefore grant leave to the prosecution to appeal against his ruling that proceedings against the three

respondents be stayed and allow the prosecution's appeal. The various counts against the respondents that were the subject of the stay will be restored to the indictment and they will stand trial with the other defendants on the offences charged in those counts.