SCSL-2004-14-T 11972

340 (11972 - 11989)

SPECIAL COURT FOR SIERRA LEONE

The Trial Chamber

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 08 February 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL -04-14-T

ABUSE OF PROCESS MOTION

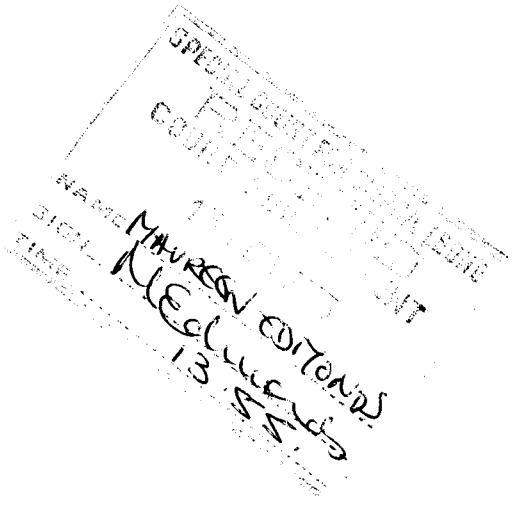
By First Accused for Stay of Trial Proceedings

Office of the Prosecutor
Luc Cote
James C. Johnson
Kevin Tavener

Court Appointed Counsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall Jr.

Court Appointed counsel for Moinina Fofana
Michiel Pestman
Arrow J. Bockarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana



I. INTRODUCTION: THE APPLICATION

1. Pursuant to rules 54 and 73 (A) of the Rules of Procedure and Evidence (the Rules) of the Special Court for Sierra Leone (SCSL), the First Accused in the current Civil Defence Forces (CDF) trial before the SCSL hereby applies to the Trial Chamber for "appropriate relief"(Rule 73(A)) in view of gross and sustained abuses of the process of the SCSL since its inception and since commencement of the present trial proceedings upon the current consolidated indictment right up until the present moment, whereby the First Accused, with others, has been and continues to be deprived of crucial due process rights, thereby irretrievably prejudicing his rights to a fair trial, contrary to the interests of justice and degrading to the integrity of the process of international criminal adjudication.(See ANNEX for references).

II. SUBMISSIONS: ABUSES OF PROCESS

2. The First Accused globally submits that, in their entirety, both the current consolidated indictment and the trial proceedings conducted upon it so far have been from their inception not only completely null and void but also contrary to the interests of justice and a disservice to the integrity of the process of international criminal adjudication. This is primarily because of their original mode of genesis and their subsequent application as a basis for and a process of administering international criminal justice, all of which have conjointly engendered a gross and sustained abuse of process in which the accused persons are deprived of crucial due process rights and thereby irretrievably prejudiced in their rights to a fair trial.

A. Mode of Genesis

3. The prosecution's Joinder Motion under Rules 48(B) and 73, in so far as its joint-charging or consolidation aspect was concerned, was a violation of the relevant material rules, and its failure to annex the draft consolidated indictment to the motion was also a violation of a regular rule of standard practice in the international criminal tribunals. In each case, the process and procedure applied were without jurisdiction and so fatally flawed that the ensuing consolidated indictment was a nullity ab initio, thereby making it a huge abuse of process that the CDF trial was founded and is being sustained upon it.(See ANNEX for references).

(i). Violation of Standard Practice

4. As to annexing drafts, the truth of the matter, quite simply, is that it seems to be quite a hard and fast rule of regular practice in both the sister international criminal tribunals of the ICTY and ICTR that drafts of such proposed consolidated or proposed amended indictments tend invariably to be attached to the relevant request motions at the time of filing (See ANNEX Item 5).

5. There is also the question of jurisdiction. As Trial Chamber I at the ICTR ruled only the day before the SCSL Joinder Decision:

> "The Chamber has no jurisdiction to decide motions on Indictments which have been superseded; nor to decide motions in respect of Indictments which did not exist at the time of filing" (Emphasis added).[1]

(ii). Violations of Joinder Rules

6 There are also violations in respect of the actual joinder rules and their related processes. Although SCSL Rule 48(B) governs applications for "joint trial", it is purposely designed to do only that and nothing more, thereby rendering it definitively inappropriate and unavailable as a vehicle for seeking or granting leave for a "consolidation" of pre-existing indictments or indeed even a "joint-charging" of accused persons. Furthermore, there is in fact a relative mutual exclusivity or a distinctive individuating emphasis in the regime of SCSL joinder rules proper, whereby they are each designed exclusively and specifically for their respective purposes and functions, as individually defined. For example, sub-rule 48(A) provides conjunctively for both the joint charging and joint trial of the appropriate set of accused persons, thereby making it the natural normal vehicle for applying for the joint charging and joint trial of such accused persons, including, where applicable, the consolidation of two or more separate indictments of such accused persons.

7. It is submitted that both Rule 48(B) and Rule 48(C) were foreclosed and unavailable for the purpose of consolidation as such, because it is obvious that they are not designed to accommodate consolidations of indictments. Moreover, the prosecution

[1] Simba, ICTR-01-76-I: "Decision on Defence Motion Alleging Defects in the Form of the Indictment", 26th January 2004, para. 5.

could otherwise have made non-consolidation applications under either Rule 48(B) or Rule 48(C) separately, wherein however it would not have been able to make the additions or changes in respect of the First Accused. Or it could have made such additions in applications under one or other of those two rules in combination in each case with Rule 50(A) Third Limb, but now **subject to further prosecution obligations or further defence rights and entitlements either under subrule 50(B), as specified, or even under the primordial Rule 47 and selective combinations of its systemic progeny of processes in terms of Rules 52, 61, 62, 66, 72 and/or 73, for instance, among others, as applicable**. But, obviously, the prosecution did not wish either to forego the said additions or to be subjected to the prosecution obligations or defence entitlements as highlighted herein in securing them.

B. Abuses of Process

8. Dogged and calculated prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, together with its ulterior reasoning and impulsion thereto, plus the consistent (even if unintended) blessing of equally determined judicial endorsements thereof, and a certain congenital constitutive anomaly, have sustained the current consolidated indictment in ways tantamount to a gross and sustained abuse of process that has, in its own turn, and from the very constituting of the Special Court and the earliest beginnings of the entire prosecution process right up until the present proceedings, repeatedly violated and egregiously prejudiced the due process rights of the accused persons, and thereby subverted the interests of justice and the integrity of the judicial process itself.

(i). Rights of the Accused.

9. The rights of accused persons, substantive and procedural alike, are enshrined in the applicable laws for the Special Court, as listed and categorised in Rule 72 bis, including fundamental rights provisions of applicable treaties and conventions like Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1966) (ICCPR), and the African Charter on Human and Peoples' Rights (1981) (ACHPR), and also Chapter III of the Constitution of Sierra Leone, Act No. 6 of 1991(C 1991 SL), containing provisions on "the

recognition and protection of fundamental human rights and freedoms of the individual".

(1). Substantive Rights

10. The substantive rights of accused persons are typically characterised as fundamental human rights and freedoms in the applicable international and national human rights instruments, subject to specified trumping considerations (Articles 7(1) (a) and 27(2) ACHPR; 29(2) UDHR; sections 15 and 23 of C 1991 SL). The only derogations permitted from these rights are as expressly specified therein by law, if at all.

11. One of the most crucial rights of the accused is **the presumption of innocence** enshrined in Article 17(3) of the SCSL Statute, and obviously deriving force and inspiration from stipulations in that regard in Articles 11(1) UDHR, 7(1)(b) ACHPR and 14(2) ICCPR, and section 23(4) of C 1991 SL. The stipulation that the Special Court for Sierra Leone was established "**to prosecute persons who bear the greatest responsibility for**" the relevant crimes[2], seems to have serious implications for the presumption of innocence for the accused persons.

12. The substantive right to **protection against double jeopardy** is distinctively stipulated in Article 9 of the SCSL Statute and in more general terms in both Article 14(7) ICCPR and section 23(9) of C 1991 SL, for example.

13. The rights enshrined in **Article 17(4)(a) and (b)** of the SCSL Statute are also replicated in the same terms in both Article 14(3)(a) and (b) ICCPR and section 23(5)(a) and (b) of C 1991 SL. The proper and effective observance of these fundamental rights by the relevant authorities and the formal means and measures whereby such observance may be effected and ensured are specifically provided for in SCSL Rules 52 and 61, for example.

14 The encompassing complex of requirements for "**a fair and public hearing by a competent, independent and impartial tribunal established by law" and for the accused person "to be tried without undue delay"**(Articles 14(1) and 14(3)(c) ICCPR respectively), as also stipulated in Article 10 UDHR, **Articles 13(1) and 7(2) and 17(4)(c) of the SCSL Statute**, and section 23(1) and (3) of C 1991 SL, comprise perhaps the most crucial set of substantive rights for accused persons.

[2] See preambular para.2 and Article 1(1) of the Agreement and Articles 1(1) and 15(1) of the SCSL Statute.

15 The general force and effect of the various human rights norms and standards, national and international alike, is **that the violation of the fundamental human right of an individual is in itself necessarily egregious, and also perforce prejudicial to the right's owner in question**(See, for example, sections 15, 28, 127 and 171(15) of C 1991 S.L.)

2). Procedural "Rights".

16 Rule 26 bis and Rule 5 of the SCSL Rules, in effect, carry over into the regime of procedural rules the force and import of the foregoing substantive rights and of the effect of their violations. Rule 26 bis expressly incorporates and integrates into the procedural rules both the fairness and expeditiousness requirements for trials, by specific reference thereto, and the remaining range of substantive rights for accused persons, by generic reference thereto.

17. It is submitted that, considering this integration by Rule 26 bis, and in view of the principle of holistic textual construction, then **if the "material prejudice" issuing from a non-compliance with a Rule amounts in fact to a violation of a fundamental human right or of a substantive right of the accused as espoused above, or if the said Rule is itself infused with any such right, as Rule 26 bis itself is, the effect of that violation or non-compliance would or ought to be an annulment of the means or measure whereby it was effectuated or manifested. Nor, it is further submitted, would that annulment have to depend upon the stage at which the objection was raised, in so far as a fundamental human right or a substantive right of the accused person was violated in the process. And finally, that the violation of such a fundamental or substantive right would in itself be deemed to be necessarily egregious and to thereby constitute the "material prejudice" to the right's owner in question.** Indeed, it would appear from certain decisions "that in certain circumstances, human rights considerations could override the clear language and meaning of the Tribunal's Rules"[3]

18. Furthermore, an accused person has a vested interest in and entitlement to, not only the prompt and proper performance by all concerned (including the prosecution and the court itself) of all their respective duties and obligations under the applicable laws, but also their keen and ready observance of all his/her own substantive rights

[3] Jones & Powles, op. cit., p. 579; see also p. 564.

as an accused person as stipulated by primary legislation and, in particular, their due and direct compliance with all relevant rules of procedure and evidence bearing upon his/her prosecution and defence, as and when they each fall due for application and/or enforcement in all three respects. The accused person's interests in and entitlements to the phenomena and processes at these three levels of criminal adjudication are rightly called his/her procedural "rights", deprivation or violation of which can cause varying degrees of prejudice to him/her in the quest for justice.

19 Under **Limbs (C) and (E) of Rule 47**, for instance, an accused person has the opportunity of the charge(s) against him/her being possibly altogether or partially dismissed; or at least so definitively verified that he/she can begin early to prepare for his/her proper defence with confidence. Non-compliance with, or abuse or misuse of, a relevant rule which deprives him/her of these interests and/or entitlements could redound into a violation of any of the substantive rights under Article 17 SCSL Statute, as specified above.

20. Furthermore, **amendment under Rule 50(A) Third Limb** obtains only "at or after" an initial appearance under Rule 61. Rule 50(B) then stipulates that if after an initial appearance an indictment is amended so as to include "new charges", then the accused person in question automatically becomes mandatorily entitled to application of the measures and/or processes under Rules 61, 66(A)(i) and 72 in respect of the new charge(s). Under Rule 72(B), for example, the Accused could raise objections as to jurisdiction, formal defects, or abuse of process, in relation to the new charge(s); he/she could also apply thereunder for severance of the new charge(s) or indeed for separate trials all over again. Depriving him/her of any of them, not to talk of more or all of them in a fell swoop, would constitute a severe prejudice to him/her.

21. As for the exercise of **service of an indictment under Rule 52**, it is intimately tied up with the observance of such fundamental human rights or substantive rights of an accused person as are stipulated in Article 17(4) (a) and (b) and (c) and the all-important subsuming right to a fair trial under Article 17(2), all of the SCSL Statute, with their respective counterparts in the international and domestic national human rights instruments as surveyed above.

22. And then, of course, the related **Rules 61 and 62. The need for arraignment on an indictment or charge** is both obvious and irrefutable. The indictment or charge is

required to be read to the accused so as to ensure that he understands it (Rule 61(ii), all in due observance and service of his substantive rights under SCSL Article 17(2) and 17(4)(a) to (c) inclusive. The compulsory entering of a plea of guilty or not guilty, on each count or charge in the indictment, thereby ensures the Accused's understanding of the indictment, his/her formal subjection to the jurisdiction of the court, and the triggering off of the actual trial process.

23. Even **the possibility of a guilty plea** is quite momentous **(Rule 61(v), Rule 62(A))**. Again the relevance of this exercise both as being in the observance or service of the substantive rights of the accused and as to the potential prejudice from its avoidance, evasion, or deprivation are quite obvious.

24. As to **Rule 51**, which concerns **the need to withdraw an indictment,** its application in a situation where a new indictment after an extensive amendment or a consolidation leaves the previous indictment(s) on the books, can put paid to any threat or possibility of a present or future exposure to the negative operation of the rule against double jeopardy.

(ii). Rights Violations and Abuses of Process.

(1) The Abuse of Process Doctrine

25. ***The abuse of process and the inherent power and duty of a criminal court to stay or terminate a pending or an ongoing prosecution so as to forestall, avoid or prevent the abuse or degradation of its own process, from any source whatsoever,*** are well established in the law. The factors and circumstances that may give rise to operation of the abuse of process doctrine include delay and ***if "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***"(per Sir Roger Omrod, in ex p. Brooks (1984) at pp. 168-169); or in those of Lord Griffiths in the Bennett case "***a responsibility for the maintenance of the rule of law***" and a "***(refusal) to countenance behaviour that threatens either basic human rights or the rule of law"***(at p.150 e-f) (emphases added).

26. In the case of international criminal tribunals, relevant jurisprudence recognises the applicability of this doctrine at both Trial and Appeals Chambers levels, together with attendant supervisory powers to apply and enforce it directly. (See Barayagwiza, paras. 74, 75, 76).

(2). Rights Violations.

27. From the foregoing analysis and submissions, it is clear that the constituting of the Special Court itself, at least in one respect, and the subsequent instituting and conducting of the entire pre-trial and trial proceedings upon the current consolidated indictment against the three accused persons, have only been made possible by acts which egregiously violate the substantive fundamental rights of the accused persons and whereby the prosecution has manipulated or misused the process of the court so as to deprive the accused persons of crucial protections, interests and entitlements provided by the law.

28. As was mooted above, even the enactment of the avowed purpose of establishing the Special Court as being "**to prosecute persons who bear the greatest responsibility for**" the commission of the relevant crimes is a congenital constitutive anomaly which infringes **the presumption of innocence**. Now, the phrase, "**persons who bear the greatest responsibility for**", is not an element or part of an element or the definition of any of the offences or crimes under the SCSL Statute; and so it is not required to be proved by the prosecution beyond reasonable doubt or at all at the trial. It is at best an administrative identification of the persons or category of persons who are targeted for prosecution but are usually to be determined only by undisplayed prosecutorial discretion. But by legislatively characterising such categories in advance by non-defining epithets, any person who gets arrested for prosecution for any of the specified offences is thereby automatically characterised as "**bearing the greatest responsibility for**" the commission of some crime which has yet to be proven by the prosecution.

29. **The protection** of the accused persons **against double jeopardy** is also egregiously violated in the current trial proceedings, this time by the adamant refusal of the prosecution **to formally withdraw the previous separate individual indictments** after the adoption of the consolidated indictment against all three accused persons jointly.

30. ***These egregious violations have gravely prejudiced the accused persons, and in particular the First Accused, in the conduct of their cases to such an extent that any sense of justice and propriety in continuing the trial proceedings is severely outraged and will only redound to further misuse and degradation of the process***

of the court and prove detrimental to the dignity and integrity of the court. Indeed, they constitute a gross deprivation and denial of the principle of fundamental fairness, of fundamental human rights and of the rule of law itself.

III. RELIEFS BEING SOUGHT

31 (1). INTERIM STAY of all CDF trial proceedings, with immediate effect as from the beginning of the fourth session thereof, pending final determination of this application.

(2). A DECLARATION to the effect that the current consolidated indictment is and has been since its inception invalid, null and void as a result of its illegal modes of genesis or coming into being.

(3). A DECLARATION to the effect that the current consolidated indictment and all trial proceedings thereon ought to be permanently stayed or terminated forthwith and immediately, on the ground of egregious abuses of the process of the Court in view of sustained and severe violations of the fundamental substantive rights of the accused.

(4). AN ORDER DISMISSING the current consolidated indictment forthwith and immediately, with prejudice to the Prosecutor.

(5). AN ORDER DIRECTING the immediate and unconditional release of the Applicant herein from detention and the custody of the Special Court.

(6). AN ORDER DIRECTING that the Applicant be compensated satisfactorily and in full for his prolonged detention and subjection to trial proceedings so far on the current consolidated indictment.

(7). OTHER OR FURTHER RELIEF OR ORDER as the Trial Chamber may consider fit, proper and just in all the circumstances.

DONE IN FREETOWN this 8th day of February 2005.

Dr. Bu-Buakei Jabbi
Court Appointed Counsel

Sam Hinga Norman
FIRST ACCUSED

ANNEX

1. Original Separate Individual Indictments
   a. P. v. Norman, Case No. SCSL – 2003 – 08 – I, "Indictment", 7 March 3003.
   b. P. v. Fofana, Case No. SCSL – 2003 – 11 – I, "Indictment 26 June 2003
   c P. v. Kondewa, Case No. SCSL – 2003 – 12 – I, "Indictment 26 June 2003

2. Joinder Motions

   P. v. Norman Case No. SCSL – 2003 – 08 – PT; P. v. Fofana, SCSL – 2003 – 11 – PT;
   P. v. Kondewa, Case No. SCSL – 2003 – 12 – PT "Prosecution Motions for Joinder", 9 October 2003.

3. Joinder Decision
   P. v. Norman, Fofana, Kondewa,: "Decision and Order on Prosecution Motions for Joinder", 27th January 2004 (unanimous).

4. Consolidated Indictment.
   P. v. Norman, Fofana, Kondewa, Case No. SCSL – 2004 – 14 – T: "Indictment", 5 February 2004.

5. Some Authorities on Annexing Draft Indictment to Joinder/Amendment Motions.
   a). Kovacevic: "Decision on Prosecutor's Request to file an Amended Indictment", 5th March 1998, paras 2 & 4 (Amendment).
   http://www.un.org/icty/kovacevic/trialc2/decision-e/80305ai2.htm
   b). Kovacevic: "Decision Stating Reasons for appeals Chamber Order of 29 May 1998" 2nd July 1998, para. 6 (Amendment).
   http://www.un.org/icty/kovacevic/appeal/decision-e/80702ms3.htm
   c) Musema: (ICTR, TC 1) "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 18 November 1998, preambular para. 6 (Amendment).

   d). Krnojelac: "Decision on Prosecutor's Response to Decision of 24 February 1999", 20th May 1999, para. 2 (Amendment).
   http://www.un.org/icty/krnojelac/trialc2/decision-e/90520F127429.htmSS
   e). Niyitegeka (ICTR): "Decision on Prosecution Request to File a consolidated Indictment ....., 13th October 2000, preambular para. 4 (Consolidation).

   http://www.un.org/ictr.org/ENGLISH/cases/Niyitegeka/decisions/2106002.htm
   l
   g). Mrksic et al: "Decision on form of consolidated amended Indictment and on Prosecution application to Amend", 23rd January 2004, para. 1 (Consolidation & Amendment).
   http://www.un.org/icty/mrksic/trial/decision-e/040123.htm
   h). Limaj et al: "Decision on Prosecution's Motion to Amend the amended Indictment", 12th February 2004, para. 1 (Amendment).

   i). Ademi et al: "Decision on Motion for Joinder of Accused", 30th July 2004, final Order (Consolidation).

6. Motions for Service and arraignment and Decisions Thereon.

P. v. Norman, Fofana, Kondewa. Case No. SCSL – 2004 – 14 – T.

a.). (i). (First Accused's) Motion for Service and Arraignment on second Indictment", 21 September 2004.

(ii). TC Decions Thereon.
(1). "Decision on first Accused's Motion ……. "29 November 2004 (Majority Decision)
(2). "Separate concurring Opinion …..," 29 November 2004.
(3). "Dissenting Opinion …. "29 November 2004.

b). (i). "Moinina Fofana Motion for Service of consolidated Indictment and a Further Appearance", 21 October 2004.

(ii).TC Decisions Thereon.
(1). "Decision on the Second Accused's Motion…." 6 December 2004.

(2). "Separate Concurring Opinion …..", 6th December 2004.

c) (i). "Allieu Kondewa Motion for Service of consolidated Indictment and a Further Appearance", 4 November 2004.

(ii). TC Decisions Thereon
(1). "Decision on Third Accused Motion….", 8 December 2004.
(2). "Separate concurring Opinion …", 8 December 2004.

7. Prosecution applications in respect of 29 November 2004 Decision i.e. Item 6(a) (ii) above.

a) (i). "Request for leave to amend the Indictment Against Norman", 8 December 2004.

(ii). " First Accused Response to Prosecution Request for leave to Amend 17 December 2004.
(iii). "Reply to Defence Response to Prosecution's Request for leave to Amend the Indictment Against Norman", 14 January 2005.

b). (i). "Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution submissions on appeal", 12 January 2005.

(ii). "Defence Response to Prosecution Notice of Appeal …..", 26 January 2005

(iii). "Prosecution Reply to the Defence Response …..", 31 January 2005.

8. Defence Applications in Respect of 29 November 2004 Decision i.e. 6 (a)(ii) above.

a). (i). Interlocutory appeal by first accused Against the Trial chamber's Decision on the first Accused's Motion for Service and Arraignment on the consolidated Indictment, 29th November 2004" 14 January 2005.

(ii). "Prosecution Response to the Interlocutory Appeal by first Accused ....., 24th January 2005.

(iii). "Defence Reply to Prosecution Response to Interlocutory appeal by First Accused .....", 28th January 2005

9. Some Authorities on the Abuse of Process doctrine.

a). Connelly v. DPP (1964) 2 all ER 401 HL (UK)
b). R. v. Crown Court at Derby, ex p. Brooks (1984) 80 Cr. App Rep. 164 DC/HC
c). Bell v. DPP of Jamaica (1985) 2 All ER 585 PC
d). Bennet v. Horseferry Rd. MC (1993) 3 All ER 138 HL (UK)
e) Barayagwiza v. P. AC "Decision", 3 November 1999 (ICTR Appeals Chamber).

ANNEX 9(d)

Bennett v Horseferry Road Magistrates' Court and another

(1993) 3 All ER 138 HL (UK), pp. 138 - 164.

HOUSE OF LORDS

LORD GRIFFITHS, LORD BRIDGE OF HARWICH, LORD OLIVER OF AYLMERTON, LORD LOWRY AND LORD SLYNN OF HADLEY

3, 4, 8, 9 MARCH, 24 JUNE 1993 Esp. pp. 138–139, 148–149, 150–151, 160–163

Extradition – Disguised extradition – Deportation to United Kingdom – Applicant arrested in South Africa and put on aircraft bound for England – Applicant arrested on arrival in England and charged – Applicant alleging that he was brought within jurisdiction by improper collusion between South African authorities and English police – Whether alleged collusion between South African authorities and English police amounting to abuse of process of court – Whether court having power to inquire into circumstances in which applicant brought within jurisdiction.

Criminal law – Committal – Preliminary hearing before justices – Abuse of process – Power of justices – Justices having power to refuse to commit for trial on grounds of abuse of process in matters directly affecting fairness of trial – Extent of power – Whether appropriate for justices to decide questions involving deliberate abuse of extradition procedures – Whether proper court to decide such matters is Divisional Court.

The appellant, a New Zealand citizen, was alleged to have purchased a helicopter in England in 1989 by a series of false pretences and then to have taken it to South Africa. In November 1990 he was arrested in South Africa. The English police, who wished to arrest him, were informed but in the absence of an extradition treaty between the United Kingdom and South Africa no proceedings for the appellant's extradition were ever initiated. Instead, the appellant was put on an aircraft bound for London by the South African police and when he arrived in England on 28 January 1991 he was arrested. He was subsequently brought before magistrates who committed him to the Crown Court for trial. The appellant sought judicial review of the magistrates' decision to commit him for trial, claiming that he had been forcibly returned to England against his will and brought within the jurisdiction as a result of disguised extradition or kidnapping. He alleged that the South African police had indicated that he would be repatriated to New Zealand but had then arranged with the English police that he would travel via England to enable him to be arrested and tried in England. He contended that the subterfuge and complicity between the English police and the South African police to obtain his presence within the jurisdiction to enable him to be arrested amounted to an abuse of the process of the court and that it would be wrong and improper for him to be tried in England. The Divisional Court held that, even if there was evidence of collusion between the English police and the South African police in kidnapping the appellant and securing his enforced illegal removal from South Africa, the court had no jurisdiction to inquire into the circumstances by which he came to be within the jurisdiction and accordingly dismissed his application for judicial review. The appellant appealed to the House of Lords.

Held (Lord Oliver dissenting) – The maintenance of the rule of law prevailed over the public interest in the prosecution and punishment of crime where the prosecuting authority had secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him or having him abducted from within the jurisdiction of some other state in violation of international law, the laws of the state from which he had been abducted and his rights under the laws of that state and in disregard of available procedures to secure his lawful extradition to the jurisdiction of the court from the state where he was residing. It was an abuse of process for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom and the High Court had power, in the exercise of its supervisory jurisdiction, to inquire into the circumstances by which a person was brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures by a process to which the police, prosecuting or other executive authorities in the United Kingdom were a knowing party the court could stay the prosecution and order the release of the accused. The appeal would therefore be allowed and the case remitted to the Divisional Court for further consideration (see p 150*e* to *h*, p 151*cd*, p 152*hj*, p 155*e* to p 156*a*, p 160*h*, p 162*e*, p 162*j* to p 163*a*, p 163*g*, p 164*h* and p 169*ghj*, post).

R v Hartley [1978] 2 NZLR 199, dictum of Woodhouse J in *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 475–476, *R v Bow Street Magistrates, ex p Mackeson* (1982) 75 Cr App R 24, *S v Ebrahim* 1991 (2) SA 553 and dictum of Stevens J in *US v Alvarez-Machain* (1992) 119 L Ed 2d 441 at 466–467 applied.

R v Plymouth Magistrates' Court, ex p Driver [1985] 2 All ER 681 overruled.

Per curiam. Justices, whether sitting as examining magistrates or exercising their summary jurisdiction, have power to exercise control over their proceedings through an abuse of process jurisdiction in relation to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. In the case of the deliberate abuse of extradition procedures the proper forum is the Divisional Court and if a serious question as to such a matter arises justices should allow an adjournment so that an application can be made to the Divisional Court (see p 152*e* to *h*, p 156*a*, p 160*g*, p 166*e* and p 169*ghj*, post).

Decision of the Divisional Court [1993] 2 All ER 474 reversed.

Notes

For seizure of persons in violation of international law, see 18 *Halsbury's Laws* (4th edn) para 153.

For committal proceedings generally, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 824–827, and for cases on the subject, see 15(1) *Digest* (2nd reissue) 139–142, *12772–12802.1*.

Cases referred to in opinions

Atkinson v US Government [1969] 3 All ER 1317, [1971] AC 197, [1969] 3 WLR 1074, HL. p. 151 d

Brown v Lizars (1905) 2 CLR 837, Aust HC. p. 147

Chu Piu-wing v A-G [1984] HKLR 411, HK CA. p. 150 b – c

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL. p. 151 a

DPP v Crown Court at Manchester and Ashton [1993] 2 All ER 663, [1993] 2 WLR 846, HL.

DPP v Humphrys [1976] 2 All ER 497, [1977] AC 1, [1976] 2 WLR 857, HL. p. 151 f – g

Frisbie v Collins (1952) 342 US 519, US SC. p. 148 f, 153, 154 e

Grassby v R (1989) 168 CLR 1, Aust HC.

Ker v Illinois (1886) 119 US 436, US SC. p. 148 f, 153, 154 e

52 611

> abused by the fact that a person may or may not have been brought to this country improperly.'

However, in a later passage Woolf LJ drew a distinction between improper behaviour by the police and the prosecution itself. He said ([1993] 2 All ER 474 at 479–480):

> 'Speaking for myself, I am not satisfied there could not be some form of residual discretion which in limited circumstances would enable a court to intervene, not on the basis of an abuse of process but on some other basis which in the appropriate circumstances could avail a person in a situation where he contends that the prosecution are involved in improper conduct.'

Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of its submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair; but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process. In support of this submission your Lordships have been referred to *R v Sang* [1979] 2 All ER 1222 esp at 1230, 1245–1246, [1980] AC 402 esp at 436–437, 454–455 where Lord Diplock and Lord Scarman emphasise that the role of the judge is confined to the forensic process and that it is no part of the judge's function to exercise disciplinary powers over the police or the prosecution.

The respondents have also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution: see in particular the majority opinion in *US v Alvarez-Machain* (1992) 112 S Ct 2188 reasserting the *Ker-Frisbie* rule (see *Ker v Illinois* (1886) 119 US 436 and *Frisbie v Collins* (1952) 342 US 519). I do not, however, find these decisions particularly helpful because they deal with the issue of whether or not an accused acquires a constitutional defence to the *jurisdiction* of the United States courts and not to the question whether, assuming the court has jurisdiction, it has a discretion to refuse to try the accused (see *Ker v Illinois* 119 US 436 at 444).

The respondents also cited two Canadian cases decided at the turn of the century, *R v Whiteside* (1904) 8 CCC 478 and *R v Walton* (1905) 10 CCC 269 which show that the Canadian courts followed the English and American courts accepting jurisdiction in criminal cases regardless of the circumstances in which the accused was brought within the jurisdiction of the Canadian court. We have also had our attention brought to the New Zealand decision in *Moevao v Dept of Labour* [1980] 1 NZLR 464, in which Richmond P expressed reservations about the correctness of his view that the prosecution in *R v Hartley* [1978] 2 NZLR 199 was an abuse of the process of the court and Woodhouse J reaffirmed his view to that effect.

The appellant contends for a wider interpretation of the court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J in *R v Hartley*, the powerful dissent of the minority in *US v Alvarez-Machain* (1992) 112 S Ct 2188 and the decision of the South African Court of Appeal in *S v Ebrahim* 1991 (2) SA 553, the headnote of which reads:

> 'The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the Court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued. The Court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial Court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The Court further held that the above rules embodied several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders. It was accordingly held that the Court *a quo* had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the Court *a quo*, the consequences of the trial had to be undone and the appeal disposed of as one against conviction and sentence. Both the conviction and sentence were accordingly set aside.'

In answer to the respondent's reliance upon *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 the appellant points to s 78 of the Police and Criminal Evidence Act 1984, which enlarges a judge's discretion to exclude evidence obtained by unfair means.

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. In *R v Crown Court at Derby, ex p Brooks* (1984) 80 Cr App R 164 at 168–169 Sir Roger Ormrod said:

> 'The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (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 by delay on the part of the prosecution which is unjustifiable ... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution ...'

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. In *Chu Piu-wing v A-G* [1984] HKLR 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence. McMullin V-P said (at 417–418):

> 'there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'

And in a recent decision of the Divisional Court in *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129 the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to s 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

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 procedures. 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. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that

in such circumstances the court should declare itself to be powerless and stand idly by. I echo the words of Lord Devlin in *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354:

> 'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Sinclair v DPP* [1991] 2 All ER 366, [1991] 2 AC 64 and *Atkinson v US Government* [1969] 3 All ER 1317, [1971] AC 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court.

Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. Although doubts were expressed by Viscount Dilhorne as to the existence of such a power in *DPP v Humphrys* [1976] 2 All ER 497 at 510–511, [1977] AC 1 at 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467 Lord Parker CJ, hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the court, said:

> 'So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.'

Diplock LJ expressed his agreement with this view (see [1967] 2 All ER 100 at 105, [1967] 2 QB 459 at 470).

In *R v Canterbury and St Augustine's Justices, ex p Klisiak* [1981] 2 All ER 129 at 136, [1982] QB 398 at 411 Lord Lane CJ was prepared to assume such a jurisdiction. In *R v West London Stipendiary Magistrate, ex p Anderson* (1984) 80 Cr App R 143 at 149 Robert Goff LJ, reviewing the position at that date, said:

triable for (again in board terms) offences other than those for which he has been extradited unless he has first had an opportunity of leaving the United Kingdom. Thus a person who is returned only as a result of extradition proceedings enjoys, as a result of this statutory inhibition, an advantage over one who elects to return voluntarily or who is otherwise induced to return within the jurisdiction. But these are provisions inserted in the Act for the purpose of giving effect to reciprocal treaty arrangements for extradition. I cannot, for my part, regard them as conferring upon a person who is fortunate enough successfully to flee the jurisdiction some 'right' in English law which is invaded if he is brought or induced to come back within the jurisdiction otherwise than by an extradition process, much less a right the invasion of which a criminal court is entitled or bound to treat as vitiating the process commenced by a charge properly brought. It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad—for instance in securing the deportation of the accused without proper authority—in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage in which the accused might have derived from the extradition process is likewise destroyed. No 'right' of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

I would only add that if, contrary to my opinion, such an extended jurisdiction over executive abuse does exist, I entirely concur with what has fallen from my noble and learned friend Lord Griffiths with regard to the appropriate court to exercise such jurisdiction. I would dismiss the appeal and answer the certified question in the negative.

LORD LOWRY. My Lords, having had the advantage of reading in draft the speeches of your Lordships, I accept the conclusion of my noble and learned friends Lord Griffiths and Lord Bridge of Harwich that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities. Recognising, however, the clear and forceful reasoning of my noble and learned friend Lord Oliver of Aylmerton to the contrary, I venture to contribute some observations of my own.

The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. *Archbold's Pleading Evidence and Practice in Criminal Cases* (44th edn, 1992) p 430, para 4.44 calls it 'a misuse or improper manipulation of the process of the court'. In *Rourke v R* [1978] 1 SCR 1021 at 1038 Laskin CJC said: '[The court] is entitled to protect its process from abuse' and also referred to 'the danger of generalizing the application of the doctrine of abuse of process' (at 1041). In *Moevao v Dept of*

Labour [1980] 1 NZLR 464 at 476 Woodhouse J spoke approvingly of 'the mu wider and more serious abuse of the criminal jurisdiction in general', where Richmond P (at 471), giving expression to reservations about the view in whi he had concurred in *R v Hartley* [1978] 2 NZLR 199, referred to the need establish 'that the process of the Court is itself being wrongly made use of'. think that the words used by Woodhouse J involve a danger that the doctrine abuse of process will be too widely applied and I prefer the narrower definiti adopted by Richmond P. The question still remains: what circumstanc antecedent to the trial will produce a situation in which the process of the cou of trial will have been abused if the trial proceeds?

Whether the proposed trial will be an unfair trial is not the only test of abu of process. The proof of a previous conviction or acquittal on the same char means that it will be unfair to try the accused but not that he is about to recei an unfair trial. Again, in *R v Grays Justices, ex p Low* [1988] 3 All ER 834, [1990 QB 54 it was held to be an abuse of process to prosecute a summons where th accused had already been bound over and the summons had been withdraw while in *R v Horsham Justices, ex p Reeves* (1980) 75 Cr App R 236 it was held to i an abuse of process to pursue charges when the magistrates had already found 'n case to answer'. It would, I submit, be generally conceded that for the Crown go back on a promise of immunity given to an accomplice who is willing to gi evidence against his confederates would be unacceptable to the proposed court trial, although the trial itself could be fairly conducted. And to proceed in respe of a non-extraditable offence against an accused who has with the connivance our authorities been unlawfully brought within the jurisdiction from a counti with which we have an extradition treaty need not involve an unfair trial, but th consideration would not in my opinion be an answer to an application to stay th proceedings on the ground of abuse of process.

This last example, though admittedly not based on authority, foreshadows m conclusion that a court would have power to stay the present proceedings again the appellant, assuming the facts alleged to be proved, because I consider that court has a discretion to stay any criminal proceedings on the ground that to tr those proceedings will amount to an abuse of its own process either (1) becaus it will be impossible (usually by reason of delay) to give the accused a fair trial c (2) because it offends the court's sense of justice and propriety to be asked to tr the accused in the circumstances of a particular case. I agree that prima facie it the duty of a court to try a person who is charged before it with an offence whic the court has power to try and therefore that the jurisdiction to stay must b exercised carefully and sparingly and only for very compelling reasons. Th discretion to stay is not a disciplinary jurisdiction and ought not to be exercise in order to express the court's disapproval of official conduct. Accordingly, if th prosecuting authorities have been guilty of culpable delay but the prospect of fair trial has not been prejudiced, the court ought not to stay the proceeding merely 'pour encourager les autres'.

Your Lordships have comprehensively reviewed the authorities and therefore will be content to highlight the features which have led me to conclude in favou of the appellant. The court in *R v Bow Street Magistrates, ex p Mackeson* (1981) 7 Cr App R 24, while quite clear that there was jurisdiction to try the applican relied on *R v Hartley* [1978] 2 NZLR 199 for the existence of a discretion to mak an order of prohibition. Woodhouse J in *R v Hartley* (at 217) had also recognise the *jurisdiction* to try the accused Bennett, but expressed the court's conclusio that to do so in the circumstances offended against one of the most importan principles of the rule of law. The court's decision in *R v Plymouth Magistrate*

22611

Court, ex p Driver [1985] 2 All ER 681, [1986] QB 95 to the contrary effect was influenced by *Ex p Scott* (1829) 9 B & C 446, 109 ER 166, *Sinclair v HM Advocate* (1890) 17 R (J) 38 and *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373. *Ex p Scott* and *Sinclair v HM Advocate* were decisions on jurisdiction and formed the basis of the decision in *Ex p Elliott*, in which there was an application for a writ of habeas corpus, based on the allegation that the applicant was not subject to military law and that he was wrongfully held in custody. My noble and learned friend Lord Griffiths has described the argument advanced by the applicant and the manner in which Lord Goddard CJ dealt with that argument in the court's judgment by reference to *Ex p Scott* and *Sinclair v HM Advocate*. Then, having disposed of an argument based on provisions of the Army Act ... relating to arrest, Lord Goddard CJ came to 'The only point in which there was any substance ... whether there has been such delay that this court ought to interfere' (see [1949] 1 All ER 373 at 379). Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it (at 379):

> 'What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him.'

This brief review strengthens my inclination to prefer *Ex p Mackeson* to *Ex p Driver* and to the Divisional Court's judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *R v Hartley*. My noble and learned friend Lord Griffiths has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of *jurisdiction* and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondents: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process ('the fruit of the poisoned tree'), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore a fortiori the view in this jurisdiction ought to favour trying such accused persons, having regard to the more tolerant common law attitude here to unlawfully obtained evidence, as shown by *R v Sang* [1979] 2 All ER 1222, [1980] AC 402. My answer is that I would consider it a dangerous and question-begging process to rely on this chain of reasoning, particularly where the constitutional meaning of 'due process' is one of the factors. As your Lordships have noted, the respondents also relied on *R v Sang* directly in order to support the argument that it does not matter whether the accused comes to be within the jurisdiction by fair means or foul.

The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its

inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial.

The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law. For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading CJ in a different context in *R v Lee Kun* [1916] 1 KB 337 at 341, [1914-15] All ER Rep 603 at 605:

> '... the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State.'

If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety.

I regard it as essential to the rule of law that the court should not have to make available its process and thereby indorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty, the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting. Nor do I consider that your Lordships ought to be deterred from deciding in favour of discretion by the difficulty, which may sometimes arise, of proving the necessary facts.

I would now pose and try to answer three questions.

(1) What is the position if without intervention by the British authorities a 'wanted man' is wrongfully transported from a foreign country to this jurisdiction? The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved and the question of staying criminal proceedings, as proposed in a case like the present, does not arise. It seems to me, however, that in practice the transporting of a wanted man to the United