



28 March 2011

PRESS SUMMARY

Curtis Francis Warren and others (Appellant) v Her Majesty's Attorney General for the Bailiwick of Jersey (Respondent) **[2011] UKPC 10**

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Brown, Lord Kerr, Lord Dyson.

BACKGROUND TO THE APPEAL

This appeal concerns the jurisdiction of the court to grant a stay for abuse of process on the grounds that it offends the court's sense of justice and propriety to be asked to try the accused given the particular circumstances of the case. A stay would have the effect of ending the proceedings. In June or early July 2007, the States of Jersey Police suspected that the appellants were planning to import a large quantity of drugs into Jersey. They believed that the plan involved the drugs being transported from Amsterdam to France by the Second Appellant, Mr Welsh, in his own Jersey-registered car and then shipped to Jersey. The police wished to fit a tracking device and an audio recording device in the car. Consent was obtained from the Attorney General for use of the two devices in Jersey. The French, Dutch and Belgian authorities authorised the use of a tracking device but the French and Dutch authorities refused permission for audio monitoring. A senior member of the Law Officers' Department in Jersey advised the police that despite the French and Dutch refusals, he did not think that a Jersey court would be likely to exclude any evidence so obtained and that the use of the devices was an operational decision for the police. By 18 July the police were aware that the appellants' plan had changed. The conspirators now intended to hire a car at St Malo. The police sought and received French approval for a tracking device in the hire car but decided not to raise the issue of the audio device in view of the earlier refusal. On 18 July, Jersey police officers installed both a tracking and an audio device on the hire car in France. They misled the French authorities by informing them that the audio device was a "back-up" for the tracking device. On 19 July, Mr Welsh collected the hire car and drove to Amsterdam. Later that same day, the police became aware that the appellants might use a small boat to transport some of the drugs. The police obtained the consent of the Attorney General to install tracking and audio devices on the boat. The Attorney General made it clear that in light of the French authorities' refusal to authorise the audio device, it should be switched off when the boat entered French waters. The police did not tell the Attorney General that the hire car was subject of audio surveillance without the permission of the French authorities. Late on 19 July and into the morning of 20 July, the audio device recorded conversations between Mr Welsh and his co-conspirators which were crucial to the prosecution's case against the appellants. On 7 October 2009 the appellants were convicted of conspiracy to import into Jersey 180 kg of cannabis, a class B controlled drug.

In a preparatory hearing in March 2008 the appellants applied to the Jersey Royal Court for the proceedings to be stayed on the grounds of abuse of process since crucial evidence against them had been obtained as a result of serious police misconduct in the circumstances described above. Commissioner Tucker heard evidence over 4 days and dismissed the application (*AG v Warren and others* [2008] JRC 050). In April 2008, the appellants sought a ruling that the evidence obtained by the use of the audio device was inadmissible under Article 76(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003. This was also dismissed. Leave to appeal to the Court of Appeal was

refused for both applications. The Court of Appeal of Jersey heard a renewed application for leave to appeal against both decisions and dismissed both applications on 14 August 2008 (*Warren and others v AG* [2009] JLR 248). The appellants now appeal to the Board, but only against the refusal of a stay. A successful appeal would inevitably lead to the quashing of the convictions.

JUDGMENT

The Board unanimously dismisses the appeal. Lord Dyson gives the lead judgment. The Board holds that in refusing to grant a stay, the Commissioner reached a conclusion that he was entitled to reach.

REASONS FOR THE JUDGMENT

The court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. The two categories are distinct and should be considered separately. Fairness is the focus of the first category, the second focuses on the court's sense of justice and propriety and public confidence in the criminal justice system: [35]. This case is concerned with the second category. When considering whether to grant a stay in this category of case, the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. Whilst in abduction and entrapment cases, the court will generally conclude that the balance favours a stay, there are, however, no hard edged rules or rigid classifications: [21]-[26]. Further, the fact that but for the abuse of executive power, there would have been no trial is a relevant factor to be taken into account in conducting the balancing exercise, but no more than that. It is not necessarily determinative: [28]-[30]. In light of this, the decision of the Court of Appeal of England and Wales in *R v Grant* [2005] EWCA Crim 1089 was wrong. In particular, the Board emphasises that a stay should not be granted in order to express the court's disapproval of the police misconduct and/or to discipline the police: [31]-[37].

In the present case, there was a strong case for a stay. The police were unquestionably guilty of serious prosecutorial misconduct. They misled the authorities of Jersey and three foreign states. Further, without the product of the unlawfulness, there would have been no trial. However, as against that there were factors which entitled the Commissioner to refuse a stay. First, the offence with which the appellants were charged was very serious. Secondly, the first appellant was a professional drug dealer of the first order. Thirdly, the unwise advice of a senior member of Law Officers' Department to the effect that a court would be likely to admit the unlawfully obtained evidence to some extent mitigated the gravity of the misconduct of the police. Fourthly, there was no attempt to mislead the Jersey court. Fifthly, the police were faced with a fast moving situation and there was real urgency. The Commissioner had to undertake a difficult balancing exercise; it would have been open to him to have decided the case the other way. However, the decision to grant a stay was not perverse or one which no reasonable judge could have reached [45]-[50]. Further, the Board rejects the submission that the Commissioner left out of account the deception of the Attorney General. There is no reason to suppose that the Commissioner did not have regard to the points to which he did not specifically refer in his judgment; or that if he did fail to have regard to them, they would have made any difference to the outcome: [56]-[58].

The Board stresses its condemnation of the police misconduct in this case. It was a sustained and deliberate act of law-breaking. The outcome of this appeal should not be seen to condone or overlook such behaviour. It should not be taken by Jersey police as any kind of signal that they can repeat this kind of conduct with impunity. Indeed, future repetition of such behaviour may well tip the balance in favour of granting a stay: [45], [61]-[63], [70]-[71], [81]-[82].

NOTE

This summary is provided to assist in understanding the Committee's advice. It does not form part of the reasons for the advice. The full advice of the Committee is the only authoritative document. Advices are public documents and are available at: www.jcpc.gov.uk/decided-cases/index.html