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Briefing Note

Non-availability of CCTV: an unfair trial or a surmountable challenge?

For many lawyers, the recent press coverage of the disclosure issues present in the criminal justice system has not been a surprise. A recent BBC survey reported that more than 1,000 criminal lawyers in England and Wales have experienced disclosure of evidence failings in the last year and of the 1,282 who responded, almost a third said they believed such failings had led to possible wrongful convictions or miscarriages of justice. However, although it must be highlighted that the Crown Prosecution Service said that this was a 'skewed view', there is a prominent view that issues with disclosure are systematic and far-reaching within the system.

With the current climate in mind, the issue of loss of CCTV is an important one that lawyers encounter, therefore, recognising when an abuse of process argument should and could be made is a useful tool.

The law on abuse of process arguments

There is a discretion on the part of the Court to stay the proceedings to prevent abuse of the process. The power has been coined in *Connelly v DPP [1964] AC 1254* where Lord Reed, at paragraph 1296, stated that the Court has "a residual discretion to convert anything which savors of abuse of process".

In *Beckford [1996] 1 Cr App R 94*, two key questions were identified for the Court: (1) to what extent is the accused prejudiced? (2) to what degree are the rule of law and the administration of justice undermined by the behaviour of the investigators or the prosecution?

In *R v Horseferry Road Magistrates Court ex parte Bennett (1994) 1 AC 42* the House of Lords confirmed that the power to stay can be used where it is impossible in the circumstances of the case to give the defendant a fair trial because one of two factors are present:

- (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality or
- (b) on the balance of probability the defendant has been or will be, prejudiced in the preparation or conduct of his defence on the part of the prosecution which is unjustifiable.



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The former is relevant to the trial process, whereas the latter is applicable where the accused should not be standing trial at all. This case set out the definition of manipulation or misuse of the process: this is to undermine the moral integrity of the process.

Moreover, when pursuing an abuse of process argument, the right to a fair trial under ECHR article 6 is often relied upon as well as the overriding objective set out in criminal procedure rules.

The burden and standard of proof on the crown balance of probabilities, as set out in the case of *Telford justices; ex parte Badhan* [1991] 2 QB 78.

Failing to obtain, losing or destroying evidence

There is no exhaustive list or indeed a definitive list of categories that amount to a potential abuse of process, albeit, failing to secure or destroying evidence is one of the recognised categories. A frequent scenario is missing CCTV and when this arises as an issue, the court has a discretion to stay proceedings.

The leading authority on this issue is *R v Feltham Magistrates Court ex-parte Ebrahim, Mourat v DPP (2008) 1 AER 831*. This case gave guidance as to the approach the Court should adopt when faced with the non-availability of evidence at trial, with specific reference to video tape evidence. Brooke LJ said that the starting point must be to ask whether there was a duty on the investigator to obtain or retain the material in question. That question will be answered mainly through the code of practice published pursuant to Section 23 and 25 of the Criminal Procedure and Investigations Act 1996 and the Attorney Generals Disclosure Guidelines. |

If there is no duty to investigate, then naturally there are no grounds to stay. However, if there is a duty and that has been breached then there must be an element of bad faith, or at least some serious fault on the part of the police or the prosecution authorities for this ground of challenge to succeed (per Brooke LJ, para 23). Subsequently, the stay will not be granted, unless there has been bad faith on the part of the prosecution resulting in the accused could not have a fair trial.

Brooke LJ, at paragraph 27, set out the two guiding principles for when a court is invited to stay proceedings for abuse of process:



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- 1) **The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law which involves fairness to the Defendant and the Prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well that those whose guilty there is any reasonable doubt should be acquitted;**
- 2) **The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded;**

Moreover, the case of *Clay v Clerk to the Justices [2014] EWHC 321 (Admin) 2014 WL 16594* commented on the Case of *Ebrahim*. The facts of this case were that there had been a lorry that had driven into the back of a car and the police gave authority to release the car and it was disposed of. Lord Justice Pitchford, stated at paragraph 46-48:

“With great respect to the court in Ebrahim, it seems to me that the question of whether the defendant can have a fair trial does not logically depend upon whether anyone was “at fault” in causing the exigency that created the unfairness. If vital evidence has as a matter of fact been lost to the defendant whether occasioned by the fault of the police or not, the issue is whether that disadvantage can be accommodated at his trial so as to ensure that his trial is fair. There is in this respect no difference between an unfair trial occasioned by delay and an unfair trial occasioned by the loss of vital evidence. This, it seems to me, was recognised by this court in Ebrahim by the inclusion at paragraph 28 of the citation from the judgment of Lord Lane Chief Justice in Attorney General’s reference (No 1 of 1990).”

Therefore, it has been clearly stated that the ultimate question for the Court is to ask itself if there has been a disadvantage, and if so, whether there is something that can be done to rectify this disadvantage and ensure a fair trial can take place.

What amounts to an abuse of process

Looking at the case law, it is certainly more difficult to find examples of cases where the court has held that missing evidence such as CCTV evidence amounts to an abuse of process. However, in *R v Birmingham [1992] Cr. R117*, HHJ Bromley QC held that an indictment would



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be stayed. The existence of a video recording of part of the incident was not disclosed to the Defence prior to the trial. Although the police officer had viewed the video, it had been lost by the time the trial came. It was held that the material prejudiced the Defendant to such an extent made a fair Trial impossible.

How likely is it the argument to succeed?

There is a high threshold set to convince a court that there is an abuse of process. The case of *Attorney General's Reference (No 1 of 1990)* 95 Cr App R 296; *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 HL held that an abuse of process should be exercised only in exceptional circumstances, specifically where it is impossible by other means to prevent an unfair trial.

It is difficult for a defence lawyer, because although a piece of evidence such as CCTV would assist a defendant, this is not enough per se to stay proceedings. For example, a situation that is commonly encountered is where the Defendant is saying that he or she acted in self-defence and that CCTV evidence would confirm his or her innocence. However, although the CCTV was in existence it has been destroyed or has gone missing. The problem for that Defendant is that although that evidence would assist them (so they say), this does not lead to a stay necessarily. The Court must turn its mind to the existence of other evidence in the case and allow the defence by taking advantage of the fact that key evidence has not been produced by the Crown (*Khalid Ali v CPS* [2007] EWCA Crim 691). The Court is likely to say that the Defence can cross-examine on this issue and that is sufficient. They are likely to also hold that the Court will take into account that the defence had not been given the opportunity to view the CCTV. Although this position will be inadequate and frustrating for many Defendants because the only route open to their advocate will be to cross-examine a police officer who has viewed the CCTV and that will be difficult if the Defence advocate has not had the ability to view that CCTV.

Moreover, missing evidence for one reason or another is not an unusual situation. Thus, the process should not be used simply as a form of punishing the Crown for not having the evidence. Ultimately, the case law is clear that where there has been no bad faith and attempts have been made by the prosecution to get the evidence, this is unlikely to amount to an unfair trial.



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Conclusion

The overriding objective surrounding abuse of process arguments is to achieve a fair trial and unless the defence can satisfy the court that this will not be achieved, they will be in difficulty. The format of the trial process is adversarial and the burden is on the Prosecution meaning the defence will face an uphill battle to convince a court that deficiencies in evidence, such as missing CCTV, amounts to an abuse of process.

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