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SCSL-2003-07-PT
(1839 – 2123)

SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

THE PROSECUTOR

-v-

MORRIS KALLON

CASE NO. SCSL-2003-07-PT

DEFENCE AUTHORITIES FOR 'PRELIMINARY MOTION BASED ON LACK OF JURISDICTION/ABUSE OF PROCESS (LOME ACCORD)'

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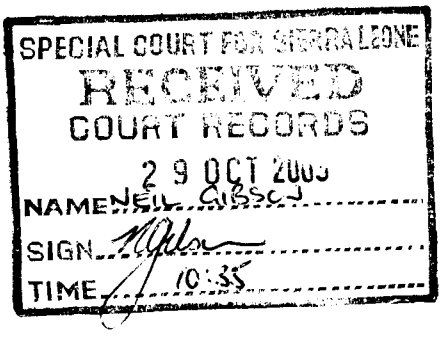
1. **Please find attached Defence Authorities for 'Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process (Lome Accord)'.**

2. **These authorities are filed in advance of oral argument before the Appeals Chamber on Defence Preliminary Motions scheduled for 3rd and 4th November 2003.**

3. **It was not possible to send the authorities by FAX to the Special Court as they were too voluminous. Accordingly, they were sent by courier to the Court. Unfortunately, the person to whom they were sent was on leave when the authorities arrived at the Court and they were therefore not filed until today.**

STEVEN POWLES

28th October 2003



SPECIAL COURT FOR SIERRA LEONE

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DEFENCE AUTHORITIES FOR PRELIMINARY MOTION BASED ON LACK OF JURISDICTION / ABUSE OF PROCESS (LOME ACCORD)

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1. *Connelly v DPP* (1964) 48 Cr App R 183
2. *Attorney-General Trinidad and Tobago v Phillip*[1995] 1 AC 396 PC
3. *Hui Chi-Ming v R* [1992] 1 AC 34 PC
4. *Re Barrings plc and others (No. 2); Secretary of State for Trade and Industry v Baker and others* [1999] 1 All ER 311 CA
5. *R v Beckford* (1996) 1 Cr App R 94
6. *R v Mullen*[1999] 2 Cr App R 143 CA
7. *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42
8. *R v Croydon JJ, ex parte Dean*98 Cr App R 76 DC
9. *R v Townsend and others*[1997] 2 Cr App R 540 CA

[IN THE HOUSE OF LORDS]

BEFORE

LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD DEVLIN AND LORD PEARCE

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Murder Committed during Robbery—Indictments for Murder and Robbery with Aggravation—Trial on Indictment for Murder—Alternative Defences, Including Alibi—Conviction of Non-Capital Murder—Appeal—Conviction Quashed on Ground of Misdirection—No Specific Decision on Issue of Alibi—Trial on Indictment for Robbery with Aggravation—Conviction—Autrefois Acquit—Res Judicata—Estoppel—Power of Judge to Direct that Prosecution should not Proceed—Criminal Appeal Act, 1907 (*7 Edw. 7, c. 23*), *s. 4* (1) (2).

Indictment—Practice—Murder—Whether Count for another Offence may be Included in Indictment.

During a robbery at an office in November 1962 an employee was killed. Four men, including the appellant C., were charged with the murder, and on a separate indictment with robbery with aggravation. This course was adopted in view of the ruling of the Court of Criminal Appeal in JONES, 13 Cr.App.R. 86; [1918] 1 K.B. 416 that no count for any other offence ought to be included in an indictment for murder. C.'s defence was alibi, and, alternatively, if he was present, no intent to kill or cause grievous bodily harm. C. was convicted of non-capital murder. The judge directed that the second indictment should remain on the file and should be marked: "Not to be proceeded with without leave of this court or of the Court of Criminal Appeal." C. appealed to the Court of Criminal Appeal, where the argument for the appellant proceeded on the question whether the evidence and the judge's direction on the issue whether C. had been present at the scene of the crime were satisfactory. The Court of Criminal Appeal quashed the conviction on the ground of misdirection, and directed a verdict of acquittal to be entered. They granted leave to the Crown to proceed on the indictment for robbery with aggravation. When this indictment came on for trial, a plea of *autrefois acquit* was filed on behalf of C., but the judge directed the jury that that plea had not been established,

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and the jury returned a verdict to that effect. The defence then asked the judge to exercise his discretion to prevent the Crown from proceeding with the indictment, but the judge held that his discretion in such circumstances was limited to expressing an opinion. He did express the opinion that the Crown ought not to proceed. The Crown, however, decided to proceed, and when the indictment was tried later before a different judge and jury, the appellant was convicted. On appeal to the Court of Criminal Appeal by C. the conviction was affirmed. On appeal by C. to the House of Lords:

Held, affirming the decision of the Court of Criminal Appeal, that the principle of *autrefois acquit* did not apply, as, in order to prove the charge of robbery with aggravation, the prosecution were not obliged to prove that the appellant was guilty of murder or of any offence of which he could have been convicted on the indictment for murder; nor did the principles of *res judicata* or issue estoppel apply to the case; nor could the appellant successfully contend that the trial judge should have directed the prosecution not to proceed with the second indictment.

The following general principles apply to *autrefois acquit* and *autrefois convict*: (a) A person cannot be tried for a crime in respect of which he has previously been acquitted or convicted, or for a crime in respect of which he could on some previous indictment have been convicted; (b) the same rule applies if the crime charged is in effect the same or substantially the same as either the principal or a different crime in respect of which he has been acquitted or has been or could have been convicted; (c) one test whether the rule applies is, whether the evidence necessary to support the second indictment, or the facts constituting the second offence, would have been sufficient to procure conviction on the first indictment either of the offence charged or an offence of which the accused could have been convicted on that indictment. This test is, however, subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first indictment; (d) on a plea of *autrefois acquit* or *autrefois convict* the defendant is not restricted to a comparison between the later and some previous indictment or to the records of the court, but he may prove by evidence all such questions with regard to the identity of persons, dates and facts as are necessary to establish that he is being charged with a crime which is the same or substantially the same as the one in respect of which he has been acquitted or convicted or could have been convicted; (e) in considering whether the case falls within (a) or (b), it is immaterial that the facts under examination or the witnesses who are being called in

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the later proceedings are the same as those in some earlier proceedings (*per* Lord Morris of Borth-y-Gest); for the doctrine of *autrefois acquit* to apply, the defendant must have been put in peril for the same offence both in fact and law as that with which he was previously charged (*per* Lord Devlin).

If a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it, and if there is no plea in bar which can be upheld, the court cannot direct that the prosecution must not proceed. The power which is inherent in a court's jurisdiction to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice, but this power does not enable a court to order that a prosecution be dropped merely because of some rather imprecise regret that the defendant should have to face another charge (*per* Lord Morris of Borth-y-Gest and Lord Hodson). It is within the power of the court to declare that the prosecution must, as a general rule, join in the same indictment charges which are founded on the same facts or are part of a series of offences of the same or a similar character, and to enforce such a direction by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first. As a general rule, a judge should stay an indictment founded on the same facts as the charges in a previous indictment on which the defendant has been tried; but a second trial on the same or similar facts is not always and necessarily oppressive, and in special circumstances may be just and convenient. In such a case the judge must, in all the circumstances of the particular case, exercise his discretion whether or not he applies the general rule (*per* Lord Devlin).

Apart from *autrefois acquit* or *autrefois convict*, the principle of *res judicata* applies in a criminal case, where the defendant is able to show that a matter has already been decided by a court competent to decide it, but on a verdict of Guilty or Not Guilty it is often impossible (as in the present case) to deduce whether that verdict involved a particular issue.

NORTON, 5 Cr.App.R. 13; [1910] 2 K.B. 496 applied.

R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (1953) 37 Cr.App.R. 148; [1954] Q.B. 1; SALVI (1857) 10 Cox 481n.; KING [1897] 1 Q.B. 214; OLLIS [1900] 2 Q.B. 758; BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570; KUPFERBERG (1918) 13 Cr.App.R. 166; MRAZ *v.* THE QUEEN

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(No. 2) (1956) 96 C.L.R. 62 and BROWN *v.* ROBINSON (1960) S.R.(N.S.W.) 297 considered.

SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA [1950] A.C. 458 distinguished.

Whether the doctrine of issue estoppel, which prevents the Crown from raising again any separate issue of fact which the jury, in reaching their verdict, have decided, or are presumed to have decided, in the defendant's favour, applies to criminal courts in this country appears to be still doubtful (*per* Lord Devlin); *semble*, that it does (*per* Lord Pearce). In any event, for the doctrine to apply, actual determination of issues is essential. In the present case the verdict of the jury and the judgment of the Court of Criminal Appeal revealed only that there had been a misdirection of fact. There had not been any determination on the issue of identity (*per* Lord Devlin), or of any separate issue in C.'s favour (*per* Lord Hodson) and, accordingly, the doctrine could not apply.

The rule of practice based on JONES (*supra*) that a charge for another offence should never be included in an indictment for murder is inconvenient and ought to be changed, but a second indictment is permissible where it would have been improper to combine the charges in one indictment (*per* Lords Reid, Devlin and Pearce).

Appeal by the prisoner from order of the Court of Criminal Appeal dismissing his appeal against conviction.

The matter before the House arose out of the robbery and murder which had taken place at the Mitcham Co-operative Society depôt on the night of Saturday, November 17, 1962. Four men, named Thatcher, Hilton, Kelly and the present appellant, Connelly, had been charged with the murder, in the course of rifling the offices at Mitcham, of a Co-operative employee, Dennis Hurden.

The result of the trial in February and March 1963, before Roskill J. and a jury, was that Thatcher was convicted of capital murder and the other three accused were convicted of non-capital murder. Three of them, including Connelly, appealed. The hearing of the appeals was concluded on April 5, 1963. The result was that Thatcher's conviction was reduced to one of non-capital murder, Hilton's appeal was dismissed, and Connelly's appeal was successful, the court deciding that it was unnecessary to go through all the

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grounds of appeal set up, because on the first four grounds relied on there had been a misdirection or failure to direct the jury such as to warrant allowing the appeal. The court quashed Connelly's conviction and directed an acquittal on the non-capital murder charge.

There had originally been not only the indictment for murder, but also a second indictment for robbery with aggravation; but owing to a rule of practice the second indictment was not tried with the indictment for murder. Roskill J., however, had made an order that the second indictment should remain on the file, marked, "Not to be proceeded with without leave of this court or of the Court of Criminal Appeal." At the conclusion of the judgment of the Court of Appeal, the Crown applied for leave to prefer against Connelly the second indictment alleging robbery; and, after hearing argument, the court had granted that application, and Connelly remained in custody.

The matter then came before John Stephenson J., on May 8, 1963, when the plea of *autrefois acquit* was put forward for Connelly; and a jury was empanelled for the purpose of deciding that point. The judge directed the jury that the case of *autrefois acquit* had not been established. He also held that the only discretion which a judge had in such circumstances was to express an opinion; and he expressed the opinion that it would be wrong for a second trial to proceed on the robbery indictment. Despite that opinion, the Crown was not prepared to stop the second trial from going on and the Attorney-General was not prepared to enter a *nolle prosequi*. The judge had in those circumstances taken the view that there was no way in which he could stop the indictment from proceeding, and had ordered that Connelly be sent to await trial. The trial, before Nield J. and a jury, started on June 7 and finished on June 24, 1963, and its result was that Connelly was convicted of robbery and sentenced to fifteen years' imprisonment. Against that conviction and sentence he appealed and the appeal was heard by the Court of

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Criminal Appeal—Edmund Davies, Lawton and Lyell JJ. on September 24, 25 and 26, 1963.

September 30, 1963. The judgment of the court was read by:

EDMUND DAVIES J. [after stating the facts]: The foundation of the present appeal against his conviction for robbery with aggravation is that the quashing by the Court of Criminal Appeal of the murder conviction is said to have involved a finding by that court that Connelly's presence at the Mitcham crime had not been proved. Upon those premises Mr. Hawser has constructed an elaborate argument (for which the court is greatly indebted) that the robbery conviction ought now to be quashed for one or more of the several reasons he advanced.

These reasons were: (1) that Connelly was entitled to rely upon the plea in bar of *autrefois qcquit* which he had raised, and that Stephenson J. misdirected the jury in telling them that it was not available to him; (2) that, assuming that *autrefois acquit* was not available, Connelly was entitled to rely upon what in some of the Commonwealth and American authorities has been called an "issue estoppel," and in consequence he ought never to have been tried on the robbery indictment; (3) that the conviction for robbery should be quashed as being inconsistent, in the circumstances, with the quashing of the murder conviction; (4) that, even though neither *autrefois acquit* nor "issue estoppel" could be made out, the trial judge had a discretion to prevent Connelly being tried on the robbery indictment, if he felt that in the particular circumstances it was unfair and unjust that there should be re-litigation on an issue which was before this court in the murder appeal and upon which the ultimate verdict of acquittal was founded, even though there had been no specific finding on that issue; that Stephenson J. had wrongly held that he had no such discretion; and that, in those circumstances this court should now either quash the conviction or order (as in cases of *autrefois acquit*), "That the defendant shall go *sine die* and altogether be discharged from the prosecution." In

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addition to the foregoing matters, the summing-up of Nield J. has been criticised in a number of respects.

Before proceeding to consider these submissions *seriatim*, it is important to see what happened, first at the murder trial at the Central Criminal Court, and, secondly, in the Court of Criminal Appeal, and then to examine the precise effect, under the Criminal Appeal Act, 1907, of the quashing of the murder conviction.

As to the first matter, it is clear beyond doubt, and it is conceded, that the defence of Connelly was a twofold one: (a) an alibi, and (b) alternatively, even were he present at the scene of the murder, the evidence did not establish that he had the felonious intent necessary to support a murder conviction. As to the second matter, some fifteen grounds were relied upon in the Court of Criminal Appeal, but, in the event, this court found it necessary to deal only with the first four grounds. The first and second grounds related to what was called "the Heysham incident," and it is perfectly clear that the Court of Criminal Appeal regarded it as having relevance not only to the alibi defence, but also to the general issue of the credibility of the accused. The third ground related to Roskill J.'s direction to the jury as to the evidence relating to footprint impressions on two pieces of carbon paper found in the Mitcham office, and that relating to a pair of shoes found at the premises where Connelly was arrested. The fourth ground of appeal alleged misdirection as to the evidence adduced in support of the allegation that Connelly had gone into hiding with his co-accused Hilton, after the murder. As we have said, the Court of Criminal Appeal, in giving its reasons for quashing the murder conviction, found it unnecessary to deal with the remaining grounds of appeal. To this should be added that learned counsel appearing before us are in agreement that the only issue ventilated in the Court of Criminal Appeal was whether the evidence (and the direction thereon) relating to Connelly's alleged presence at the scene of the murder was satisfactory, and that the issue as to murderous intent was not raised. That being so, it is argued, the

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quashing of the murder conviction is explicable only upon the basis that the Court of Criminal Appeal held that proof of presence at Mitcham had not been established, and this "finding" (as it has been called) applies not only to the murder charge originally preferred, but is fatal also to the second indictment for robbery with aggravation. That the Court of Criminal Appeal did not itself consider that, in quashing the murder conviction, they were arriving at any "finding" that Connelly had not been proved to be at Mitcham on the relevant date is clear, both from the language employed by Ashworth J. in delivering the judgment of the court, and from the fact that, after argument, the court granted leave for the trial on the robbery indictment to proceed. But that fact cannot prejudice the appellant, if in law the effect of what the court then did is as his counsel submits.

The grounds upon which this court may quash a conviction, and the effect of so doing, are dealt with in section 4 (1) and (2) of the Criminal Appeal Act, 1907, in the following terms: "(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. (2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

Where this court quashes a conviction ". . . the appellant, having by order of this court on his first conviction, had a judgment and verdict of acquittal entered, is in the same

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position for all purposes as if he had actually been acquitted" (*per* Lord Reading C.J. in BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570, at p. 574). Does that mean more than that the appellant is thereafter to be treated as if the original jury had acquitted him? If it does not, then, in view of the twofold nature of the defence relied upon at the Central Criminal Court, it cannot, in our judgment, be said that acquittal involved a finding that Connelly was not proved to have been at Mitcham on November 17, for such a verdict might equally have been based on the jury's not being satisfied that, although there, a murderous intent had been established. But it is submitted that, as the only issue ventilated in the Court of Criminal Appeal was as to his presence at the scene of the crime, that (and that alone) must have been the ground upon which the appeal was allowed and there was accordingly a finding in Connelly's favour to that effect. We find ourselves unable to accept that submission. In the murder appeal this court had to consider whether there had been "a miscarriage of justice" and, if so, whether it nevertheless could be said "that no *substantial* miscarriage of justice had actually occurred." As was said in COHEN *v.* BATEMAN (1909) 2 Cr.App.R. 197, at p. 202, *per* Channell J.): "There is such a miscarriage of justice not only where the court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge, may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, therefore the appellant has lost the chance which was fairly open to him of being acquitted."

In such circumstances, this court not only quashes the conviction but, as required by section 4 (2) of the Act of 1907, *must* "direct a judgment and verdict of acquittal to be entered." In so directing it does not, in our judgment, arrive at any specific finding regarding any of the ingredients of the

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offence charged. In SALVI (1857) 10 Cox 481n, at p. 483n, Pollock C.J. said: "The acquittal of the whole offence is not an acquittal of every part of it, it is only an acquittal of the whole." These words are equally applicable to a verdict of acquittal entered by this court as to an acquittal resulting from the verdict of a jury. In our judgment, the position is not altered by the fact that the issue ventilated in the Court of Criminal Appeal was simply whether or not the evidence and the legal direction relating to the issue of presence at Mitcham were satisfactory. We accordingly hold that no such finding as is contended on the appellant's behalf was either arrived at by this court or is implicit in its quashing of the murder conviction.

In the light of the foregoing, we turn to consider the four main submissions relied upon before us. As to the first, *autrefois acquit*, it is not sufficiently comprehensive to say (as Archbold's *Criminal Pleading*, etc., does in the 35th edition, para. 436) that "The only cases in which a previous acquittal can effectually be pleaded in bar to a subsequent indictment are: (1) where the acquittal was for the exact offence charged in the subsequent indictment; or (2) where the subsequent indictment is based on the same acts or omissions in respect of which the previous acquittal was made and some statute directs that the prisoner shall not be tried or punished twice in respect of the same acts or omissions." As subsequent paragraphs in that most useful work show, the cases establish that this plea in bar extends, as Lord Reading said in BARRON'S case, 10 Cr.App.R. 81; [1914] 2 K.B. 570 at p. 574, "not only to the offence charged in the first indictment, but to any offence of which he could have been properly convicted at the trial of the first indictment." And in KUPFERBERG (1918) 13 Cr.App.R. 166 Lawrence J. said (at p. 168): "For a plea of *autrefois acquit* to be maintainable, the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients. The facts which constitute the

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10 Cox 481n, at p. 483n, of the whole offence is not it is only an acquittal of ally applicable to a verdict as to an acquittal resulting our judgment, the position issue ventilated in the Court whether or not the evidence to the issue of presence at cordingly hold that no such ppellant's behalf was either plicit in its quashing of the

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one must be sufficient to justify a conviction for the other." But whatever test one applies, it cannot, in our judgment, be said correctly that, in the circumstances of this case, the statutory "acquittal" by the Court of Criminal Appeal on the murder charge enables the appellant to plead *autrefois acquit* in bar to the robbery indictment.

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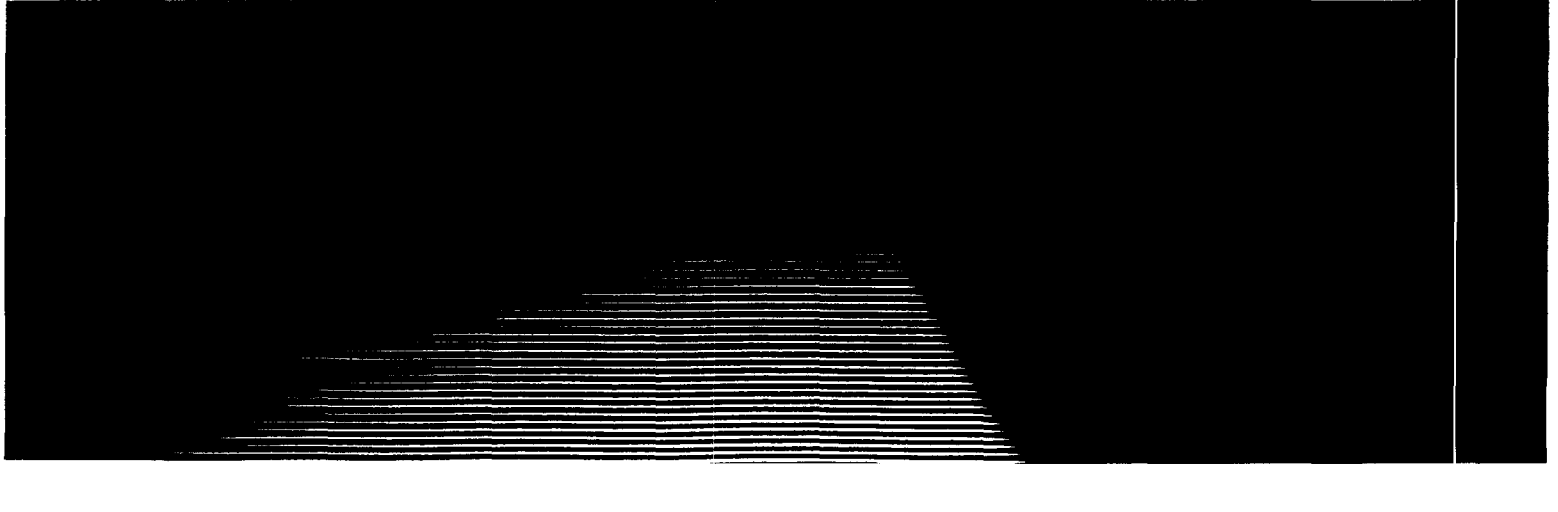
The decisions of this court in NORTON (1910) 5 Cr.App.R. pp. 65 and 197 have some relevance to this matter. The only issue raised in the trial of the accused for a sexual offence, in the course of which the victim was wounded, was as to the identity of the assailant. The conviction was quashed and Norton was thereafter indicted and convicted for wounding the same girl on the same occasion. Defence counsel submitted to this court that the identity of the assailant was the sole point at issue in both indictments, that by the quashing of the first conviction it had become *res judicata* that Norton had not committed the sexual offence and that, as it was common ground that the same person committed both offences, he was entitled to rely upon *autrefois acquit*, and that accordingly the second conviction should be quashed. Dismissing the appeal, the Lord Chief Justice (Lord Alverstone) said (1910) 5 Cr.App.R., at p. 198: "There is only one possible view which would have supported the appeal. If the evidence as to the injury showed that it was essential to the commission of the sexual offence, then it may be that a verdict of acquittal for the sexual offence would support a plea of *autrefois acquit* upon the charge of felonious wounding." It is true that no reference was made to the "identity" point expressly relied upon by the appellant's counsel, but it is inconceivable that it would not have been dealt with had this court considered that the quashing of the first conviction had the effect which had been contended.

The submission as to "issue estoppel," which was the second matter advanced on the appellant's behalf, is a somewhat novel one in the criminal courts of this country, although it is being increasingly raised both in the Commonwealth and



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in the United States of America (see, for example, HARRIS *v.* STATE OF GEORGIA (1941) 17 S.E.R. 573) and is discussed at length in a valuable article, "Res Judicata in the Criminal Law" by Mr. Colin Howard, in (1961) *Melbourne University Law Review*, pp. 101 *et seq.*

In MRAZ *v.* THE QUEEN (No. 2) (1956) 96 C.L.R. 62, Dixon C.J. said (at p. 68): "The law which gives effect to issue estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact . . . It is enough that an issue or issues have been directly raised and found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other. *Res judicata pro veritate accipitur* . . . And . . . this applies in pleas of the Crown." In BROWN *v.* ROBINSON (1960) 60 S.R.(N.S.W.) 297 Herron and Maguire JJ. said (at p. 301) that: "Before issue estoppel can succeed in a case such as this, there must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. . . . It depends upon an issue or issues having been distinctly raised and found in the former proceeding."

Does issue estoppel avail an accused person in this country? We do not find ourselves, in the circumstances of the present case, called upon to give a definite answer to that question. But, as Lawton J. observed in the course of the argument, it would be deplorable if English law lagged behind in this matter because of a strict rule of pleading. That an issue distinctly raised and decided in *civil* proceedings here may not generally be permitted to be litigated afresh between the same parties or persons claiming under them is well established; see, for example, HOYSTED *v.* FEDERAL COMMISSIONER OF TAXATION [1926] A.C. 155 and NEW BRUNSWICK RY. *v.* BRITISH AND FRENCH TRUST CORPORATION [1939] A.C. 1. And, as Holmes J. said in UNITED STATES *v.* OPPENHEIMER (1916) 242 U.S.

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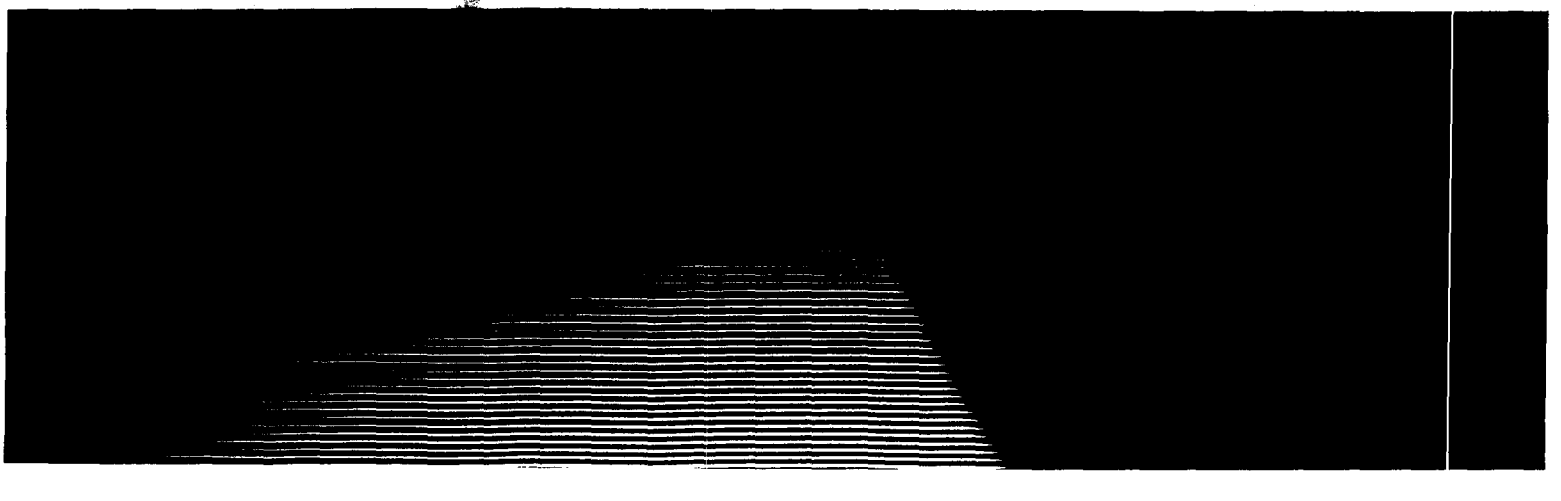
Supreme Court Rep. 85, at p. 88: "It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt." Furthermore, in SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA [1950] A.C. 458 Lord MacDermott said (at p. 479): "The maxim *Res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings." And it is of some significance that, in OLLIS [1900] 2 Q.B. 758, Wright J., having said that *autrefois acquit* was an inappropriate plea in the circumstances of that case, added (at p. 769): "Nor can there be an estoppel of record or quasi of record, unless it appears by the record of itself, or as explained by proper evidence, that the same point was determined on the first trial which was in issue in the second trial." It may be that issue estoppel is the true basis upon which a second trial arising out of the same incident or transaction was held, in such cases as KING [1897] 1 Q.B. 214, not to lie, notwithstanding that *autrefois acquit* and *autrefois convict*, as explained in some of the older cases, were not in strictness available to the defendant.

Assuming, without deciding, that such a plea may validly be raised in the criminal courts of this country, even so, as Herron J. expressed it in CLIFT (1952) 52 S.R.(N.S.W.) 213, at p. 217, ". . . the situation would not often arise in a criminal court, where the very issue of fact upon which the decision rests can be so isolated as to be capable of decision that such issue had been already determined in another previous criminal trial." For the reasons we have already sought to state, these conditions cannot be said to be fulfilled in the present case. For issue estoppel to arise, there must have been distinctly raised and inevitably decided the same issue in the earlier proceedings between the same parties. "The doctrine [of estoppel] cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be asserted beyond all possible doubt to be, identical with those raised in the previous action" (*per* Lord Maugham L.C. in NEW BRUNSWICK RY. *v.* BRITISH



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& FRENCH TRUST CORPORATION, LTD. [1939] A.C. 1, at p. 20). It is this impermissible extension which is involved, in our judgment, in the issue estoppel point here raised on behalf of the appellant. We accordingly hold that the submission is invalid.

The third point raised by the appellant's counsel is closely linked with those already dealt with. It was submitted that the conviction on the robbery indictment was wholly inconsistent with the quashing by this court of the conviction on the murder indictment. That the court will interfere to prevent inconsistent verdicts is well established; see, for example, COOPER AND COMPTON (1947) 32 Cr.App.R. 102. In this connection we were referred to Diplock J.'s direction to the jury in BEACH AND OWENS, *The Times*, September 26, 1957, that *autrefois acquit* was established in answer to a charge of conspiracy to pervert the course of justice, following upon this court having quashed ([1957] Crim.L.R. 687) the conviction of the two accused for having, respectively, attempted to pervert the course of justice and with aiding and abetting that offence. But each case turns on its own facts. In the present case, no inconsistency can be said to exist between the quashing by this court of the murder conviction and the conviction by the jury on the robbery charge except upon the one ground advanced, namely, that the quashing amounted to and involved a finding that Connelly was not proved to have been present at Mitcham. We have, I hope, already sufficiently indicated our reasons for holding that no such inconsistency is involved.

We turn to consider the fourth point relied upon by the appellant's counsel. The question primarily raised is as to whether Stephenson J. had any discretion which entitled him to refuse a trial on the second indictment. The learned judge originally thought he had, and Crown counsel originally thought he had, though that concession was later retracted. The appellant's counsel has submitted that on this occasion first thoughts were best. He contends that, whatever may be a judge's powers in relation to preventing the trial of a first

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indictment, he clearly has a discretion if he considers that it would be unfair and unjust for an accused person to be retried on an issue upon which a previous acquittal was *founded*, even though there was no specific finding on that issue. Reliance is placed on MILES (1909) 3 Cr.App.R. 13, where the Lord Chief Justice (Lord Alverstone) said (at p. 15): "The judge has a discretion . . . and if, when a man has been acquitted, he considers the acquittal should make an end to the whole case, he can express an opinion," and to some observations of Lord Reading in BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570, at p. 573. We were also referred to TANCOCK (1876) 13 Cox 217 and BAINES [1909] 1 K.B. 258, where Walton J. said (at p. 262) that: "The old Queen's Bench had ample jurisdiction over all criminal proceedings." But, as always, these cases turn on their particular facts. In our judgment a judge is not entitled to refuse the trial of any indictment, be it a first or second indictment, merely because he thinks the trial ought not to proceed. He may do this only in accordance with established principles. To hold otherwise involves dangers too obvious to need stating. Having said in R. *v.* MIDDLESEX QUARTER SESSIONS' JUSTICES, *ex p.* D.P.P. (1952) 36 Cr.App.R. 114, at p. 122; [1952] 2 Q.B. 758, at p. 767 that, "The prosecution had a *right* to present their case," Lord Goddard C.J. added in R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (1953) 37 Cr.App.R. 148, at p. 151: "Once an indictment is before the court, the accused *must* be arraigned and tried thereon *unless* (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment discloses an offence which a particular court has no jurisdiction to try. . . ." Although Mr. Hawser contended that this classification ought not to be regarded as exhaustive, we regard it as a valuable and complete exposition of the law on the matter. But even if learned counsel is right,

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in our judgment it cannot be said, for the reasons we have already indicated, that the trial of the appellant on the robbery indictment involved the re-litigation of an issue upon which the quashing of the murder conviction was founded. So to say is mere conjecture. We accordingly hold that neither Stephenson J. nor Nield J. had any discretion to refuse that the trial of the second indictment proceed.

The summing-up of Nield J. was criticised on many grounds. It might be sufficient for this court to say that in our judgment it was a conspicuously fair, accurate and helpful summing-up and that none of the criticisms advanced have been substantiated. But out of deference to the industry and ability with which the appellant's counsel has presented his case, we feel that mention should be made of two of the matters he relied upon. It is, first, said that the learned judge was wrong in allowing the prosecution to give evidence of and rely upon certain oral statements alleged to have been made by the appellant to certain police officers, inasmuch as these same statements had been relied upon by the prosecution in the first trial for the purpose of endeavouring to prove that the appellant was guilty of murder, a charge upon which he was ultimately acquitted by this court. Secondly, it is said that the learned judge was wrong in refusing to allow the defence to refer to and rely upon the fact that the appellant had been acquitted on the murder charge, "and the circumstances in which and the issue upon which he was so acquitted." These criticisms were said to be supported by the decision of the Privy Council in SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA [1950] A.C. 458 and that of the Supreme Court of Georgia in HARRIS *v.* STATE OF GEORGIA (1941) 17 S.E.Rep. (2nd Ser.), p. 573, but, in our judgment, the issues involved in these cases were wholly different from those we are called upon to consider and the cases are not in point. The oral statements imputed to Connelly had a distinct relevance upon the issue of whether he was present at Mitcham, that issue was involved in and common to both indictments, and the fact that the first

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indictment had ultimately resulted in a quashing of the conviction thereon by this court in no way prevented the same oral statements from being adduced in evidence on the trial of the second indictment. We accordingly hold that they were rightly admitted. Whether or not the Crown was being excessively technical in objecting to its being elicited that Connelly had been acquitted on the murder conviction is nothing to the point as to whether such evidence was strictly admissible. In our judgment, it was not. Even more inadmissible would it have been to seek to elicit " the issue upon which he was acquitted."

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For these reasons, we hold that none of the submissions advanced for the quashing of this conviction have been made good. The appeal against conviction is accordingly dismissed.

The court reduced the sentence to one of ten years' imprisonment.

The court granted a certificate for appeal to the House of Lords on the question whether there was any reason why the trial of the indictment for robbery with aggravation should not have proceeded to conviction and sentence.

The hearing before the House of Lords took place on December 10, 11, 12, 16, 17 18 and 19, 1963, and January 15, 16 and 20, 1964.

C. L. Hawser, *Q.C.* and *A. F. Waley*, for the appellant.

The Solicitor-General (*Sir Peter Rawlinson*, *Q.C.*), *J. M. Griffith-Jones*, *Alastair Morton* and *Patrick Milmo*, for the Crown.

Owing to the length of this report it has not been thought necessary to set out the arguments of counsel, which are summarised in the opinions of their Lordships.

Their Lordships took time for consideration.

April 21. The following opinions were read:

LORD REID: My Lords, the question in this case is essentially simple. The appellant took part in an armed

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robbery. In the course of that robbery one of the robbers shot and killed a man. Clearly those facts were capable of giving rise to two charges against the appellant—murder and robbery. He was tried and convicted of murder, but by reason of a misdirection this conviction was quashed by the Court of Criminal Appeal. Ought he then to have been tried afresh on the charge of armed robbery?

If it were proper to be guided by the view of public policy which presently commends itself to Parliament, I would think not. Ever since the passing of the Criminal Appeal Act, 1907, Parliament has persistently refused to permit a retrial in respect of the same offence after a verdict of guilty has been quashed on any ground by the Court of Criminal Appeal. Refusal to allow a new trial has always been put on the ground of fairness to the accused and I cannot see why, if it is unfair to allow a retrial for the same offence, it is fair to allow a fresh trial on the same facts merely because the offence now charged is different.

But I must take the law as I find it. The numerous authorities marshalled by my noble and learned friend, Lord Morris of Borth-y-Gest, show that many generations of judges have seen nothing unfair in holding that the plea of *autrefois acquit* must be given a limited scope. It may not be possible to reconcile all the decisions, but I cannot disregard the fact that with certain exceptions it has been held proper in a very large number of cases to try a man a second time on the same criminal conduct where the offence charged is different from that charged at the first trial. Distinctions between cases where a man can be tried a second time and where he cannot may seem technical, but they seem to me to be so well established by authority that it would be wrong to disregard or overrule them even if I desired to do so.

The difficulty in this case arises from the practice, based on JONES, 13 Cr.App.R. 86; [1918] 1 K.B. 416, that a second charge is never combined in one indictment with a charge of murder. I would think that the Indictments Act, 1915, was designed to ensure that all charges arising out of the same facts

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are combined in one indictment and thus to prevent there being a series of indictments and trials on substantially the same facts. I have had an opportunity of reading the speeches of my noble and learned friends, Lord Devlin and Lord Pearce, and I agree with them. I think that the present practice is inconvenient and ought to be changed. I realise that there are cases where, for one reason or another, it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all the charges which he intends to prefer. But in a case where it would have been improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general question as to the extent of the discretion of the court to prevent a trial from taking place. But I think there must always be a residual discretion to prevent anything which savours of abuse of process.

As regards the present appeal I think that the course which this case has taken was in accord with existing practice, and I would therefore dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, there were two indictments against the appellant. The first charged him (together with three others) with the murder of a man named Hurden on November 17, 1962. The second charged him (together with the three others) with robbery with aggravation, contrary to section 23 (1) (*a*) of the Larceny Act, 1916. The particulars of the offence charged in the second indictment alleged that on November 17, 1962, the accused, being armed with offensive weapons, to wit firearms, and being together with others robbed a man named Davies of a sum of over £519. By reason of a rule of practice (see JONES, 13 Cr.App.R. 86; [1918] 1 K.B. 416) the charges could not both have been contained in one indictment. The appellant pleaded not guilty to both. The two indictments could not be tried together. The first was taken first. The appellant's defence

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(at a trial at the Central Criminal Court) was that he was not guilty for the reason that he had not been present at the scene of the crime. He made an alternative submission that if he was present he was still not guilty of murder. The submission was put by learned counsel to the jury in the following words: ". . . nevertheless, members of the jury, if you come to the conclusion that Connelly was there, you still have to decide whether he is guilty of murder, and my submission to you is this. There is no evidence that any of the men in the office intended to do more than frighten people with unloaded guns. There is no evidence that the guns in the office were loaded; there is no evidence that any of the men in the office knew that the man outside had a loaded gun or intended to use it, and unless the prosecution satisfy you that the men in the office either were themselves prepared to use such force as would cause grievous bodily harm or knew that their confrere outside was prepared to do the same kind of thing, then the prosecution would not have established the necessary ingredients of murder. They would, of course, have established the necessary ingredients for robbery and quite clearly, on the second indictment, if Connelly came up again and the jury had found that he was present, then he would go down on the second indictment." The jury found the appellant guilty of murder. The learned judge said that the second indictment should remain on the file and be marked as not to be proceeded with unless the court or the Court of Criminal Appeal gave leave.

The appellant appealed to the Court of Criminal Appeal. On the ground that there had been misdirection in that part of the summing-up which dealt with the appellant's defence of an alibi and because the court did not feel it possible to apply the proviso, the appeal was (on April 5, 1963) allowed, and the appellant's conviction of murder was set aside. The question of the trial of the second indictment then arose. The Court of Criminal Appeal recognised that a plea of *autrefois acquit* could not then be argued and acceded to an application made by the prosecution for leave to prefer the second indictment. It has not been suggested that this circumstance would

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The appellant appeared again at the Central Criminal Court on May 10, 1963. He pleaded *autrefois acquit*. A jury was sworn to try that issue. The learned judge told the jury about the proceedings in the Court of Criminal Appeal and of the resulting acquittal of murder, and in his direction to them said: "The question that you have to decide is a short and simple one; has this man Connelly proved that he has already been tried and acquitted of the same felony or offence, or of substantially the same offence, or has he already been tried and acquitted on an indictment on which he could have been convicted of the same or substantially the same offence?" Pointing out that the murder which was alleged in the first indictment took place in the course of the robbery which was alleged in the second indictment, he asked the jury whether it could be said that the murder of Hurden on November 17 was the same or substantially or practically the same as robbery with aggravation of a sum of money from Davies. He told the jury that the answer must be "no." He directed them that on the indictment for murdering Hurden the appellant could not have been convicted of robbing Davies. The jury on his direction found that the appellant had not previously been acquitted of the felony for which he was indicted in the second indictment.

My Lords, for reasons which I will elaborate, I can find no error in the direction of the learned judge. The appellant could not on the first indictment have been found guilty of the offence of robbery with aggravation. Nor is proof of robbery with aggravation equated with proof of a killing.

Following the verdict of the jury, the learned judge expressed the view that the Crown ought not to proceed with the second indictment. The reason formulated by the learned judge for that view was that the issue whether the appellant had taken part in the raid at Mitcham on November 17, 1962, had already been decided and ought not to be re-tried. So far, however, as there had up to then been any direct decision,

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such decision was that of the jury who found that the appellant was guilty of murder. That necessarily involved that he had been at Mitcham on November 17, 1962. The Court of Criminal Appeal did not decide that he had not been there. Their decision, publicly stated, records no such finding. Though the appeal was presented on the ground that there had been misdirection concerning the issue as to whether the appellant had been at Mitcham, and though the issue of murderous intent was not raised, all that the Court of Criminal Appeal decided was that there had been misdirection in the summing-up and that they could not apply the proviso. The result was that the conviction was set aside. The result is that the appellant can validly assert that he has been acquitted of the charge of murder—with the consequential result that he has also been acquitted of manslaughter. He cannot, however, say that anyone has ever decided that he was not present. Indeed, it is probable that the Court of Criminal Appeal would not without demur have agreed that the second indictment should be proceeded with had they thought that their decision in any way involved a finding or conclusion to the effect that the appellant had not been at Mitcham. The verdict of acquittal of murder which was the consequence of the decision of the Court of Criminal Appeal (see Criminal Appeal Act, 1907, s. 4) can be regarded as placing the appellant in the same position as he would have been in if the jury had returned a verdict of not guilty. Such a verdict of a jury could not, however, be analysed. The appellant's case as submitted to the jury on the murder charge was twofold, *i.e.* (1) I was not there at all; (2) if I was there, I was in no way responsible for the killing that took place. A verdict of not guilty would not proclaim what had been the view of the jury.

The Crown decided to proceed with the second indictment. A submission was then made to the learned judge that he could and that he should prevent the prosecution from proceeding. He was invited (1) to make an order that all further proceedings on the indictment should be stayed or that the

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indictment should lie on the file and that the matter should be adjourned *sine die*, or (2) to allow the indictment to remain on the file of the court marked "Not to be proceeded with without leave of the court," or (3) to quash the indictment, or (4) to empanel a jury and to direct them to acquit the appellant. The submission apparently was that it "would be unfair or contrary to the interests of justice" to allow the second trial to take place.

The learned judge declined to give any direction to the prosecution that they should not proceed. They did proceed, and in due course the appellant was convicted. My Lords, in my view, the learned judge was entirely correct in so declining. He had no power to suppress the prosecution. There was no abuse of the process of the court. The indictment was correct in form. There was no basis for the quashing of it. Should it then be said (in a somewhat vague and imprecise way) to have been "unfair" that the appellant should have been tried on the second indictment? The guiding principles as to what is fair and in the interests of justice have been evolved over the centuries: some of them, indeed, find their expression in the rules governing the pleas of *autrefois acquit* and *autrefois convict* and other kindred pleas: but if an appellant, being faced with a charge, cannot show that any of these pleas avail him, why is it unfair that he should take his trial? He will not be convicted unless his guilt of the charge is established so that a jury are quite sure of it. Why is that contrary to the interests of justice? The most that can be said in this case is that, if there had not been a rule of practice which prevented the joinder in one indictment of other charges together with a charge of murder and if there had been such a joinder and all offences had been charged in one indictment and tried together and if in that event there had been misdirection in the summing-up similar to the misdirection in the summing-up on the trial of the first indictment and if the appellant had been convicted by a jury, the result of an appeal to the Court of Criminal Appeal would have been that the appellant would have been acquitted of

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all charges. That the plight of the appellant would on all those suppositions have been different does not seem to me to be a valid basis for a view that it was contrary to the interests of justice that the trial of the second indictment should proceed. In any event, if there had been a joinder of all charges in one indictment, it is possible that there might have been a request to have a separate trial of the robbery count. I consider that, if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it and if there is no plea in bar which can be upheld, the court cannot direct that the prosecution must not proceed. I agree with what was said by Lord Goddard C.J. in R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (1953) 37 Cr.App.R. 148; [1954] 1 Q.B. 1, that once an indictment is before the court the accused must be arraigned and tried thereon unless (on a motion to quash or demurrer pleaded) the indictment is held to be defective in substance or form and is not amended, or unless matter in bar is pleaded and the plea is tried or confirmed in favour of the accused or unless (after the indictment is found) the Attorney-General enters a *nolle prosequi* or unless the court has no jurisdiction to try the offence disclosed by the indictment. In that case Lord Goddard said that he knew of no power in the court to quash an indictment because it is anticipated that the evidence would not support the charge: indeed, the only ground on which the court can examine the depositions, before arraignment, is to see whether (in a case where there is a count for which there has not been a committal) the depositions disclose the offence covered by that count.

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules

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of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process of the court.

I consider that the rule of practice that counts for other offences should not be included in an indictment for murder (see JONES (*supra*)) could with advantage now be modified. Some of the considerations which no doubt prompted the rule are not now as fully applicable as they were before the passing of the Homicide Act, 1957. The ruling in JONES (*supra*) was, I consider, not a ruling of law, but was one of practice and procedure. (See also LARGE (1939) 27 Cr.App.R. 65 and DAVIS (1937) 26 Cr.App.R. 95.) There must now often be circumstances in homicide cases (though probably not in capital murder charge cases) in which such joinder of charges as is made permissive by the Rules of the Indictments Act, 1915, would not be undesirable. In view of this and in the light of current experience the time is, I think, opportune for a reconsideration by the Court of Criminal Appeal of the rule of practice. It is, however, clear that in framing two indictments against the appellant in the present case the prosecution were not at fault and were only doing what they were obliged to do. While, as I will endeavour to show, there has never been a rule that the same facts may not form the basis of successive charges, there is inherent in our criminal administration a policy and a tradition that even in the case of wrongdoers there must be an avoidance of anything that savours of oppression. That fine tradition is not tarnished if, where rules (which have themselves been evolved in the interests of fairness) make it inevitable, and where the interests of justice so direct, a second trial takes place in which facts are for a second time investigated.

The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. That power, as

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is demonstrated by a stream of authority to which I will refer, has, however, never been regarded as endowing a court with a power to say that evidence given in reference to one charge may not be repeated in reference to another and different charge. Nor does it enable a court to order that a prosecution be dropped merely because of some rather imprecise regret that an accused should have to face another charge. If there had not been the rule of practice against the joinder with a murder charge of another charge (a rule which in 1918 may have been based upon the fitness of things, having regard to the fact that a conviction for murder always resulted in a sentence of death, but which was not, I would have thought, a rule designed to give any assistance to the defence), then in the circumstances of the present case the murder and robbery charges might have been in one indictment. Had they been, I do not understand it to be suggested that there would have been any prejudice to the accused. Nor is it suggested that the judge would have been invited to require the prosecution to elect between the two charges. He might possibly have been invited to order that the charges should be tried separately. He clearly would have had power so to order. I do not consider that the court would have had any power to order that one or other of the charges must be dropped. Had there been a trial of the two charges together, the powerful plea of counsel for the accused would have been that if the jury were satisfied (contrary to the submission of the defence) that the appellant had been present, they should acquit him of murder, but would then inevitably have to convict him of robbery. It could not, therefore, be said that the two charges are repugnant: the appellant might have been convicted of both of them. There could be no very obvious embarrassment for the appellant either in dealing with the two charges at the same time or in dealing with them at different times.

If there had been an acquittal by the jury on the murder charge, it would not have been known what was the basis of the acquittal. The jury had been told that on one view the

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appellant, in the event of an acquittal of murder, would be tried for robbery: he certainly would have expected that in that event he would be or might be so tried. He was in fact convicted, and when the conviction was set aside by the Court of Criminal Appeal there could be no second trial on the charge of murder. No question as to second trials arises, therefore, in this case. There was a first and an only trial for robbery.

When the Court of Criminal Appeal gave judgment allowing the appeal from the conviction for murder, the prosecution applied to that court for leave to proceed with the second indictment. That application was made because of the order that had been made by the learned judge after the jury had convicted at the trial for murder. The second indictment was to lie on the file of the court and was not to be proceeded with unless the court or the Court of Criminal Appeal gave leave. It is not necessary to express any concluded opinion as to the effect of such an order. It may not amount to more than a statement by the defence to the court that there is no insistence by them upon having the outstanding charge dealt with at once and a statement by the prosecution to the court that the charge would not be tried until such time as the court said that it could be tried. In fact leave was given, but it was only given after a detailed and careful submission had been made to the Court of Criminal Appeal to the effect that, quite apart from any question as to the plea of *autrefois acquit*, there were various reasons why the case should not proceed on the second indictment. The arguments as to the undesirability of proceeding to trial upon the second indictment were put to the court in similar terms to those developed before your Lordships and were put on the basis that it was for the court to decide whether or not to give its leave. The matter was put as being one that was entirely within the discretion of that court. Having heard and considered the submission, the court merely stated that it acceded to the application of the prosecution and ordered the accused to remain in custody. When the case later came before John Stephenson J. and a jury the plea of *autrefois acquit* was

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pleaded and it is accepted that that was the right time to raise the plea. As already stated, it was rejected by the jury. When thereafter the learned judge expressed his opinion that the second indictment should not be tried but should be dropped, that opinion was based upon the view "that to try him on this indictment would be to ask a jury to determine an issue of identity which was decided against him by another jury and in his favour by the Court of Criminal Appeal on the ground that if the jury had been differently directed they might have reached the opposite determination of the same issue." The learned judge thought that the appellant ought not to be tried on the second indictment "because the issue whether he took part in the raid at Mitcham on November 17, 1962, had already been decided and ought not to be re-tried." With respect, as I have indicated above, the Court of Criminal Appeal did not decide that the appellant had not been at Mitcham. What they decided was that the finding that he had been there was reached after a summing-up that was open to criticism and that the conviction for murder should be set aside. The only positive result was that the appellant was acquitted—finally and absolutely—of murder. It had then to be decided whether or not to proceed with the second indictment. The decision involved some difficult considerations. Views may differ as to which course was desirable. I can appreciate and understand the view which appealed to the learned judge. I can appreciate and understand the view of those who had the responsibility to decide whether to proceed with the untried indictment or whether to abandon it. It was not, however, for the court to decide as between the two views, and I consider that the learned judge was entirely correct in refusing to direct that there should be no trial. It was a matter for the prosecution. I cannot think that it can properly be said that the decision of the prosecution to proceed involved any abuse of the process of the court. The learned judge himself was clearly of this opinion. In reference to the application of learned counsel for the appellant he said: "Indeed, there would be an abuse of the process of this court

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not in my refusing, but in my consenting to treat this indictment as he asks me to treat it." I agree with that approach of the learned judge, and I also agree with him " that generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it." Indeed, under the English system of law criminal procedure has been conceived of as an action between a plaintiff and a defendant to be tried by a process substantially similar to that employed in any other action (see Holdsworth's *History of English Law*, Vol. 3, p. 622). It would, in my judgment, be an unfortunate innovation if it were held that the power of a court to prevent any abuse of its process or to ensure compliance with correct procedure enabled a judge to suppress a prosecution merely because he regretted that it was taking place. There is no abuse of process if to a charge which is properly brought before the court and which is framed in an indictment to which no objection can in any way be taken there is no plea such as that of *autrefois acquit* or *convict* which can successfully be made.

Even had I not been of the opinions which I have just expressed, and had I considered that on some ground there was some discretionary power in some court to order that the robbery indictment be not tried, I would very much doubt whether after what transpired in the Court of Criminal Appeal, and thereafter before John Stephenson J. and before Nield J. and after the dismissal of the second appeal in the Court of Criminal Appeal, there ought now, in your Lordships' House, to be some new and original exercise of a discretion which would involve the quashing of the conviction. In my opinion, there was no abuse of the process of the court in proceeding with the outstanding indictment and there was no bar to it unless the appellant could successfully plead *autrefois acquit*.

I pass, therefore, to a consideration of the questions which arise concerning the plea of *autrefois acquit*. In giving my reasons for my view that the direction given by the learned judge was entirely correct, I propose to examine some of the

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authorities and to state what I think are the governing principles. In my view both principle and authority establish:

(1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

(2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;

(4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

(5) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus if there is an assault and a prosecution and conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies;

(6) that on a plea of *autrefois acquit* or *autrefois convict* a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in

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effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

(8) that apart from circumstances under which there may be a plea of *autrefois acquit*, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of *res judicata* applies;

(9) that, apart from cases where indictments are preferred and where pleas in bar may therefore be entered, the fundamental principle applies that a man is not to be prosecuted twice for the same crime.

These principles, which in my view should be accepted and followed, have been evolved over a long period. Brief reference may be made to some of the statements in the books. Thus Coke (3 Inst. 213) says that "*auterfoitz acquite* must be of the same felony." Blackstone (*Commentaries*, Book IV) (1759 ed.) says (p. 329) that "the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." He says that when a man is once fairly found not guilty upon any indictment he may plead such acquittal in bar of any subsequent accusation "for the same crime": and that the plea of *auterfoits convict* depends upon the same principle. Also he points out that a conviction of manslaughter is a bar to an indictment of murder: "for the fact prosecuted is the same in both, though the offences differ in colouring and in degree." He adds: "It is to be observed, that the pleas of *auterfoits acquit* and *auterfoits convict*, or a former acquittal, and former conviction, must be a prosecution for the same identical act and crime."

In Hale's *Pleas of the Crown* (1778 ed.), Vol. 2, p. 240, it is pointed out that pleas in bar of the indictment of felony or treason are of two kinds, *i.e.*, (i) such as are purely matters of record, and (ii) such as are partly matters of record and

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partly matters of fact. The plea of pardon would be of the former kind. Hale gives four illustrations of pleas of the latter kind: "1. *Auterfoits acquit* of the same felony. 2. *Auterfoits attaint* or *convict* of the same felony. 3. *Auterfoits attaint* of another felony. 4. *Auterfoits convict* of another felony and had his clergy." In a plea of *auterfoits acquit* the matter of record would include the former indictment and acquittal: the matter of fact would be that the prisoner is the same person that was acquitted and "that the fact is the same of which he was acquitted, and whereof he is now indicted." Hale proceeds to give illustrations as to what would and what would not be regarded as the same felony as that whereof the party was acquitted. Thus if A and B were indicted as principals in the robbing or killing of D and if B was convicted as principal but A was acquitted, then if A was later indicted as an accessory after the fact he could not then rely on his former acquittal because the two offences would not be the same. If, however, A was later indicted as an accessory before the fact he could plead *auterfoits acquit* "because it is in effect the same offence." (This latter view was not shared by other writers.) So if a man was indicted for the robbery or murder of John a Stiles and acquitted and was later indicted for the robbery of John a Nokes, he could plead *auterfoits acquit* if he could show that notwithstanding the variance it was in fact the same man. Further (see p. 245): "If A commits a burglary in the county of B and likewise at the same time steals goods out of the house, if he be indicted of larceny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal. And *è converso*, if indicted for the burglary and acquitted, yet he may be indicted of the larceny, for they are several offences, tho committed at the same time. And burglary may be where there is no larceny, and larceny may be where there is no burglary. Thus it hath happened, that a man acquitted for stealing the horse hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time." Hale proceeded to point out (at p. 246) that if a man is acquitted generally on

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an indictment of murder, *auterfoits acquit* would be a good plea to an indictment of manslaughter of the same person. It would be the same death: the fact would be the same. The charges of murder and manslaughter only differ in degree.

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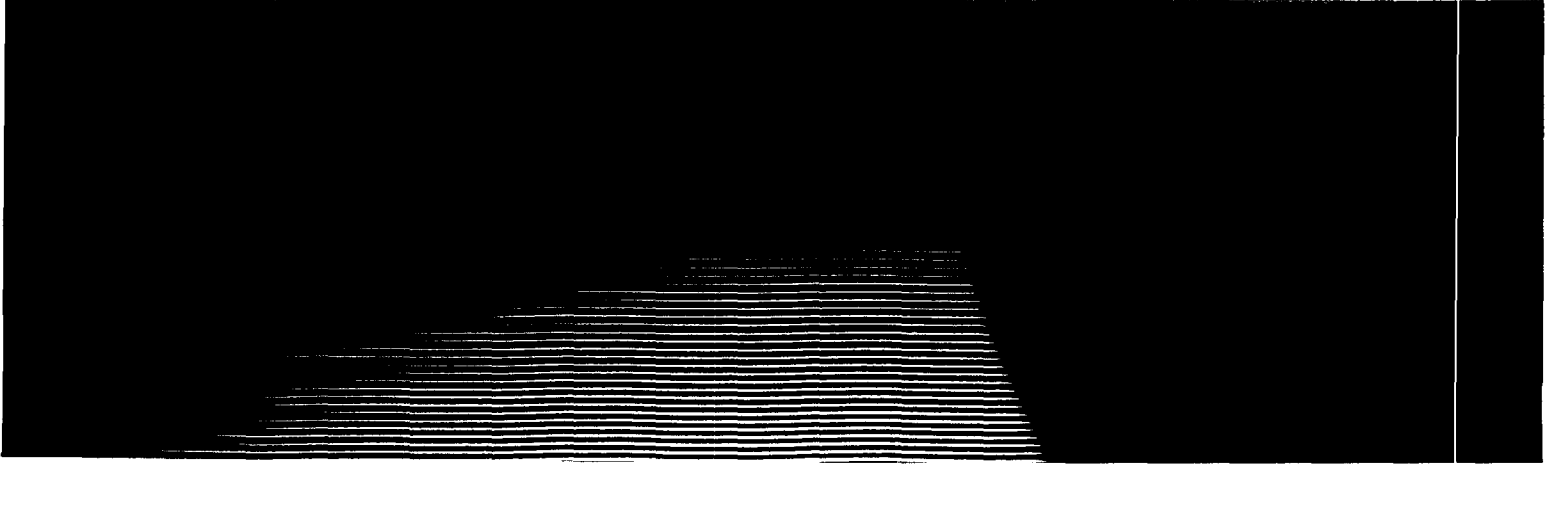
The principle seems clearly to have been recognised that, if someone had been either convicted or acquitted of an offence, he could not later be charged with the same offence or with what was in effect the same offence. In determining whether or not he was being so charged the court was not confined to an examination of the record. The reality of the matter was to be ascertained. That, however, did not mean that, if two separate offences were committed at the same time, a conviction or an acquittal in respect of one would be any bar to a subsequent prosecution in respect of the other. It was the offence or offences that had to be considered. Was there in substance one offence—or had someone committed two or more offences?

In Hawkins' *Pleas of the Crown* (8th edition, published in 1824), Book II, at p. 515 it is said: " The plea of *autrefoits acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found ' not guilty ' on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime." Hawkins makes it clear that a mere variance between the record of a former acquittal and the later indictment will not defeat the plea if both indictments are for the very same felony. Hawkins further says (see p. 518): " Also it seems a general rule, that a bar in action of an inferior nature will not bar another of a superior. Yet it seems, that an acquittal in an indictment of murder will be a good bar of an indictment of petit treason, because both offences are in substance the same. But it is clear, that an acquittal of one felony is no manner of bar to a



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prosecution for another in substance different, whether committed before or at the same time with that of which he is acquitted."

Some of the cases cited by Hawkins must be read in the light of the later guidance given in VANDERCOMB AND ABBOTT (1796) 2 Leach 708. An indictment charged the two prisoners with having burgled a house and stolen certain articles therein. The facts to sustain that charge were not proved and the jury by the direction of the court acquitted the prisoners. The grand jury had not been discharged and the prisoners were detained in custody in order to have another indictment preferred against them. Two new indictments were then preferred. One charged them with having burgled the house with intent to steal. The other charged them with having stolen articles in the house, stating other articles than those stated in the former indictment, or the same articles differently described and laid as to part of them to be the property of different persons than what were included in the former indictment. To the first of the two new indictments the prisoners pleaded *autrefois acquit*. To the plea there was a demurrer and to the demurrer a joinder. The questions raised were argued in the Exchequer Chamber before all the judges of England. The prisoners' plea failed. It was quite clear that the burglary charged in the new indictment was precisely the same burglary as that charged in the previous indictment: "there was only one act done." It was pointed out, however, that burglary was of two sorts, first, breaking and entering a dwelling-house in the night time and stealing goods therein; secondly, breaking and entering a dwelling-house in the night time with intent to commit a felony, although the meditated felony be not committed. The judges therefore said: "In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment, charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with

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reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other." Having referred to certain cases, the judges said: " These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." (The charges which can be preferred under the provisions of the Larceny Act, 1916, need not for present purposes be considered.)

My Lords, the law of England was, therefore, clearly stated. It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction. Applying to the present case the law as laid down, the question is whether proof that there was robbery with aggravation would support a charge of murder or manslaughter. It seems to me quite clear that it would not. The crimes are distinct. There can be robbery without killing. There can be killing without robbery. Evidence of robbery does not prove murder or manslaughter. Conviction of robbery cannot involve conviction of murder or manslaughter. Nor does an acquittal of murder or manslaughter necessarily involve an acquittal of robbery. Nor on a charge of murder or manslaughter could a man be convicted of robbery. That the facts in the two trials have much in common is not a true test of the availability of the plea of *autrefois acquit*. Nor is it of itself relevant that two separate crimes were committed at the same time so that in recounting the one there may be mention of the other.

The law was thus stated by Archbold (*Pleading and Evidence in Criminal Cases*, 2nd ed., 1825, at p. 53): " When a man is indicted for an offence, and acquitted, he cannot

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afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and, if he be thus indicted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment. The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

An illustration of the application of the principle would be where after an acquittal upon an indictment for manslaughter there was an indictment for murder in respect of the same killing. In my view, the acquittal on the first indictment would be a bar to the second. It would be the same if the first indictment resulted in a conviction. In the report of WROTE *v.* WIGGES (1591) 2 Co.Rep., Part IV, 46.b, and see 2 Hale 246, referring to HOLCROFT'S case (1578) (unrep.), it is said that: "It was resolved without difficulty in HOLCROFT'S case (*supra*), that if a man commits murder, and is indicted and convicted or acquitted of manslaughter, he shall never answer to any indictment of the same death, for all is one and the same felony for one and the same death, although murder is in respect of the circumstance of the forethought malice more odious." In TANCOCK (1876) 13 Cox 217 a man was indicted for and convicted of manslaughter and after that conviction a coroner's jury returned a verdict of wilful murder and upon that inquisition the man was arraigned for murder. He pleaded *autrefois convict*. Denman J. thought that no jury would convict of murder and he directed the jury to find the plea proved. He did, however, say that had he thought that the facts would have supported a conviction for murder he would have let the man be tried for murder and would have reserved the point for the Court of Crown Cases Reserved as to whether following a conviction for manslaughter there could be a trial for murder. My Lords, I would think that the weight of authority would compel the answer that that could not be.

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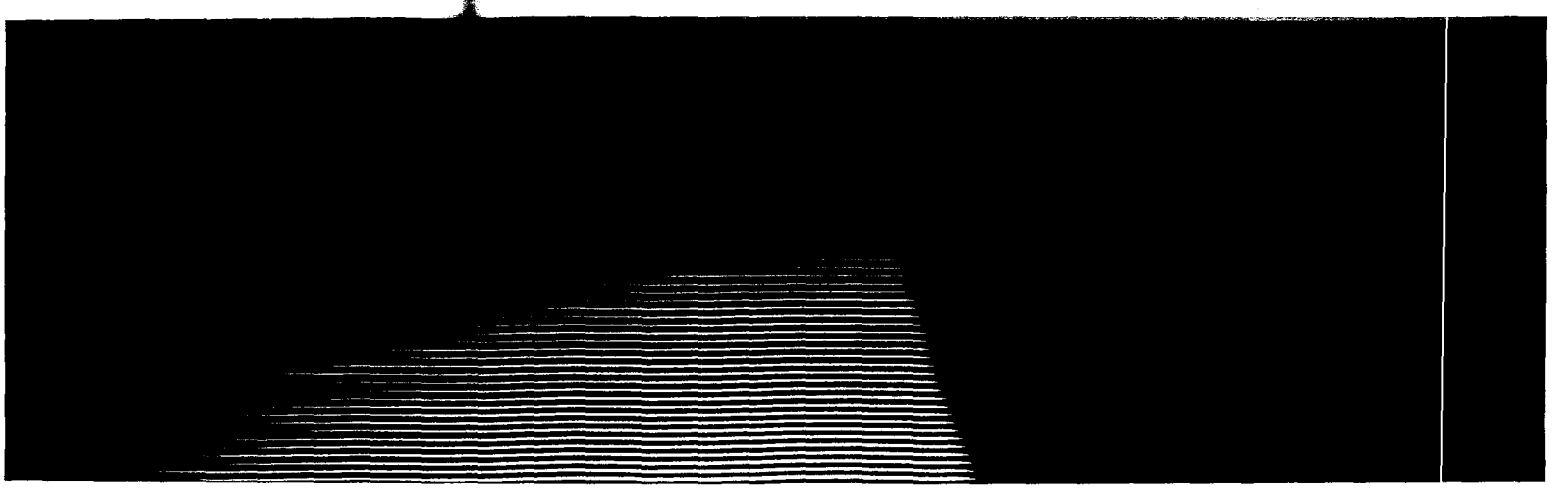
The test above referred to is also the test as to whether the new charge is the same as or substantially the same as or in effect the same as the charge contained in the earlier indictment. In the present case it was in no way necessary to prove that anyone had been killed in order to prove a charge of robbery with aggravation. Though the evidence which was given on the trial of the second indictment did in fact inform the jury that a man had been killed, the killing was no necessary element of the crime of robbery with aggravation, and the learned judge in his summing-up to the jury emphasised that they were not concerned with any charge of murder. The crime of robbery with aggravation could not be said to be the same as or substantially the same as or in effect the same as the crime of murder or manslaughter.

My Lords, the authorities to which I have referred show that the plea of *autrefois acquit* has availed if the charge contained in a later indictment is one of which a man could have been convicted on the trial of an earlier indictment. It was recognised, for example, by Hale that an acquittal of murder involved that there could be no later charge of manslaughter in respect of the same death. It was shown in 1611 in MACKALLEY'S case, 9 Co.Rep. 61, that on an indictment for murder there could at common law be a conviction for manslaughter. The circumstances are today numerous in which on a trial for one offence there may be a conviction of an offence of less gravity. At common law on an indictment for an offence of a compound nature there might be a conviction of one of the criminal elements of which the offence was composed. There could be such a conviction if the words of the indictment were wide enough. As was said in HOLLINGBURY (1825) 4 B. & C. 329 at p. 330: "In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law." But at common law there cannot be a conviction of an offence which is quite different from the charge in the indictment. There are, however, many statutory provisions which enable verdicts of guilty of offences differing from those charged to be returned. But neither at common



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law nor under any statutory provision could there be a conviction of robbery on a charge of murder.

The fundamental principle of the plea of *autrefois acquit* as laid down by the Judges of England in 1796, and as stated by writers earlier than that date, has been consistently followed. It was thus stated in 1848 in Broom's *Legal Maxims*, 2nd ed., p. 257: "and this plea is clearly founded on the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation—*nemo debet bis puniri pro uno delicto*. Thus, an acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter: and an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for the larceny of the same goods; because, in either of these cases, the prisoner might, on the former trial, have been convicted of the offence charged against him in the second indictment. On the other hand, an acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanor, and this holds *è converso*. Nor is an acquittal on an indictment for larceny any bar to an indictment for the same offence charged as a false pretence; though, on account of the proviso in Stat. 7 & 8 Geo. IV c. 29 s. 53, an acquittal for the latter offence is a bar to an indictment for the same act charged as a larceny. An acquittal on an indictment for having been present aiding and abetting in a felony, is no bar to an indictment charging the party as an accessory before the fact, because the offences described in the two indictments are distinct in their nature. The true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

It is, of course, clear that there may now be a joinder of felonies and misdemeanors in one indictment and by statutory provision there may in certain cases be convictions of misdemeanors on charges of felonies. Under the Indictments Act, 1915, charges may be joined in the same indictment if they are

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founded on the same facts or form or are a part of a series of offences of the same or a similar character. Whenever charges can be joined, they should be joined.

The general principle of *autrefois acquit* was illustrated in the case of GOULD, 1840, 9 C. & P. 364. Gould was charged with burglary. There had been a previous charge against him of murder. What had been suggested against him was that in the course of burglary and in furtherance and prosecution of burglary he had murdered a Mr. Templeman. He was acquitted. At that date it would have been possible on an indictment of murder to convict not only of manslaughter but even of assault "where the crime charged shall include an assault" (see section 11 of the Offences against the Person Act, 1837, 7 Wm. 4 and 1 Vict. c. 85). On the second indictment—for burglary—he was convicted. The conviction was upheld. There was no charge of burglary with violence. Baron Parke's view (at pp. 364–365) was that "if he had been indicted for burglary with violence, as he might have been convicted of manslaughter or even of assault on the indictment for murder, on which he had been acquitted altogether, in his opinion, that acquittal would have been an answer to the allegation of violence if it had been inserted in the present indictment." Had there been a charge of robbery with violence, the evidence necessary to support such a charge would have been sufficient to convict of assault. But he had been acquitted of assault because the acquittal of murder was in the circumstances also an acquittal of manslaughter and of assault.

The case of BIRD (1851) 2 Den. 94, turned mainly upon the construction of the words "where the crime charged shall include an assault against the person" which were contained in section 11 of the Act of 1837 (which was repealed in 1861). The two accused were charged with the murder of a young woman who died on January 4, 1850. There were a number of counts in the indictment alleging that on various dates after November 5, 1849, the two accused had struck and beaten the young woman and so had caused her death. At the trial

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evidence was given of various assaults in the months of November and December, but the evidence showed that the death was caused exclusively by one particular blow on the head which had been inflicted shortly before the death on January 4, 1850. There was no evidence to show that that blow had been struck by either of the accused and they were acquitted. The wording of section 11 was " where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicated, if the evidence shall warrant such finding." For an assault so found there could be a sentence of three years' imprisonment. The two accused, after their acquittal, were then indicted on a charge of having assaulted the young woman on November 10, 1849, with intent to wound and with intent to do grievous bodily harm. They pleaded *autrefois acquit*. They were convicted. There was a case stated for the Court of Crown Cases Reserved. It was first argued before five judges. It was then re-argued before fourteen judges in the Court of Exchequer. Eight of the judges affirmed the conviction, while six thought that the plea of *autrefois acquit* should have succeeded. At the second trial the plea of *autrefois acquit* failed because the jury were told that they could convict if they were satisfied that there were several distinct and independent assaults some or any of which did not in any way conduce to the death of the deceased. The great debate before the judges was, therefore, whether there could have been a conviction of assault at the trial on the murder charge. Did the general acquittal at the first trial operate as a bar to a prosecution for each and every assault? Could there have been a conviction of assault if the assaults were not connected with and did not cause the death? In the circumstances did the murder " include " the assaults? In order that section 11 should apply must the assaults be connected with the death? Must they be connected with the circumstances relied upon as constituting the felony? My Lords, with the questions of construction then raised there need not now be any concern but the case illustrates that it was

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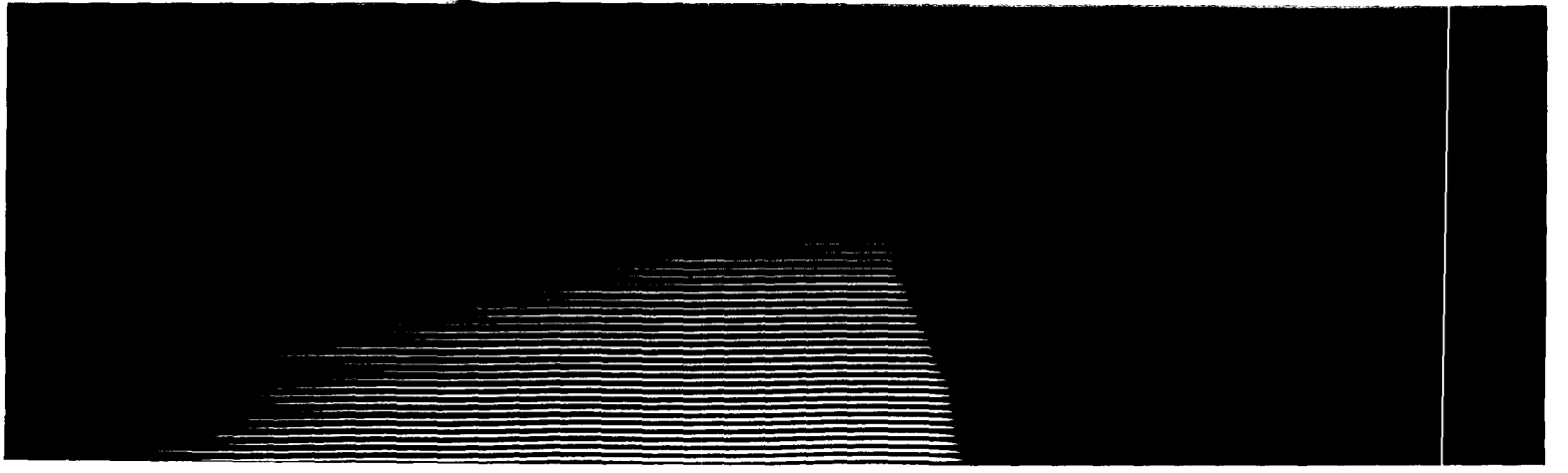
well settled in 1850 that on a plea of *autrefois acquit* it can be shown what evidence was given at an earlier trial. There can be parol evidence to show what the charge in the previous indictment really was. In BIRD'S case (*supra*) it was a question of fact (for the jury) whether the assault which was the subject of the second indictment was the same as one of the assaults forming the basis of the murder charge, but it was a question of construction and, therefore, of law for the judge whether on the indictment for murder there could have been a verdict of guilty of assault. There does not seem to have been any suggestion that the second indictment could not be preferred or could not result in a conviction merely because it related to facts which had already been examined or because it required the repetition of evidence previously given.

In ELRINGTON (1861) 1 B. & S. 688, there was an indictment containing three counts: (1) assault causing grievous bodily harm (2) assault (the same assault) causing actual bodily harm (3) common assault (the same assault). Elrington pleaded that in respect of the same assault an information and complaint against him had previously been heard by justices of the peace and had been dismissed and that the justices had signed a certificate of dismissal. Section 28 of 9 Geo. IV, c. 31, provided that in such circumstances a person should be " released from all further or other proceedings, civil or criminal, for the same cause." Cockburn C.J. held that the express words of the statute enabled Elrington successfully to plead it in bar to the indictment and Blackburn J. agreed. Though Cockburn C.J. expressly decided the matter on the wording of the statute, he added when dealing with an argument of counsel (at p. 696): " on the other hand, we must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form." In speaking of " a series of charges " the Chief Justice must have been referring to charges preferred at different dates, for there clearly could have been no objection



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to the inclusion in one indictment of the three counts that were preferred against Elrington. Series of charges are constantly and entirely properly preferred. The Chief Justice must have been referring to the established principle of *autrefois acquit* —and equally the established principle of *autrefois convict.* He must have been referring to the well-recognised test, *i.e.*, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. In argument he had said to counsel (at p. 694): "Suppose a man indicted and tried before a jury for a common assault were acquitted, if the prosecutor were afterwards to indict him for a felonious assault, on the same facts, could he not plead *autrefois acquit?*" and he had pointed out that Coltman J. had (in WALKER (1843) 2 Moo. & Rob. 446) said that the plea would avail. In argument also the Chief Justice had referred to STANTON (1851) 5 Cox 324, which was an indictment for a felonious assault and wounding, it having transpired in the course of the trial that the prisoner had been previously convicted before two justices for the same assault, and where Erle J. said (at p. 325): "In my opinion the conviction would have been an estoppel to the indictment for the felonious assault and wounding, if pleaded, and although it has not been pleaded I am bound to consider the charge as having been already adjudicated upon, and the prisoner as having undergone the punishment allotted for it."

WALKER (*supra*) had been decided in 1843. There were two indictments against the prisoner. One related to stabbing a certain person; the other related to stabbing a different person. Each indictment had three counts, *viz.*, (1) stabbing with intent to maim (2) stabbing with intent to disable (3) stabbing with intent to do grievous bodily harm. The prisoner had previously been taken before two magistrates under 9 Geo. 4, c. 31, s. 27. Both prosecutors (the stabbed persons) had given evidence before the magistrates and, as the two assaults were included in one and the same transaction, the prisoner had been fined in one joint sum of £5 for the two assaults. The

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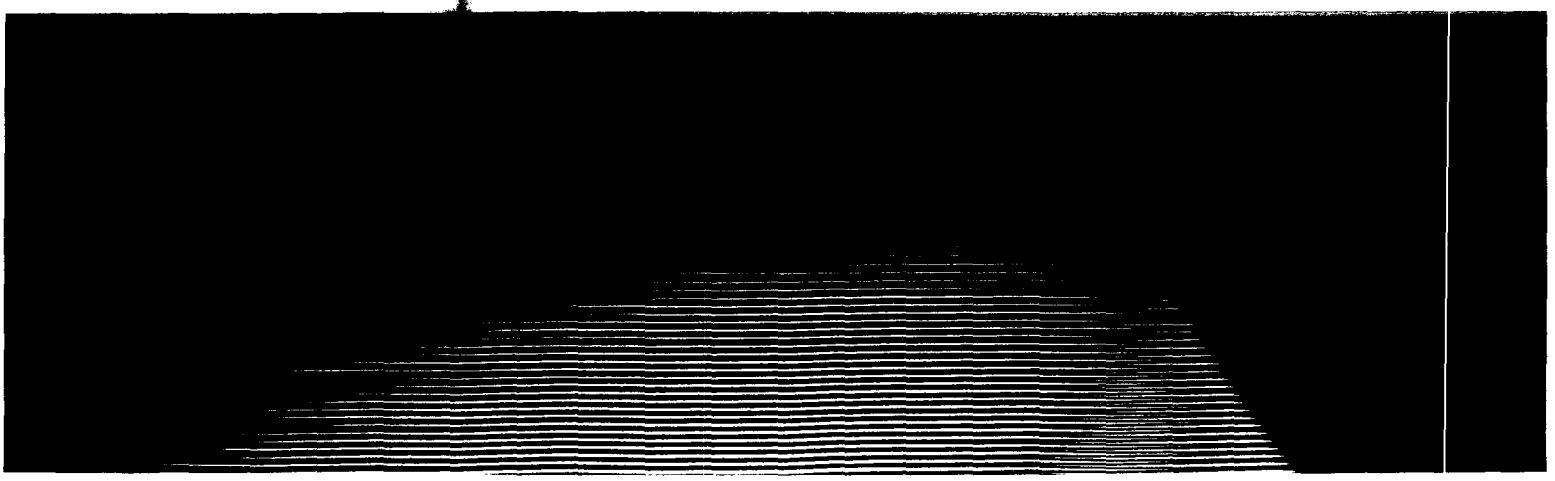
assaults had consisted of stabbings with a knife and the indictments related to the same stabbings in respect of which the prisoner had been fined by the magistrates: to the indictments the prisoner pleaded *autrefois convict* and to his plea there was a demurrer. It was argued that the magistrates had no jurisdiction in any case of felony and only had jurisdiction under section 27 to deal with common assault. Under section 28 it was provided that if a person against whom a complaint for common assault was preferred either obtained a certificate of dismissal "or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause." It was argued that "the same cause" must be the common assault referred to in section 27 and that there could not be a release for a felony over which the magistrates had no jurisdiction. It was, however, provided by section 29 that if the justices "shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any circumstances, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act . . . ." The plea of the prisoner was held to be good. Coltman J. said (at pp. 457–458)—"I am of opinion that the justices had jurisdiction in this case. On a complaint for a common assault they were to determine whether such assault was accompanied with any felonious intention: on that question they have adjudicated and their decision is final. They are like any other court of competent jurisdiction. It is the same as if the party had been convicted by a jury of an assault and he was afterwards indicted for the felony which involved that assault: it is clear, if he did not make the assault he could not be guilty of that which includes and depends upon the assault. There is no difference in such a case whether the party was acquitted or convicted." Again



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the same test appears and was applied. Would the evidence which was necessary to support the indictments be sufficient to convict of the earlier charge? If the prisoner had been acquitted by the magistrates, he could not have been later charged with the felony. To prove an assault with intent would involve proving an assault: but he would have been acquitted of an assault. Furthermore a court having jurisdiction to decide the matter would have decided that there was no felonious intent. The same reasoning applied where there had been a conviction before magistrates. The prisoner could not later be convicted of the felony. That would be for two reasons (1) that the felony would involve the assault: it would include and depend upon the assault: and he had already been convicted of the assault, (2) a court having jurisdiction to decide the matter would have held that there was no felony. That was a case therefore which illustrated both how the principle of *res judicata* applies in criminal cases and how the principle of *autrefois acquit* applies.

STANTON (1851) 5 Cox 324, was another case affected by the provisions of 9 Geo. 4, c. 31. Stanton was indicted at assizes for a felonious assault: he was acquitted of the felony, but found guilty of a common assault. During the trial it appeared that Stanton had previously been summoned before two magistrates in respect of the same assault and had been fined and, in default of payment of the fine, had been imprisoned. Erle J. asked why the conviction by the magistrates had not been pleaded in answer to the indictment in pursuance of the statute 9 Geo. 4, c. 31. Erle J. then (at p. 325) used the words which I have already quoted *viz.*: "In my opinion the conviction would have been an estoppel to the indictment for the felonious assault and wounding, if pleaded, and although it has not been pleaded I am bound to consider the charge as having been already adjudicated upon, and the prisoner as having undergone the punishment allotted for it." He bound the man over in his own recognisances to keep the peace. The principle which governed the decisions in these cases was applied in MILES (1890) 24 Q.B.D. 423.

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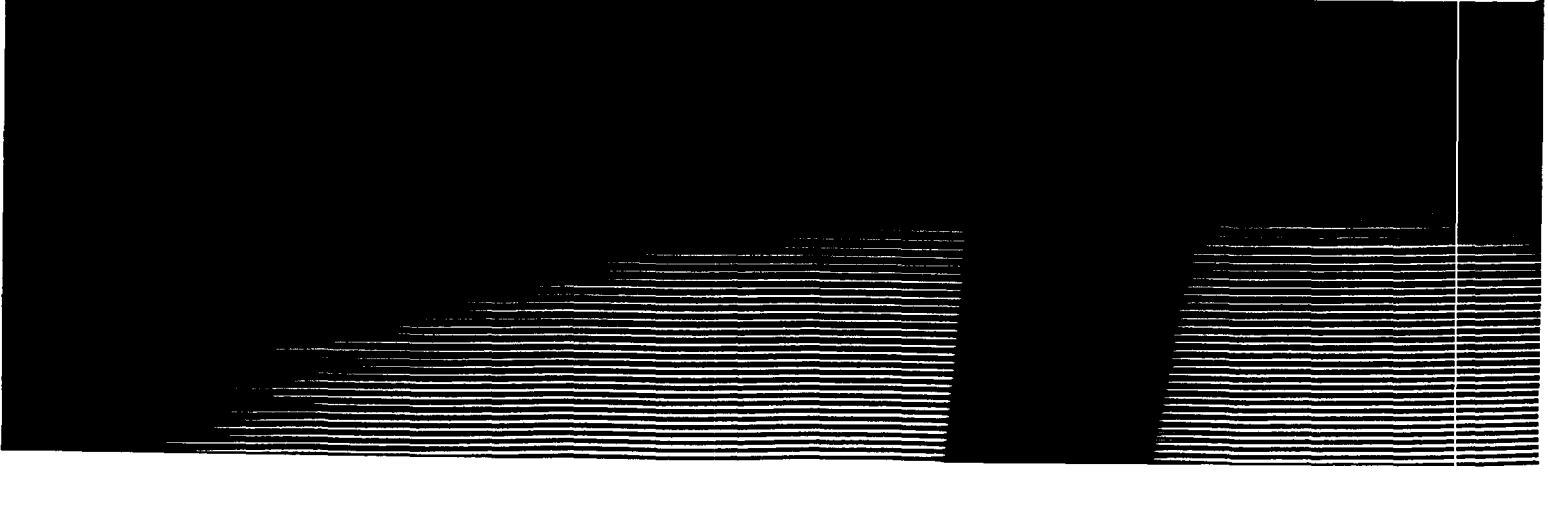
By the time that MORRIS (1867) L.R. 1 C.C.R. 90; 10 Cox 480, was heard in 1867 the statute 9 Geo. 4, c. 31, had been replaced by the Offences against the Person Act (24 & 25 Vict. c. 100): section 45 of the latter Act was in similar terms to section 28 of the earlier Act. The accused had been summoned before magistrates at the instance of L for assaults upon L. The accused was convicted and was sentenced to and underwent punishment. L then died from injuries resulting from the assaults. The accused was then indicted for manslaughter. There was apparently a doubt whether the death was the result of the injuries inflicted by the accused. There was another man concerned and there was a question whether or not the two had acted in concert. There was no plea of *autrefois convict*. The matter went to the jury and the accused was convicted. The judge then reserved for the opinion of the Court of Criminal Appeal the question of law as to whether as a result of section 45 the conviction for the assaults afforded a defence to the charge of manslaughter. Were the manslaughter proceedings "for the same cause"? Kelly C.B. thought that they were, but the rest of the judges thought otherwise. Martin B. said that a new offence arose when the man died: he thought that the cause on which the justices adjudicated was not the same as that for which he was convicted: he felt that the words "for the same cause" in the section meant the same as those words meant in the plea of *autrefois acquit*. The case really turned upon the construction of section 45, but it illustrates that in the maxim *nemo debet bis vexari pro eadem causa* the reference is to the same offence. It could be said, I think, that the felonious nature of the assault arises from the retrospective effect of the death.

In a case tried on circuit in 1890 (FRIEL, 17 Cox 325) an accused had been summarily tried for assault and had been convicted. The person assaulted subsequently died of injuries resulting from the assault. The accused was then indicted for manslaughter and pleaded *autrefois convict*. The plea failed and Williams J. refused to reserve a case for the Court



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for Crown Cases Reserved. He said (at p. 327): "The indictment for manslaughter is not a charge in a new form based on the facts supporting the former charge, nor is it the former charge with the addition of matters of aggravation or of newly alleged consequences. It is a charge based on new facts; and the circumstance that some of those facts have been made the basis of a former charge of a different class is immaterial. The difference is not of degree merely. The characteristic new fact here is the death."

In THOMAS (1949) 33 Cr.App.R. 200; [1950] 1 K.B. 26, it was held by the Court of Criminal Appeal that where a person has been convicted of wounding with intent to murder and the person wounded subsequently dies of the wounds inflicted, a plea of *autrefois convict* is not a good answer to a subsequent indictment for murder.

Reference was made in MORRIS (*supra*) to the earlier case of SALVI (1857) 10 Cox 481n. In that case there was a plea of *autrefois acquit*. The accused was indicted for murder. He had previously been acquitted on a charge of wounding with intent to murder. The plea failed. Pollock C.B. said (at p. 483n.)—"The acquittal of the whole offence is not an acquittal of every part of it, it is only an acquittal of the whole." As murder could be committed without there being an intention to murder, the previous acquittal was no bar.

In WEMYSS *v.* HOPKINS (1875) L.R. 10 Q.B. 378 there was a case stated by justices. There had been an assault which constituted an offence under each of two statutes. A complaint was preferred under one statute. There was a conviction and fine. Some six weeks later a complaint was preferred under the other statute. On conviction there was a further fine. The question that arose was whether the first conviction was a bar to the second. It was held that it was. As the cases had been in a court of summary jurisdiction, the plea of *autrefois convict* could not as such be presented. But the principle applied. The case was decided "on the well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction,

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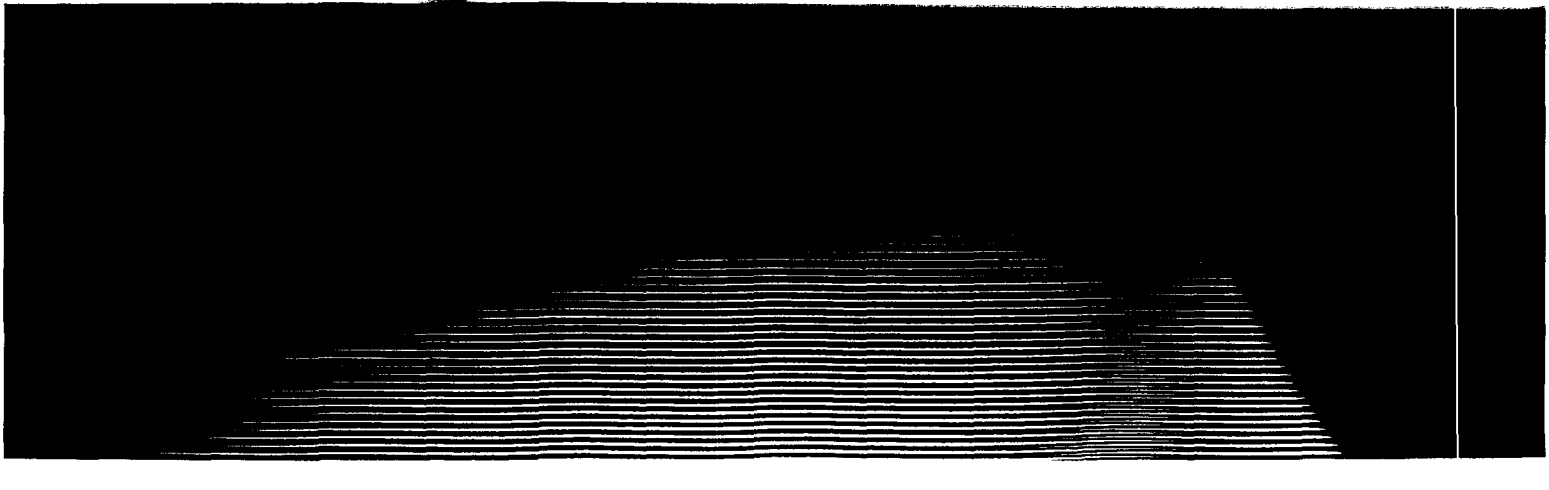
transit in rem judicatam, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter" (see *per* Blackburn J. at p. 381). Lush J. pointed out (at p. 382) that the offence of the appellant was one for which he might be punished under either of two statutes and referred to the "fundamental principle" that "no person shall be prosecuted twice for the same offence."

It is to be noted that it is provided by section 33 of the Interpretation Act, 1889, that: "Where an act or omission constitutes an offence under two or more Acts or both under an Act and at common law . . . the offender shall, unless the contrary intention appears, be liable to be prosecuted under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

KING [1897] 1 Q.B. 214, was not a case where the principles of *autrefois convict* applied. In that case there was an indictment charging the prisoner (*inter alia*) with obtaining credit for certain goods by fraud and there was a separate indictment charging him with larceny of the same goods. After conviction upon the first indictment he was put upon his trial upon the second. On a case stated the Court of Crown Cases Reserved quashed the second conviction. The report is not very clear. Hawkins J. said (at p. 218): "The man had clearly been convicted of a misdemeanour in respect of obtaining credit for the same goods which were the subject of the charge of larceny; and it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation." Cave J. said (at p. 219): "The second question is, whether the defendant, having been convicted on the charge of false pretences, could on the same facts be convicted of stealing. There is only one answer: he clearly could not." If the correct interpretation of the somewhat brief references to the facts is that the accused obtained some goods by means of false pretences and obtained credit for those goods by fraud and if the jury so found, then it would seem to follow



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that he had not stolen the goods. Therefore, it was a case which was governed by the principle of *res judicata*. The finding in the first trial could not be challenged or upset in the second. I would have thought that the judge at the second trial ought to have directed the jury, once all the facts were established, to acquit on the ground that the adjudication at the first trial was conclusive and would preclude a contrary adjudication.

It was recognised by Lord Macdermott, in giving the judgment of the Board in SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA [1950] A.C. 458, at p. 479, that a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is binding and conclusive in all subsequent proceedings between the parties to the adjudication. "The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings." This is in tune with what has been laid down in a number of important judgments in Australia. Thus in MRAZ *v.* THE QUEEN (No. 2) (1956) 96 C.L.R. 62 it was stated in the judgment of the High Court (at p. 70) that the principle of issue estoppel is "to treat an issue of fact or law as settled once for all between the parties if it is distinctly raised and if the judgment pronounced implies its determination necessarily as a matter of law." So, too, in BROWN *v.* ROBINSON (1960) 60 S.R.(N.S.W.) 297 it was said in reference to issue estoppel that it depends upon an issue or issues having been distinctly raised and found in a former proceeding—"Once this is done, then, so long as the finding stands if there be any subsequent litigation between the same parties no allegations legally inconsistent with the finding may be made by one of them against the other." A similar approach is shown in the case of SEALFON *v.* UNITED STATES (1948) 332 U.S.Rep. 575.

Though the principle of *res judicata* applies to criminal cases as to civil cases, the conclusions in criminal cases tried on indictment are expressed either by verdicts of Guilty or Not Guilty. The result is that issues are not isolated and analysed as they are in a judgment which specifies findings and records

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reasons. In very many cases, therefore, it is not possible to know or to deduce whether a verdict involves a particular conclusion or determination. That is the position in the present case. The Court of Criminal Appeal quashed the conviction. They quashed it for the reasons which are contained in their judgment. The appellant cannot, however, be in any better position than he would be in if the jury had said Not Guilty. If they had, it would not have been possible to deduce the basis on which they had so found. No more could be said than that for one reason or another the accused was not guilty of murder and not guilty of manslaughter.

The words of Hawkins, J. in KING (*supra*) to the effect that a man should not be placed twice in jeopardy upon the same facts must be considered in the context of what was then being decided, and cannot be given a literal meaning as an expression of wide principle. Nor ought they to be interpreted in a sense which would run contrary to the stream of authority. Nor should they be interpreted as suggesting that some facts forming the basis of an earlier case may not ever form the basis of a later one. In BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570, there were two indictments against the accused. One charged him with sodomy with a boy: the other indictment charged him with gross indecency with a male person (the same boy). Only one set of depositions had been taken in respect of both charges. The accused was tried upon the first indictment and convicted. The other indictment remained on the file. There was an appeal to the Court of Criminal Appeal who quashed the conviction on the ground of some wrongful admission of evidence. It was ordered by the Court of Criminal Appeal that the accused take his trial upon the other indictment. When the trial came on, there was a plea of *autrefois acquit*. The plea failed. The accused then pleaded guilty and was sentenced and upon appeal to the Court of Criminal Appeal the question which was considered was whether the plea of *autrefois acquit* should have succeeded. The appeal failed, though the court pointed out that the previous order of the court that the accused should take his trial upon the

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second indictment did not in any way preclude him from relying upon a plea of *autrefois acquit* if it could properly be upheld. But it could not. In giving the judgment of the court, Lord Reading C.J., 10 Cr.App.R., at p. 87; [1914] 2 K.B., at p. 574, expressed very clearly the accepted principle upon which the plea of *autrefois acquit* is based, *i.e.*, "that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, *i.e.*, found to be not guilty of the offence, by a court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment." Lord Reading pointed out that the test was not whether the facts relied upon were the same in the two trials, but whether the acquittal on the charge of sodomy necessarily involved an acquittal on the charge of gross indecency. Clearly it did not. Furthermore, it had not been open to the jury at the first trial to convict of gross indecency. Nor were the two offences the same or substantially the same as each other. The case very clearly illustrates that the circumstance that all or very much of the evidence given on a second trial corresponds with that given on a first trial is not by itself a basis for the success of a plea of *autrefois acquit*. *Mutatis mutandis*, the case has striking correspondence with the case now being considered.

The principles now being discussed are further illustrated by the decision in the earlier case of NORTON (1910) 5 Cr.App.R. 197; [1910] 2 K.B. 496. The accused was indicted for the offence of carnal knowledge of a girl under the age of 13. There was a second indictment which charged him with feloniously wounding her by striking her on the head with a stone. The blow which was the subject of the charge in the second indictment was struck in the course of the commission of the sexual offence charged in the first. There was first a trial in respect of the first indictment. The jury disagreed. There was then a further trial. The jury convicted. The accused appealed to

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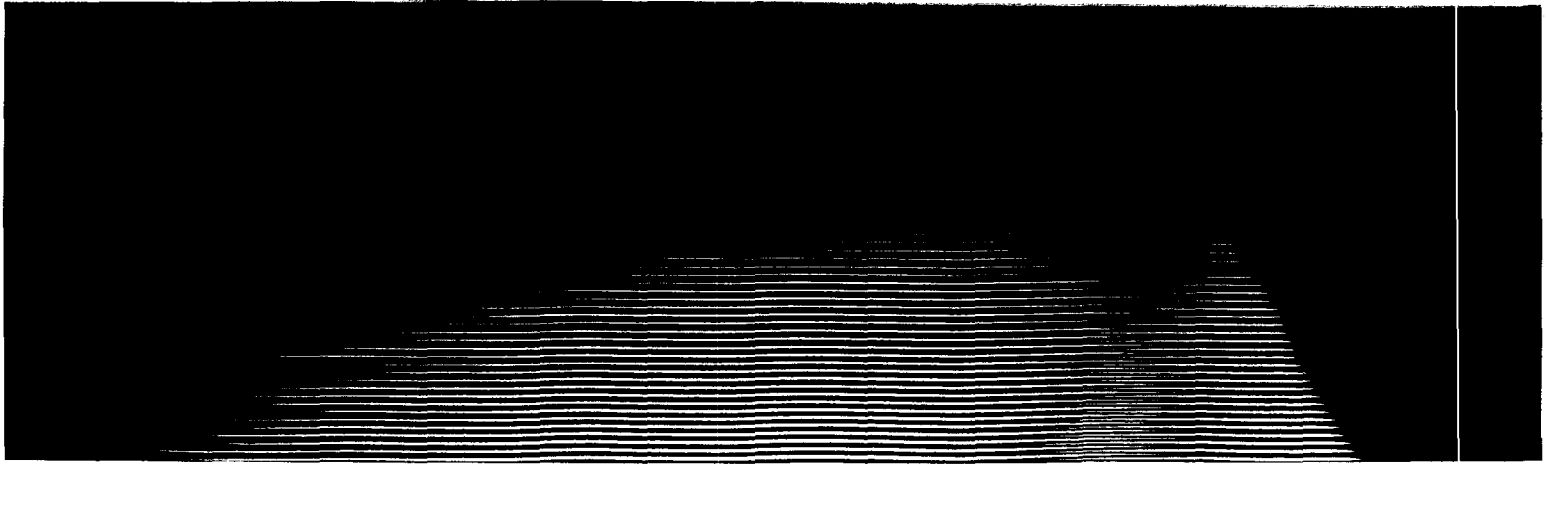
the Court of Criminal Appeal. On the ground that certain evidence had been improperly dealt with at the trial and of misdirection and because the proviso could not be applied the court allowed the appeal and set aside the conviction. The court remanded the appellant in custody to be tried on the second indictment. He was so tried. Being convicted, he appealed to the Court of Criminal Appeal and it was argued that he was entitled to succeed on a plea of *autrefois acquit*. It was said that he had been in peril and that the identity of the culprit was the point at issue in respect of each charge. The appeal failed, and it was said that the only possible view which might have supported it would have been if the evidence as to the injury had shown that it was essential to the commission of the sexual offence. As things were, the assault was a distinct act from the carnal knowledge. Though evidence that had been given in respect of the first indictment must have been given on the trial of the second indictment, the charges were different. On the trial of the first the accused could not have been convicted of the offence charged in the second. Furthermore, the evidence necessary to support the charge in the second indictment would not have been sufficient to procure a legal conviction of the charge in the first.

In KUPFERBERG (1918) 13 Cr.App.R. 166, an acquittal on a charge of conspiring to contravene a Regulation was held not to found a plea of *autrefois acquit* on a charge of aiding and abetting their contravention. A. T. Lawrence J. said (at p. 168): "For a plea of *autrefois acquit* to be maintainable, the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients. The facts which constitute the one must be sufficient to justify a conviction for the other." The phrases "the same essential ingredients" and "the facts which constitute" are to be noted. They denote and, in my view, correctly denote an entirely different situation from that which merely involves that the same facts may be relevant in respect of two charges,



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or that some evidence which is given in one case may again be given as being relevant in another.

In KENDRICK & SMITH (1931) 23 Cr.App.R. 1, the two accused were convicted of charges of threatening to publish photographic negatives with intent to extort money (contrary to section 31 of the Larceny Act, 1916), but on charges contained in the same indictment, of uttering letters demanding money with menaces (contrary to section 29 of that Act) the jury disagreed. On a retrial on those charges pleas of *autrefois convict* were filed. They failed. The accused were found guilty and their appeal to the Court of Criminal Appeal was on the basis that their pleas of *autrefois convict* should have succeeded. The appeals failed. In giving the judgment of the court Swift J. said (at p. 3): "It is quite clear that, to enable an accused person to rely on that plea," (*autrefois convict*) "the offence with which he is charged on the second occasion must be the same offence, or practically the same offence, as that with which he was charged on the first occasion. It is not enough to say that the evidence tendered on the second charge was the same evidence as that offered to prove the first charge. It is not the evidence which is material to the charge that grounds the plea, but the offence which is charged." Swift J. pointed out that it was impossible to say that the two offences were the same or substantially the same. It is to be observed that in that case the charges were being tried together and that they were separate charges. The charge under section 29 was the graver charge. Swift J. (at p. 6) touched on the question whether "if you prove a case under section 29, you must prove a case under section 31": he said "but I do not decide that this is so."

That there is no rule or principle to the effect that evidence which has first been used in support of a charge which is not proved may not be used to support a subsequent and different charge is further illustrated by the case of MILES (1909) 3 Cr.App.R. 13. On one indictment the accused was charged with larceny. On that indictment he was acquitted. (On well recognised principles that acquittal would (since the Criminal

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Procedure Act, 1851) include an acquittal for an attempt.) The case had depended upon the evidence of two witnesses who said that they saw the accused in a lane and saw him take money from a person's pocket. The second indictment subsequently tried was for an offence under section 7 of the Prevention of Crimes Act, 1871, and had, as one of its constituent elements, that he had been found in a public place with the intention of committing a felony. (The words of the section are " that he was about to commit " or " was waiting to commit.") The felony alleged to be contemplated was described in the second indictment exactly as in the first. The two witnesses who had given evidence on the trial of the first indictment gave the same evidence again on the second trial as they had given on the first. An appeal against conviction on the second indictment was dismissed. My Lords, I think that the decision was correct. The offences were different. On the first indictment there could not have been a conviction for the second offence. On the second indictment the necessary proof did not involve guilt of the first offence. The case shows that it would be wrong to suppose that the maxim *nemo debet bis vexari pro eadem causa* means that the same incident or event or story may not be under investigation in more than one trial or that evidence once given at one trial may not again be given at a later trial.

The case of OLLIS [1900] 2 Q.B. 758, was another case where evidence that had been given at one trial of the accused was again given at a later trial of the accused. The question that was argued was as to the admissibility of the evidence when given at the second trial. There was a difference of opinion among the judges who sat in the Court of Crown Cases Reserved, six being of opinion that the evidence was admissible and two being of the contrary opinion. Grantham J. (one of the majority) said (at p. 766): " The real test is, was the first charge the same as that on which the prisoner is being charged again, or, was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first charge can be used again,

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because it is being used in a different case, and on a different charge."

The case of O'BRIEN (1882) 15 Cox 29, was another case in which the evidence given in support of a second indictment corresponded with that given on the trial of a first indictment where an acquittal had resulted.

The considerations which I am examining are illustrated in GILMORE (1882) 15 Cox 85. The accused was charged with throwing poles on to a railway track with intent to endanger the safety of persons travelling and with intent to injure and obstruct the engine. The offences charged were felonies pursuant to certain statutory provisions. The accused was acquitted. He was afterwards charged, upon the same facts, with an offence which was a misdemeanour pursuant to other provisions of the same statutes: the intent which was necessary to prove the felonies was not an ingredient of the misdemeanor. A plea of *autrefois acquit* failed. The accused could not have been convicted of the lesser offence upon the trial of the first indictment. Huddleston B. said (at p. 87) that the plea of *autrefois acquit* proceeds upon the well-recognised maxim *nemo debet bis vexari pro eadem causa* and said "the authorities clearly show that an accused person who relies upon a previous acquittal must make out satisfactorily that he has been acquitted of the identical charge before, or that he could upon the trial of the first indictment have been lawfully convicted of the offence which was charged in the second indictment." The case is in line with the strong stream of authority which shows that the words *pro eadem causa* do not refer to facts but refer to offences.

It was submitted that the evidence given on the robbery charge was such as would be sufficient to warrant a conviction of manslaughter and that, inasmuch as a killing occurred at a time when four people were joining in a robbery, a conviction of the appellant of robbery would involve that he was also guilty at least of the offence of manslaughter. My Lords, I cannot accept this. The submission ignores the test which, as I have endeavoured to show, has been for so long and so

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consistently laid down and accepted. The test is whether the essential ingredients of the robbery charge or the evidence necessary to sustain it would suffice to prove a charge of murder or manslaughter. The answer seems to me to be clearly no. As I have already stated, armed robbery does not involve or necessitate any killing. If a killing takes place, there may be the offence of robbery together with the offence of murder (or manslaughter). If four men join in a robbery and a killing takes place, it could be that as to one or more of them there is guilt of murder (or manslaughter) as well as robbery, but that as to the others or other there is only guilt of robbery. In the present case, on the second indictment there was no need to prove that anyone had been killed. No one was asserting or seeking to establish that the appellant had been guilty of murder or manslaughter. So far as manslaughter is concerned, the suggestion that the appellant might have been not guilty of murder but guilty of manslaughter does not appear to have been canvassed at the trial on the murder charge. The appellant's then submission to the jury, as already pointed out, was, firstly, that he had not been present at all but, secondly, that if he had been present he was only guilty of robbery but not of murder because he was not in any way a party to the killing. It would be strange if the appellant could now successfully assert that his acquittal of murder involved his acquittal of robbery. The point taken at the murder trial was that three men had gone into the office and that there was a fourth man outside. It was urged for the appellant that, if it was proved that he was one of the three who had gone into the office, there was no proof that any of those three intended to do more than frighten people with unloaded guns, that there was no evidence that the guns in the office were loaded, and no evidence that any of the men in the office knew that the man outside had a loaded gun or intended to use it. The learned judge did not give any direction in regard to manslaughter. No one apparently thought that the evidence warranted any other possibilities than that (1) there should be a verdict of guilty of murder, or (2) that there should be

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a verdict of not guilty of murder—which verdict the jury could reach either because it was not established that the appellant was present or because, if that was established, it was not established that the appellant was a party to any common resolution or intention either to kill or to cause grievous bodily harm. My Lords, it does not appear to me to be shown that the evidence given on the trial of the second indictment was such as to prove the appellant guilty of manslaughter. There is no mention of manslaughter in the grounds of appeal to the Court of Criminal Appeal. In the careful judgment of the Court of Criminal Appeal there is no discussion of this matter at all, nor was it thought necessary to place before your Lordships other than very limited parts of the evidence given on the robbery charge and limited extracts from the summing-up. In the nature of things, there was no suggestion made by the prosecution that the appellant was a party to any killing. and there was no investigation as to the circumstances of the killing. The only effective issue at the trial was whether it was proved that the appellant was present as one of those who took part in the robbery. The learned judge emphasised in his summing-up to the jury that they were solely concerned with that matter and not with any charge of murder. Though the killing was mentioned, it formed no part of the essential ingredients of the charge of robbery and presumably no direct evidence of any killing was given. The learned judge was careful to explain to the jury that Kelly's statement was not evidence and that a reference to it was no proof of the truth of anything stated in it and that it only came into the case by way of introduction of evidence as to what the appellant himself had said. There was evidence that when Kelly's statement had been read to the appellant he said, "Look, I went a-thieving with them on that occasion. I never had a gun and I never did the murder. You know what bloody fool did." Though it was the case of the prosecution that the appellant was armed with an offensive weapon and was with others, I cannot suppose that there was any cross-examination directed

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to showing that the appellant was guilty of murder or manslaughter. Had there been, it would have been objected to and would have been disallowed as being irrelevant and inadmissible and objectionable.

In SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA (*supra*) the prosecution relied on a statement of the appellant which both went to prove him guilty of a charge of which he had been acquitted at a previous trial and also went to prove him guilty of an offence which was the subject of a later trial. It was held that a failure to inform assessors at the later trial that the appellant had been acquitted of the charge preferred at the previous trial rendered the second trial unsatisfactory. In the present case the statement of the appellant contained a repudiation of complicity in murder and no one was impugning the validity and the finality of the verdict of acquittal of murder and consequentially of manslaughter.

My Lords, it seems to me to be sufficient to say that the proof which was necessary and relevant to justify a conviction on the robbery charge would not prove guilt either of murder or manslaughter.

Had it been essential to consider whether on the murder trial a direction as to manslaughter should have been given (and apparently no one thought so), then it would be necessary to consider all the evidence and to consider what was within and what was outside the scope of any concerted action. The mere fact that the killing was mentioned at the robbery trial did not involve that guilt of manslaughter was being asserted or could be proved. The case that had been advanced at the murder trial was that all the men concerned were guilty of murder because they were united in a common resolution or intention to use violence of such a nature as an ordinary man would foresee was likely to cause serious bodily injury and that the man who in pursuance of that common intention and resolution did the shooting was guilty of capital murder. There may be cases where there is a mere variation in the manner of execution of an agreed plan. There may be cases where

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there is a total and substantial variation from some agreed plan. In WESLEY SMITH [1963] 1 W.L.R. 200, it was held in the Court of Criminal Appeal that when in the course of a concerted attack by several persons without any intention of killing or doing grievous bodily harm, one participant develops an intention to kill or to do grievous bodily harm and in fact kills, then a second participant in the attack who did not develop any such intention will nevertheless be guilty of manslaughter, if the act causing death was within the scope of the concerted action, but it was said that the use of a loaded revolver the possession of which was unknown to the other might be a possible example of what would have been outside the scope of the concerted action so that there would be no guilt of manslaughter. That case was followed in the Court of Criminal Appeal in BETTY (1963) 48 Cr.App.R. 6. For the reason that I have given, I do not find it necessary to pursue these matters or to express any opinion in regard to them.

It was submitted on behalf of the appellant that it was not open to the prosecution at the second trial to adduce evidence in support of the robbery charge which had been first adduced at the first trial in support of the charge of murder. The weight of long-accepted authority tells against the submission. Quite apart from this, it does not seem to me that either principles of fairness or the requirements of justice compel its acceptance. A further submission was to the effect that the learned judge at the second trial ought to have allowed full reference to be made of the course of events at the first trial. It seems to me that the learned judge was guided by a desire to exclude any evidence that might be prejudicial and to exclude any evidence that was not relevant to the issues which were raised. I see no error in the course that he directed.

For the reasons that I have given, I consider that the judgment of the Court of Criminal Appeal was correct and I would dismiss the appeal.

LORD HODSON: My Lords, this appeal centres round the principle which is firmly established in our law but, as the

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authorities show, is not easy of consistent application, namely, the principle enshrined in the Latin maxim—*Nemo debet bis vexari pro eadem causa.* The classic statement of the principle is to be found in Hawkins' *Pleas of the Crown,* Chap. 35, s. 1, and is as follows: "That a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found 'not guilty' on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime." What is meant or involved in the words "the same crime"? It is in the answer to this question that so much difficulty has arisen and so much argument has been entertained down to the present day not only in this country but in other countries where the common law prevails.

It is clear that the plea may be raised at any time either as a plea in bar to the second indictment or at any stage in the proceedings. In this case the appellant raised the plea in bar to the indictment of robbery after the Court of Criminal Appeal had quashed his conviction for murder and directed judgment and verdict of acquittal to be entered. He failed in his plea, but raised it again on his trial for robbery before Nield J. and again before the Court of Criminal Appeal on his unsuccessful appeal to that Court. It has not been contended before your Lordships that he was then or is now too late to take the point that he was by reason of the result of the first trial *autrefois acquit* of the robbery. The point may not arise until the second trial has taken place where, as in SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA [1950] A.C. 458, the prosecution on a second trial rely on a statement made by the accused not put in evidence at the first trial which impugns the verdict of acquittal pronounced in the first trial. In that case Lord MacDermott, delivering the judgment of the Board,

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pointed out that the verdict of acquittal is binding and conclusive in all subsequent proceedings between the parties to the adjudication.

It is clear that on the narrowest interpretation of the principle the appellant has not been convicted of the same offence as that for which he was previously acquitted, for robbery is not literally the same offence as murder. If the offence is the same in the narrow sense the accused has, in order to establish his plea, to do no more than establish his own identity and establish if necessary the place and time of the crime of which he has already been acquitted. This may not be apparent from the record, and from early times it has been recognised that it will often be necessary to rely on evidence "which would show what crime was the subject of the enquiry and would identify the charge and limit and confine the generality of the indictment to a particular case" *per* Parke B. in BIRD (1851) 2 Den.C.C. 94. Parke B. was careful to limit the use to which the evidence could be put and to say that whether the jury believed or disbelieved the evidence and the inference drawn is immaterial. The Crown does not seek to restrain the plea of *autrefois* to the narrow sense but, while admitting extensions of the principle, maintains that those extensions are confined within ascertainable limits. Thus, where there is acquittal of a lesser offence which is in law an essential ingredient in a greater, it is plainly not possible to convict on the greater without in effect reversing the acquittal on the other and lesser offence.

In ELRINGTON (1861) 1 B. & S. 688, Cockburn C.J. said (at p. 696): "We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form." The Chief Justice must have been referring to the extension of the narrow principle of *autrefois* to which I have referred. This may be called the ascending scale principle and is subject to an exception in the case of a subsequent charge for murder, at any

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rate if the death occurs after the acquittal or conviction on the lesser charge. The explanation for excluding murder may be that the supervening death is a new fact which necessitates a trial in the interests of justice. The law has, however, been clearly established that the defence of *autrefois* is not available where the subsequent charge is murder or manslaughter. See MORRIS (1867) L.R. 1 C.C.R. 90, and SALVI (1857) 10 Cox 481n., THOMAS (1949) 33 Cr.App.R. 200; [1950] 1 K.B. 26. It makes no difference whether there has been a previous acquittal or a previous conviction, although when there has been a previous acquittal of the lesser charge the rule of *autrefois* if logically followed would be expected to apply.

Your Lordships are not concerned with the kind of case which I have just been discussing except as an illustration of the way in which the law has endeavoured to apply the basic principle and of the difficulties which lie in the way. The appellant does, however, claim that he falls within that part of the principle of *autrefois acquit* which lays down that his previous acquittal necessarily involves a finding on one of the essential elements of the present offence so that he could not be convicted of the present offence without involving a contrary finding on that essential element; see BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570, and KUPFERBERG (1918) 13 Cr.App.R. 166.

The appellant put his case in this way. Having been acquitted of murder by the Court of Criminal Appeal, which set aside his conviction and substituted an acquittal, an acquittal of manslaughter follows, since on the indictment for murder a verdict of manslaughter would have been open to the jury. On the second indictment, which related to the same occasion, he was charged with being armed with offensive weapons, to wit firearms, and that being together with other named persons he robbed one Davies of money the property of the Royal Arsenal Co-operative Society, Limited. He argues that the supervening death of the murdered man cannot be separated from the robbery charge and that conviction of robbery as alleged against him involves a contrary finding to

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the acquittal of manslaughter. In other words, if he was guilty of robbery, he must have been guilty of the manslaughter of which he has been acquitted. Therefore he says his plea of *autrefois acquit* should be allowed. I am unable to accept his contention although, on the face of it, it gains support from a dictum of Parke B. in GOULD (1840) 9 C. & P. 364, to the effect that it a man is acquitted of murder and then charged with burglary with violence the acquittal would be an answer to the charge of violence. That case has the important distinction that in the first indictment the accused was charged with assault as well as murder, so that it might well be said that the acquittal of assault negatived the violence essential to the proof of the second offence.

The two offences, murder or manslaughter on the one hand and armed robbery on the other, are not the same, and the second charge could be proved without reference to the death of the murdered man who met his death on the occasion of the robbery. Even if the same evidence is given to prove separate offences, it is well settled that whether or not the facts are the same in both trials is not the true test; the test is whether the acquittal on the first charge necessarily involved an acquittal on the second: KENDRICK (1931) 23 Cr.App.R. 1 and the earlier case of BARRON (*supra*).

Thus, so far as *autrefois acquit* is concerned, the appellant must fail unless he can persuade your Lordships to make a further extension of the principle which justice requires. This he has sought to do by reliance on issue estoppel which has been referred to of recent years more often in other countries than our own, but is an aspect of the law which I think lies behind the application of the principle *autrefois acquit*. It was recognised *pro tanto* in the SAMBASIVAM case (*supra*) and the appellant is entitled if he can to bring himself within it.

Although differentiating issue estoppel from *res judicata* and *autrefois acquit* as well as *autrefois convict*, Dixon J. (as he then was) dealt with the matter at some length in WILKES (1948) 77 C.L.R. 511, at pp. 518–519. He summarised the

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matter in this way: "There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply."

Upon this the appellant urges that his defence to the murder was that he was not present at the crime. Although convicted by the jury, the acquittal which he obtained from the Court of Criminal Appeal involves, he says, that he was elsewhere when the crime was committed as he had all along contended. Hence it is argued that as the crime of robbery was committed on the same occasion as that on which the murder was committed he should succeed on the appeal. This argument breaks down because one cannot in this case say that the only issue before the jury on the murder trial was whether or not the appellant was there. The issue of intent to murder was also an issue in the case and there is no way of establishing any separate issue in his favour, either by looking at the verdict of the jury or by looking at the judgment of the Court of Criminal Appeal which reversed that verdict. The reversal was not of any specific issue or finding of fact, but of the verdict of guilty of murder, and more than that cannot be read into it.

One further point has been raised by the appellant, namely, that the court in the exercise of its undoubted power to prevent an abuse of its process has power, quite apart from the common law principles which have been discussed, to stop any prosecution. If it has this power, it is said the discretion must be exercised in favour of the appellant. It is said that, although your Lordships have not seen the evidence given at the second trial, it was substantially the same as that given at the first, and the appellant ought not to be penalised because the two offences have been tried separately. It is said that but for the rule of practice that a murder charge must be tried alone the

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robbery charge would have been heard with it and the misdirection which invalidated the judgment given on the first trial would have been fatal to the whole conviction, and the jury's verdict, assuming it was a verdict of guilty on both charges, must necessarily have been replaced by an acquittal when the matter came before the Court of Criminal Appeal. First of all, I do not think that one could make the assumption asked, but in any event I am satisfied that there is no such wide discretion to stop a prosecution as the appellant seeks to establish. There is no trace in the early cases such as ELRINGTON (1861) 1 B. & S. 688 and WEMYSS *v.* HOPKINS (1874) L.R. 10 Q.B. 378, of the existence of such a discretion. Judges such as Cockburn C.J. and Blackburn J. treated the question of *autrefois* as one of common law principle well established. It had, I think, clearly outgrown the sphere of discretion even if it originated therein and is treated as one of common law principle almost without exception in the decided cases. There is a reference to the judge having a discretion in MILES (1909) 3 Cr.App.R. 13, where it is said (at p. 15): "The judge has a discretion . . . and if, when a man has been acquitted, he considers the acquittal should make an end of the whole case, he can express his opinion." This is not the language of a judge who thought he had the power in his discretion to stop the case. In BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570, at p. 573, Reading C.J. said that the trial judge in KING [1897] 1 Q.B. 214 (a case of *autrefois convict*) had wrongly exercised his discretion to allow an indictment for larceny to stand, the accused having been found guilty on an indictment charging him with false pretences. I think that the learned Chief Justice may well not have intended to use the words "judicial discretion" to describe an unfettered power, but that, if he did, it was an unguarded expression and not in line with the current of authority. The true position is, I think, stated by Lord Goddard C.J. in R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (1953) 37 Cr.App.R. 148; [1954] 1 Q.B. 1, when

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he explained the circumstances in which an indictment could be quashed and the limits on the power of the court to prevent an indictment duly instituted being prosecuted.

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The inherent power of the court to control its own process, civil or criminal, should not prevent access to the courts when a lawful claim is presented. So to hold would involve grave interference with the liberty of the subject to have access to the courts, which I should be surprised to find to be warranted by authority. If a writ or statement of claim discloses no offence, the court has inherent power to dispose of the matter *in limine*, for it is then entitled to say that its process is being abused. Neither do I dispute that once proceedings are lawfully instituted the court can use its power to prevent its process being abused. Many instances occur to my mind. A litigant sometimes maliciously obtains the issue of subpoenas to all sorts of people holding positions of authority in the State without being able to show that these eminent persons can give relevant evidence in the suit. In such a case a subpoena may be set aside. Embarrassment to litigants may be and often is avoided by the use of this power. As my noble and learned friend, Lord Devlin, has pointed out, the Judges' Rules for the protection of accused persons are examples of the use of this power. I do not myself think that they are open to criticism as exceeding the limits of the power to prevent abuse of process. In JONES, 13 Cr.App. R. 86; [1918] 1 K.B. 416, the Court of Criminal Appeal laid down a rule of practice that in a case of murder the indictment ought not to be complicated by an alternative count of such a character as robbery with violence. In that case the appellant had been convicted on two counts in the same indictment, one of murder and one of robbery with violence. He was sentenced to death upon the charge of murder and to ten years' penal servitude upon the charge of robbery with violence, which produced an incongruous situation. So too, in LARGE (1939) 27 Cr.App.R. 65, a like direction was given in a manslaughter case. The rule has not been treated as inflexible. Glyn-Jones J. in SMITH AND OTHERS

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(1958) 42 Cr.App.R. 35, in the exercise of his discretion, joined a count for manslaughter and counts for other offences in an indictment preferred by his direction under section 2 (2) (*b*) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. These are legitimate uses of the judicial power and not rules of law. The fact that the rule of practice initiated by the court in JONES (*supra*) was followed in this case and, as it now turns out, may have been to the disadvantage of the accused, having regard to the misdirection given at the first trial and its consequences, does not involve that the appeal should be allowed on the ground that a separate trial was ordered in the wrongful exercise of a judicial discretion. Separate trials are familiar examples of matters dealt with by the exercise of judicial discretion, which, generally speaking, should be left to the control, where necessary, of the Court of Criminal Appeal.

To exclude a litigant with a prima facie case, whether prosecutor or civil claimant, from the courts seems to be a very different thing and not justifiable unless an Act of Parliament so provides, for example, the Judicature Act, 1925, section 51, replacing the Vexatious Actions Act, 1896.

I accept that the history of the development of our law justifies the contention that all rules of common law which emanate from the breast of the judges may in a sense be said to be discretionary in origin, but I cannot concede that there ought to be given to the judge a discretion, which in my opinion he has not hitherto been allowed, to interfere with anything that he personally thinks is unfair. If one disclaims such a proposal, but seeks to substitute a discretion to determine, in accordance with principle, whether or not a prosecution should be stopped, I do not know what principle can be applied. In the case now under consideration different judges will, as the history of the case shows, have different views as to what is unfair, and I should find the discretion, if there is one, immensely difficult to exercise at all, nor should I know how to exercise it judicially. If there were such a discretion, I do not understand why so many cases have been

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decided and so much learning has been expended in considering the doctrine of *autrefois convict* and *autrefois acquit*. Has all this been waste of judicial time? It would seem so, if all the judge had to do was to exercise his discretion as to whether or not a second indictment in such a case as this should be allowed to proceed.

After all, the cases, although they may not all be consistent and may be difficult to justify on the basis of *autrefois acquit* or *autrefois convict*, seem to me to cling at least to the central principle that a second trial is permissible on a charge, other than that dealt with at the first trial, arising out of the same facts and involving an issue not disposed of at the first trial; see KENDRICK (1931) 23 Cr.App.R. 1 for a recent illustration of the principle. If there were a discretion to prevent the prosecution proceeding with the second trial, it would surely have been exercised in some of these cases, one way or the other. On the contrary, the matter of discretion was never raised except in BARRON (*supra*) where one would have thought the considerations applicable in this case were present, the first trial being for sodomy and the second on the same facts for gross indecency. It was not, however, decided that the second trial should have been stopped because it was unfair to the prisoner. The appeal was dismissed. Many of those cases indeed to which my noble and learned friend, Lord Morris of Borth-y-Gest, has referred must be at least of doubtful authority, if the whole field can be covered by the use of a discretionary power.

The common form of order used in this case, that the second indictment is to remain on the file and not to be proceeded with without the leave of the court, is in my opinion ineffective if it does more than delay the trial of the second indictment until the first case has been completed. It may be justified on procedural grounds until an appeal has been disposed of, but cannot exclude the prosecutor from his right to proceed with a lawful case.

In conclusion I see no way in which the principle of *autrefois acquit*, in any form recognised by law, can be applied to this

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case, nor do I think that in these circumstances there is any general judicial discretion which could be invoked to bring about the same result.

I would dismiss the appeal.

LORD DEVLIN. My Lords, on November 17, 1962, four robbers made an armed raid on the premises of the Co-operative Society at Mitcham, and in the course of the raid a man was shot dead. Four men, including the appellant, were arrested and charged with murder. They were tried at the Old Bailey before Roskill J. and on March 12, 1963, were convicted. The appellant's main defence, which was rejected, was that he was not one of the four men. A second indictment charging all four with the robbery was ordered by Roskill J. to remain on the file, not to be proceeded with without the leave of the Central Criminal Court or of the Court of Criminal Appeal. The appellant Connelly appealed to the Court of Criminal Appeal, and on April 5, 1963, his appeal was allowed on the ground of misdirection on fact. Accordingly, the court, as required by the Criminal Appeal Act, 1907, s. 4 (2), quashed the conviction and directed a judgment and verdict of acquittal to be entered. The court, after hearing argument, gave leave for the second indictment to be proceeded with. On May 8, 1963, this indictment for robbery came before Stephenson J. at the Old Bailey. The appellant entered a plea of *autrefois acquit*. Stephenson J. directed the jury to reject the plea, but he indicated that he would, in the exercise of his discretion, which at that time the Crown conceded that he had, order that the indictment should not be proceeded with. In the course of further argument on May 17 the Crown withdrew their concession and Stephenson J. came to the conclusion that it was rightly withdrawn and that he had in law no discretion to exercise. The trial for robbery proceeded before Nield J. at the Old Bailey. The plea in bar was argued again, and Nield J. considered and followed the reasoning of Stephenson J., but he indicated that, if he had had a discretion, he would not have exercised it against the Crown. The appellant Connelly then put forward the same defence,

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namely, that he was not one of the four men, and again it was rejected by the jury. On June 24 he was convicted of robbery and sentenced to fifteen years' imprisonment. From this conviction he appealed to the Court of Criminal Appeal. His main ground of appeal was that the plea of *autrefois acquit* was good in law, but he contended alternatively that Stephenson J. was wrong in law in thinking that he had no discretion to stay the indictment. On September 30 his appeal was dismissed. The Court of Criminal Appeal certified that the point which he had taken was one of general public importance and gave leave to appeal to this House.

My Lords, in my opinion, Stephenson and Nield JJ. were right in directing the jury to reject the plea of *autrefois acquit.* I have had the advantage of reading the speech of my noble and learned friend, Lord Morris of Borth-y-Gest, and he has dealt so fully with this point that I need state only briefly my conclusion on it. For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word " offence " embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. Robbery is not in law the same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment) and so the doctrine does not apply in the present case. I would add one further comment. My noble and learned friend in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with my noble and learned friend that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based; see KENDRICK (1931) 23 Cr.App.R. 1. I have no difficulty about the idea that one set of facts may be substantially, but not exactly, the same as another. I have more difficulty with the idea that an offence may be

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substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise.

The appellant advanced two other arguments which admittedly fall outside the strict doctrine of *autrefois*, but which raise analogous points. One was a contention based on the important decision of the Privy Council in SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA [1950] A.C. 458. The other was based on the doctrine of issue estoppel, which, while it appears to have been accepted in the criminal law of Australia and of the United States, has not so far been recognised in the criminal law of England.

SAMBASIVAM'S case (*supra*) was an appeal from the Supreme Court of Malaya. The appellant was charged with two offences, first, carrying a firearm, and, secondly, being in possession of ammunition. He was acquitted on the second charge and a new trial was ordered on the first. At the new trial a statement, which purported to have been made by the appellant but which he denied making and which had not been put in evidence on the first trial, was relied on by the prosecution. In the statement the appellant said that he was carrying a firearm and was in possession of ammunition. The Board had to consider the effect upon the alleged admission of the fact that the appellant had already been acquitted of being in possession of ammunition. At p. 479 Lord MacDermott said: "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *Res judicata pro veritate accipitur* is no less applicable to criminal than to civil

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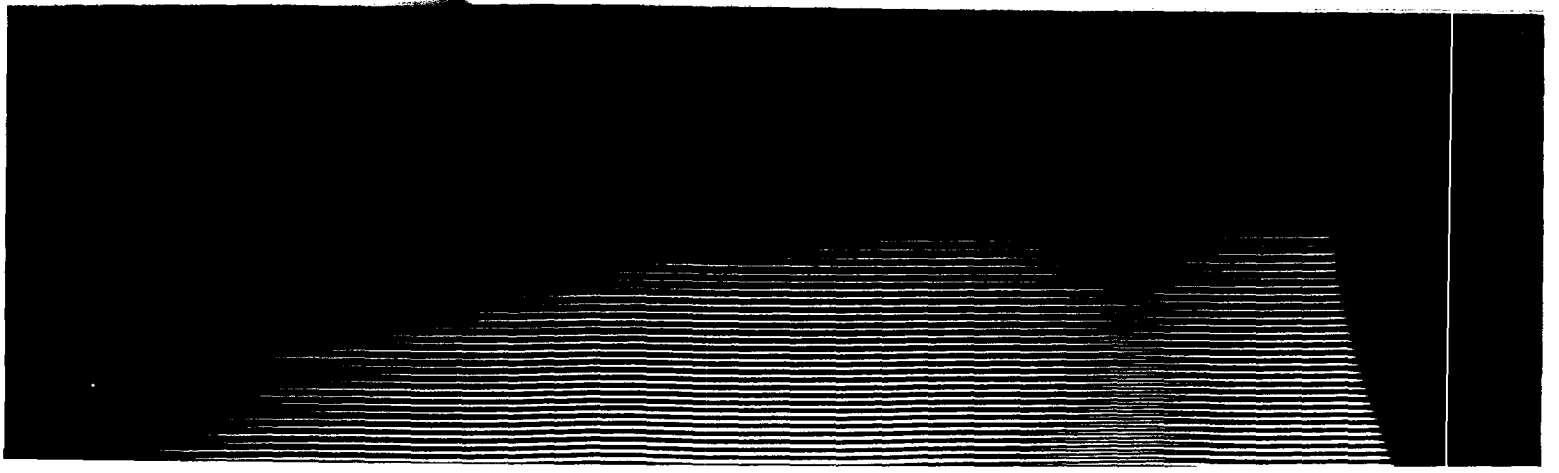
proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial." In the opinion of the Board the application of this principle might well have been made a ground for excluding the statement in its entirety, for it could not have been severed satisfactorily. But no objection was taken to it at the trial and the Board was content to say that it should not have been left to the assessors without an intimation that the prosecution could not assert, or ask the court to accept, a substantial and important part of what it said. As this direction was not given, the Board set aside the conviction reached at the second trial. This case can be treated, as my noble and learned friend, Lord Morris of Borth-y-Gest, has treated it, as an instance of the application of the principle of *res judicata* to the criminal law. For my part, I see difficulties about that which I shall elaborate when I consider the argument on issue estoppel. I should prefer to regard it as an extension of the principle of *autrefois* which becomes necessary as soon as it is accepted—as it has been, for example, by Lord Goddard C.J., in FLATMAN *v.* LIGHT [1946] K.B. 414, at p. 419—that there is no technicality about the plea of *autrefois* and that it can be taken at any stage. On this footing the proposition is that the plea can arise whenever, in order to prove the offence alleged on the second indictment, the prosecution is obliged to prove that the accused has committed an offence of which he has previously been either convicted or acquitted. This proposition was accepted by the Solicitor-General with the proviso—to cover the case of MORRIS (1867) L.R. 1 C.C.R. 90; 10 Cox 480, and the other cases which followed it—that at the time of the first trial the offence must be complete.

The appellant attempted to bring his case within this proposition but did not, in my opinion, succeed. The prosecution at both trials proved a statement in which on the face of it the appellant admitted robbery and denied murder. What he meant by his denial was that he had taken, as he thought,



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no part in the shooting; doubtless he did not appreciate that his participation in a crime in the course of which the infliction of grievous harm was contemplated was enough in law to make him party to the murder. The statement does, in spite of the denial, contain evidence of murder and was used by the prosecution in that way at the first trial. The appellant submitted to the House that it ought to have been excluded at the second trial since it was evidence to prove murder as well as robbery. This is to misunderstand the nature of the proposition. Under it the prosecution were precluded from relying on the fact of murder as part of their proof of robbery. If they tendered in evidence facts which went beyond robbery and proved murder, some of that evidence would prima facie be inadmissible, not under the proposition, but because irrelevant to the proof of robbery. Some part of the appellant's statement was undoubtedly irrelevant, for example, the references to the shooting and the death of the man shot. When a statement is partly relevant and partly irrelevant, its admissibility has to be considered in the usual way, as was done in SAMBASIVAM'S case (*supra*). If the statement can be severed, it should be; and if it cannot, the judge must consider whether the irrelevancies are so prejudicial to the accused that the statement ought to be excluded altogether. In my opinion, the irrelevant matter in this statement was not prejudicial to the accused. Evidence that a man had been shot by one of the robbers other than the appellant could not have made the jury any more or less likely to have rejected his defence that he had no part in the robbery and was not present at all. There could therefore be no question of excluding the whole statement. Parts might perhaps have been excluded if objected to, but anyway there was no grave error here such as should now cause your Lordships to quash the conviction.

The appellant's point that he might at the first trial have been convicted of manslaughter seems to me to fail upon the same ground. He argues that if the jury thought that he was participating in the robbery but that it was not part of the concerted plan that there should be shooting, they could and

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should have convicted him of manslaughter on the footing that he was taking part in an unlawful act out of which death resulted. Manslaughter was not left to the jury and I doubt very much whether it was a possible verdict. But assuming that it was, the only result would be to amplify the proposition that I have previously stated. The prosecution would be precluded from relying either on the fact of murder or on the fact of manslaughter as part of their proof of robbery. It is unnecessary for them to rely on either; references to the shooting and the death of the man shot are irrelevant to the proof of robbery, whether the death amounted to murder or manslaughter. OLLIS [1900] 2 Q.B. 758 is also in point as a case which illustrates the limits of the proposition and of the extent to which a previous acquittal can be used. In this case the prisoner was charged on two indictments with offences of obtaining money by means of worthless cheques from different persons. He was acquitted on the first indictment. On the trial of the second indictment the person whom he was alleged to have defrauded on the first indictment was called to give evidence of the transaction in order to assist in the proof of guilty knowledge on the second indictment. Objection was taken to this evidence on two grounds, the first being that, irrespective of the acquittal on the first indictment, the evidence was inadmissible and the second being that, if otherwise admissible, it ought to have been excluded because of the acquittal. There was a difference of opinion in the Court of Crown Cases Reserved on the first ground, the majority holding the evidence to be admissible. All nine judges overruled the objection on the second ground. Lord Russell C.J., at p. 764, said: "It is clear that there was no estoppel; the negativing by the jury of the charge of fraud on the first occasion did not create an estoppel; nor is there any question arising upon the maxim *Nemo debet bis puniri pro uno delicto.* The evidence was not less admissible because it tended to show that the accused was, in fact, guilty of the former charge." Darling J., at p. 780, said: "The defendant was not *bis*

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vexatus, for I feel sure that those words are not to be understood as meaning that a man is not to be more than once annoyed by the same evidence."

I turn now to consider the doctrine of issue estoppel. The difference between issue estoppel and the *autrefois* principle is that while the latter prevents the prosecution from impugning the validity of the verdict as a whole, the former prevents it from raising again any of the separate issues of fact which the jury have decided, or are presumed to have decided, in reaching their verdict in the accused's favour. This form of estoppel is of course well known to the civil law where separate issues of fact are frequently decided by a judge or by a jury on a special verdict. There is no trace so far of its application to criminal matters. I do not propose to detain your Lordships with an elaborate examination of BIRD (*supra*) and OLLIS (*supra*) which were said at least to foreshadow it. Since my judgment does not turn on whether or not the doctrine should be adopted, I shall content myself with saying that those decisions when analysed and the judgment of R. S. Wright J. in the latter case when read as a whole do not in my opinion assist at all. But, as I have said, issue estoppel in criminal matters has been recognised by the highest courts in Australia and in the United States; see MRAZ *v.* THE QUEEN (No. 2) (1956) 96 C.L.R. 62 and SEALFON *v.* U.S. (1948) 332 U.S.Rep. 575. The main difficulty about its application to criminal trials is that as a rule there is no determination by the jury of separate issues; and so their conclusion on any issue can be reached only by an analysis of the general verdict. How subtle this analysis can be is shown in the MRAZ case (*supra*). In the present case the situation is even more complicated because the jury convicted the appellant and so must have found all the issues against him. It is argued, however, that the substitution by the Court of Criminal Appeal of the verdict of Not Guilty means that the jury must be deemed to have acquitted him. If they had in fact acquitted him, they could have done so either because he was not proved to be a robber or because, being a robber, he was not a murderer because not privy to the use of force. The latter point

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was taken by the appellant, not very convincingly, at the first trial; and if it were deemed to be the ground of the acquittal, issue estoppel would be no use to the appellant. But, it is argued, the jury in fact convicted the other men of murder. So they must have been satisfied that all the robbers, whoever they might be, were also murderers. Therefore, if they had acquitted the appellant, it could only have been on the ground that he was not one of the robbers. But, my Lords, the jury did not in fact acquit him at all. This seems to me to be quite fatal to the application of issue estoppel in this case. You cannot ascertain how an issue was determined by mixing the formal with the factual. The justification for issue estoppel is that it enables the court to go behind the form of the verdict and, in the light of the evidence and the submissions in the particular case, find out what issues the jury actually determined. The formal verdict entered by the Court of Criminal Appeal, if pierced, reveals only that there was a misdirection of fact. Actual determination of issues is what is required for issue estoppel. In the MRAZ case (*supra*) the High Court of Australia in its process of analysis made use of the finding of the jury in a verdict that has been quashed. In the present case I should prefer to say that there was no determination at all of the issue of identity. The Court of Criminal Appeal certainly made none and the determination of the jury, being made under a misdirection, must be ignored as defective.

In my opinion, therefore, if issue estoppel is applicable in criminal trials, it does not assist the appellant here. But I must say that, while acknowledging the high authority of the cases I have noted and the desirability of uniformity in such a matter with decisions in Australia and the United States, I entertain serious doubts about the value of the doctrine to the criminal law. I can see the necessity for giving the accused some protection beyond the plea of *autrefois*. If there were no other way of giving it to him, issue estoppel might be made to serve. But I hope to satisfy the House that the court has power without the importation of new doctrine to give such protection in cases where the accused might otherwise be harassed by a

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second trial. Altogether there seem to me to be a number of difficulties about the introduction of issue estoppel into the criminal law. The first, the necessity for analysis, I have already mentioned. It introduces an element of chance. Assume that the appellant was actually acquitted of murder and that he had been tried alone. Analysis would then have shown nothing. It is only the fact that he was tried with others that enables the appellant to put forward an analysis in this case. The truth is that for estoppel on issues to work satisfactorily, the issues need to be formulated with some precision. In civil suits this is usually done as a matter of record: in the criminal process it is not. If issue estoppel is going to be introduced into the criminal law, the proper basis for it is a system of special verdicts on separate issues. But that would be to introduce a profound change into the working of our law which I am not prepared at present to countenance. Then, since estoppel is available to both parties in civil law, there is the question whether it should be made available to the prosecution in criminal law. No one so far has advocated that it should. But is it necessary in the interests of justice to give the defence this unreciprocated advantage? The defence rightly enjoys the privilege of not having to prove anything; it has only to raise a reasonable doubt. Is it also to have the right to say that a fact which it has raised a reasonable doubt about is to be treated as conclusively established in its favour? I need say no more about these questions which it is unnecessary for me to answer since I think that the point fails in any event.

The appellant's final contention was that the court has a general discretionary power to quash or stay an indictment when to try it would be oppressive to the accused. The substantial defence to both cases was the defence of alibi. The appellant was tried twice on the same set of facts; and that offends against the spirit (though not, as at this stage of the argument the appellant has to concede, against the letter) of the rule against double jeopardy. The court, he submits, has power to prevent this and ought to exercise it. As I have said,

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Stephenson J. would have prevented it if he had thought that he had power to do so.

To this contention there is a short and a long answer. If this case had not involved a charge of murder, there should not, in my opinion, have been two indictments. The prosecution could not prove murder against the accused unless it first proved robbery and so the only result of the separation is to present the prosecution with a second chance of destroying the alibi, and that on the face of it seems to be oppressive. But it is not suggested that the separation was the deliberate choice of the prosecution. A decision of the Court of Criminal Appeal —JONES, 13 Cr.App.R. 86; [1918] 1 K.B. 416—has laid it down that no count for another offence is to be included in an indictment for murder. The short answer is therefore that it cannot be oppressive for the prosecution to do what the court has told it that it must do.

But the short answer concedes—or at least does not dispute —that the court has power to stay a second indictment if it considers that a second trial would be oppressive. The Solicitor-General disputes that. He does not wish to take shelter behind JONES (*supra*) unless he has to. He insists that the Crown has a right to bring forward its case in as many indictments as it chooses and that the court is bound to proceed on each of them, whether or not it considers that the Crown is behaving oppressively. Thus, before the merits of this particular case can be considered, there is raised for your Lordships' determination a point of criminal procedure of the greatest importance which requires to be dealt with fully.

My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that "are founded on the same facts, or form or are a part of a series of offences of the same or a

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similar character" (I quote from the Indictments Act, 1915, Sched. I, r. 3, which I shall later examine); and power to enforce such a direction (as indeed is already done in the civil process) by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first. I think that the appropriate form of order to make in such a case is that the indictment remain on the file marked not to be proceeded with.

I propose to put under three heads the reasoning which, in my opinion, supports this conclusion. First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law and I shall illustrate this with special reference to the framing of indictments. Secondly, if the power of the prosecutor to spread his case over any number of indictments was unrestrained there could be grave injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law.

Under the first head I must observe that nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused. The doctrine of *autrefois* was itself doubtless evolved in that way. The process is still continuing, and it is easy to think of recent examples.

The Judges' Rules were formulated first in 1912, the latest revision being in the present year, in order to protect the accused against the result of unfair questioning. It was questioning within the law as it then stood. In the present case it has been argued that the well-established rule of *autrefois* gives to the accused all the protection to which he is entitled against double jeopardy. It might equally well have been argued that the well-established rule that confession must be voluntary gave the accused all the protection to which he was entitled against unfair questioning. If that argument had prevailed, there would have been no Judges' Rules.

Another example is the power the courts have assumed to insist that notice of additional evidence must be given of all

witnesses who have not made depositions. This was described by Lord Goddard C.J. in R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (1953) 37 Cr.App.R. 148, at p. 152; [1954] 1 Q.B. 1, at p. 6 as a requirement of modern practice. Then there is the rule that the defence must be supplied with the names of any material witnesses interviewed by the prosecution whom it does not intend to call; BRYANT (1946) 31 Cr.App.R. 146. Likewise the rule that the defence must be given a copy of any report made by the prison doctor about the state of mind of an accused person in custody; CASEY (1947) 32 Cr.App.R. 91. In 1955 the judges of the Queen's Bench gave a practice direction which required *inter alia* that particulars of a prisoner's previous convictions must be given to the defence so that counsel could know whether or not he could safely put his client's character in issue; see 39 Cr.App.R. 20. This was supplemented by a further rule that the defence must be told of convictions affecting the credibility of the prosecution's witnesses: COLLISTER (1955) 39 Cr.App.R. 100. All these are rules of practice which no one disputes the power of the court to make and enforce.

I propose now to examine in some detail the power which the courts exercised before the Indictments Act, 1915, to control the prima facie right of the prosecutor to put as much as he liked into one indictment. The relevant authorities will be found in any old edition of Archbold's *Criminal Pleading*; I have consulted the 20th edition (1886), pp. 77–82. The chief authorities are cited and reviewed in LOCKETT (1914) 9 Cr.App.R. 268; [1914] 2 K.B. 720. There are also some valuable passages in a speech by Lord Blackburn in CASTRO *v.* THE QUEEN (1882) L.R. 6 App.Cas. 229, at p. 242. There was before 1915 only one rule of law that prevented the prosecutor from including as many crimes as he liked in one indictment. This was the rule that forbad him from including both felonies and misdemeanours. The objection to that seems to have been purely formal, the right of challenge and the form of oath administered to jurors being different in felony and misdemeanour. In the case of felony the judges laid down a rule

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of practice forbidding the prosecution to include more than one felony in any indictment. It is best put in the words of Buller J. in YOUNG *v.* R. (1789) 3 T.R. 98. He said: "If it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge, who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed." Certain exceptions appear to have been recognised if the offences were clearly connected, for example, forgery and the uttering of the forged document. As a general rule it was almost invariably applied. But the contention that the accused had an absolute right to have it applied was negatived in LOCKETT where it was held to be discretionary. Isaacs C.J. said at (1914) 9 Cr.App.R., at p. 277; [1914] 2 K.B., at p. 731: "It is apparent that in dealing with these and similar questions which arise upon indictments we are only dealing with matters of practice and procedure devised by the judges who have presided in the past at criminal trials, for the purpose of protecting prisoners from oppression, and that they are not laid down as, and are not, rules of law, but are guides to the course which will and can in such circumstances be adopted by judges, which will entitle them, if as a matter of prudence and discretion they think it right, either to quash the indictment or to call upon the prosecution to make its election." In misdemeanour, the position was just the opposite. The general rule was that any number could be joined, but that in exceptional cases the court could in its discretion quash the indictment. In KINGSTON (1806) 8 East 41, Ellenborough C.J., while declining to entertain the point on demurrer, said at p. 46: "This would have been a good ground of application to the discretion of the court to quash the indictment for the

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inconvenience which may arise at the trial from joining different counts against different defenders; but where to the offences so charged in different counts there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law." The general rule against the joinder of felonies was too rigid. Parliament considered so, and in the last half of the nineteenth century enacted a number of statutes exempting specific crimes from its operation. Then in 1915 the Indictments Act swept the whole thing away.

It can hardly be doubted that by 1915 a general rule of practice virtually forbidding the joinder of felonies while allowing the joinder of misdemeanours had outlived its usefulness. Importance was no longer attached to the distinction between felony and misdemeanour. The accused in cases of felony was no longer in need of the same degree of protection. The challenge had already begun to fall into disuse. The rule was made at a time when indictments, even simple ones, were lengthy and cumbersome documents which it would be difficult for a prisoner, who frequently had to defend himself, to understand. He was not then entitled to see the depositions which would have told him clearly what was the case against him. At the present time, when nearly all accused are legally aided and when the indictment is by no means the only information on which he has to prepare his defence, an absolute rule against joinder of felonies would be quite antiquated. But it was a good rule at the time when it was made and it was made by virtue of the judicial power to protect defendants from injustice and oppression. If the court has power to see that a defendant is not oppressed by having too much put against him in one indictment, it must surely also have the power to see that he is not oppressed by having the case against him spread over too many indictments. The relevant provisions of the Indictments Act are as follows: Section 4. "Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one

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misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies." Rule 3 of Schedule I provided: "Charges for any offences, whether offences or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character." It took some time for these provisions to become established in practice. In a series of four cases about 1925, following rapidly on each other (TAYLOR (1924) 18 Cr.App.R. 25; CLARKE (1924) 18 Cr.App.R. 166; TYREMAN (1925) 19 Cr.App.R. 4 and SMITH (1926) 19 Cr.App.R. 151), the Court of Criminal Appeal said that rule 3 was being habitually ignored. It directed that full effect should be given to it and threatened to disallow the costs of second indictments.

Before that one notable exception had been established. In JONES (*supra*) the Court of Criminal Appeal said that in a case of murder the indictment ought not to contain a count of such a character as robbery with violence. Giving the judgment of the court, A. T. Lawrence J. said at (1918) 13 Cr.App.R. 81; [1918] 1 K.B. 416, at p. 417: "The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment. In the opinion of the court the Indictments Act, 1915, did not contemplate the joinder of counts of this kind. The proper course in a case like this is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge."

In LARGE (1939) 27 Cr.App.R. 65 the court said that the same practice should be followed with a charge of manslaughter. JONES (*supra*) has generally been accepted as a rule of practice and is referred to as such in the Homicide Act, 1957, s. 6 (2). It is a clear example, repeated in 1939, of the exercise by the court of its power to protect an accused from prejudice or

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embarrassment. It can hardly be doubted that in 1918 the court was, notwithstanding the Indictments Act, 1915, exercising in a limited way and for the benefit of the defence the same sort of power as it had always exercised before 1915. It seems to me that if the court had power in 1918 and 1939 to say that, notwithstanding the permission of Parliament, there must be no joinder of counts, this House must have power in 1964 to say that that is a mistaken or obsolete view and that there is power to stay second indictments in cases in which rule 3 ought quite clearly to have been used and has not been.

I know of no authority for saying that the power has been in any way diminished and there is indeed good authority for saying that the discretion would apply as much in the one case as in the other. In BARRON (1914) 13 Cr.App.R. 86; [1914] 2 K.B. 570 (the case is fully dealt with in the speech of my noble and learned friend, Lord Pearce) Lord Reading C.J. (1914) 13 Cr.App.R., at p. 88; [1914] 2 K.B., at p. 574, clearly thought it proper that a "judge should not, as a matter of fairness and in the exercise of a proper judicial discretion, have allowed the second trial to take place . . ." This dictum, which was in a considered judgment, was delivered three months after the dictum, which I have already cited, on the nature of the judicial discretion in criminal matters, which Lord Reading (then Isaacs C.J.) had delivered in LOCKETT (*supra*). It shows clearly that Lord Reading considered that a discretion could be used to disallow a second indictment just as well as to separate the charges in one indictment. There is a dictum which I consider to be to the same effect in MILES (1909) 3 Cr.App.R. 13. Lord Alverstone C.J., at p. 15, while saying that there was no rule of law that prevented the appellant being tried for a different offence on the same set of facts, said: "The judge has a discretion in such a matter, and if, when a man has been acquitted, he considers the acquittal should make an end of the whole case, he can express his opinion." This dictum is said to be ambiguous. I cannot think it means no more than that a judge has a discretion to

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express an opinion which can be ignored. Finally, under this head I refer to the order of Roskill J. in the present case that the second indictment was to remain on the file, not to be proceeded with without the leave of the court. This is a common form of order that is constantly being made. It is meaningless except on the hypothesis that the court has power to order an indictment not to be proceeded with.

I turn now to my second head. The doctrine of *autrefois* protects an accused in circumstances in which he has actually been in peril. It cannot, naturally enough, protect him in circumstances in which he could have been put in peril, but was not. Yet even the simplest set of facts almost invariably gives rise to more than one offence. In my opinion, if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and of injustice to defendants. The Crown might, for example, begin with a minor accusation so as to have a trial run and test the strength of the defence. Or, as a way of getting round the impotence of the Court of Criminal Appeal to order a new trial when, as in this case, it quashes a conviction, the Crown might keep a count up its sleeve. Or a private prosecutor might seek to harass a defendant by multiplicity of process in different courts. There is another factor to be considered, and that is the courts' duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility, the differences may be accounted for by differences in the evidence. No system of justice can guarantee that every judgment is right, but it can and should do its best to secure that there are not conflicting judgments in the same

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matter. Suppose that in the present case the appellant had first been acquitted of robbery and then convicted of murder. Inevitably doubts would be felt about the soundness of the conviction. That is why every system of justice is bound to insist upon the finality of a judgment arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to reopen again and again what is in effect the same matter.

The appellant presses this point so hard as to submit that inconsistent verdicts in two trials ought to be dealt with in the same way by the Court of Criminal Appeal as it deals with inconsistent verdicts in the same trial; and that on that ground the court ought in this case to have quashed the second conviction for robbery. I cannot accept that. As my noble and learned friend, Lord Pearce, observed in the course of the argument, the ground for quashing inconsistent verdicts in the same trial is not that there is no room for different conclusions on the same facts, but because, if the same body of men reach inconsistent conclusions on the same evidence, there is good ground for thinking that they were subject to confusion of thought affecting their judgment as a whole. I cannot agree, therefore, that inconsistent verdicts in two trials will necessarily produce a miscarriage of justice within the meaning of section 4 of the Criminal Appeal Act, 1907. But I accept that it is something which in the interests of justice it is very desirable to avoid. The Solicitor-General does not dispute that, if the prosecution were in fact to behave in all the ways in which according to his argument, they could legally behave, there would be abuses which ought to be corrected. But in his submission the danger of abuse is a matter for the Crown; the Crown itself may be trusted not to abuse its powers and if a private prosecutor is abusing his, the Attorney-General can interfere by means of a *nolle prosequi*. The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now

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avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. 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.

Yet if this matter is governed by the decision of the Divisional Court in R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (*supra*), as literally interpreted by the Solicitor-General in his argument, this would be the inevitable result. What was decided in that case was that the court had no power to quash an indictment because it was anticipated that the evidence would not support the charges. In the course of his judgment Lord Goddard C.J. said (1953) 37 Cr.App.R., at p. 151; [1954] 1 K.B., at p. 6, that once an indictment was before the court it must be tried except in four cases, namely, if it was defective, if matter in bar was pleaded, if a *nolle prosequi* was entered and if the court had no jurisdiction. My Lords, this statement describes in general terms and quite sufficiently for the purposes of the point which the Lord Chief Justice was considering the usual circumstances in which the court will not proceed upon an indictment. I think it is wrong to divorce a statement of this sort from the facts of the case and to treat it as if it were a comprehensive statement of the law for all purposes. On the same page of his judgment Lord Goddard C.J. refers to the order that a second indictment is not to be prosecuted without leave as "quite common practice." This case falls far short of an authority for the view that a vexatious use of process by the prosecution (which the court was not considering) can be dealt with only by means of a *nolle prosequi*. But if the statement is treated as a comprehensive statement of the law for all purposes, I cannot see how otherwise even a flagrant abuse of process could be dealt with. I do not really understand the

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argument that maintains that, while the statement must be treated as comprehensive, if there is a gross abuse of process the court can in some way or another protect itself against it. The only way in which the court could act in such circumstances would be by refusing to allow the indictment to go to trial; and that must mean that there is a fifth ground to be added to the four given by Lord Goddard C.J.

I pass now to consider the position in civil suits. The same fundamental doctrines, although they are often expressed differently, govern the rules of pleading and procedure in civil and criminal cases. In CASTRO *v.* THE QUEEN (1881) 6 App.Cas. 229, Lord Blackburn said, at p. 243: "I must say at once I totally disagree with what has been repeatedly asserted by both the learned counsel at the bar. I totally disagree that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking of course of the time before the Judicature Acts passed which swept them all away. Many enactments had from time to time been passed, relieving the strictness of pleadings in civil cases, which did not relieve them in criminal cases; but the rules of pleading at common law were exactly the same in each case." When, therefore, four years later in METROPOLITAN BANK *v.* POOLEY (1885) 10 App.Cas. 210, Lord Blackburn said at p. 220 (the passage is quoted in full in the opinion of my noble and learned friend, Lord Pearce) that from early times the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds so as to be vexatious and harassing, there can be no doubt that he would have considered his words as applicable to criminal as to civil proceedings. It is therefore very relevant to see how in civil cases the power has been used in matters that are akin to *res judicata*.

The doctrine of *res judicata* occupies the same place in the civil law as the doctrine of *autrefois* does in the criminal. *Autrefois* applies to offences that are charged and not to those that could have been. *Res judicata*, also if strictly confined,

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applies only to issues that are raised and not to those that could have been. But from early times it was recognised that some protection must be given to defendants against multiplicity of actions in respect of issues that could have been raised and that were not. At first in the civil law (and I shall note later a similar tendency in the criminal law) it was done by trying to extend the doctrine of *res judicata*. The classic judgment on this point is by Wigram V.-C. in HENDERSON *v.* HENDERSON (1843) 3 Hare 100. He said at p. 114: "I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." It will be observed that this rule is not rigid: the plea of *res judicata* applies except in special circumstances.

MACDOUGALL *v.* KNIGHT (1890) 25 Q.B.D. 1 was a case in which the plaintiff was suing a second time on a different defamatory statement in the same pamphlet. Lord Esher M.R. said at p. 9: "Even if the plaintiff could in law split up the defamatory matter in the report into different causes of action, I think such a course would be vexatious, so that either way I am of opinion the appeal must be allowed and the action stayed." Actions have been stayed upon the same principle by the Court of Appeal in GREENHALGH *v.* MALLARD [1947] 2 All E.R. 255 and WRIGHT *v.* BENNETT [1948] 1 All

E.R. 227. In the latter case the court did not reach any conclusion as to whether the plea of *res judicata* would succeed.

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I think it is likely that there would have been a similar development in criminal procedure, had it not been that prosecutions fell largely into the hands of public authorities who in practice impose restrictions on themselves. Any development would probably have been based on the principle —wider than that of *autrefois* because it comprehended different offences in relation to the same facts—first stated by Lord Cockburn C.J. in ELRINGTON (1861) 1 B. & S. 688, at p. 696 and is as follows: "We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form." This was applied in MILES (1890) 24 Q.B.D. 423 and GRIMWOOD (1896) 60 J.P. 809. In both cases a conviction for common assault was held to be a bar to subsequent charges of wounding, including wounding with intent to cause grievous bodily harm. For the reasoning that supports the decisions I think it will be sufficient if I refer to the former. The principle enunciated by Lord Cockburn C.J. was adopted by Hawkins J. and Pollock B. at pp. 431 and 436, Pollock B. adding: "This is not only the law, but it is consonant with sound sense and the just treatment of defendants." As elaborated by Hawkins J. the principle is that "circumstances of aggravation," whether they consist of the offence having been committed with wicked or malicious intent or of it being followed by serious consequences, are not to be treated as differentiating. This case expands the doctrine of *autrefois* in much the same way as Wigram V.-C. expanded the doctrine of *res judicata*. A man charged with common assault is never in actual peril of conviction or punishment for wounding with intent to cause grievous bodily harm, but where the facts warrant it, the prosecution can put him in peril by proceeding on the graver rather than the lesser charge. But Hawkins J.

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goes further than Wigram V.-C. did. He does not say that the plea of *autrefois* is to be applied except in special circumstances. He says that wounding with intent is to be treated as the same offence as common assault. This means that the defendant would have an absolute right to a verdict of *autrefois*. I cannot accept this part of Hawkins J.'s reasoning. If I did, I should not find great difficulty in bringing the present case within the doctrine of *autrefois*. To charge the appellant with murder in this case is really only to charge him with robbery in an aggravated form. His guilt consisted in taking part in a robbery in which one of the serious consequences of the threat inherent in the robbery was murder. It is very often only the consequences which differentiate one offence from another. I cannot say that robbery is the same offence as murder any more than I can say that wounding with intent to cause grievous bodily harm is the same offence as common assault. That would be inconsistent with numerous authorities, of which perhaps the strongest is KENDRICK (*supra*). The facts in the two cases may be substantially the same, but as offences they are quite distinct; common assault is punishable by imprisonment for one year and wounding with intent by imprisonment for life.

In my opinion, therefore, the principle stated by Cockburn C.J. as applied in MILES (*supra*) necessarily goes beyond the principle of *autrefois*. I consider it very desirable that the two principles should be kept distinct, for one gives the defendant an absolute right to relief and the other only a qualified right. I think it is equally desirable that they should be kept distinct in the civil law. *Res judicata* imposes a rigid bar and Wigram V.-C.'s principle a flexible one. I prefer the modern development of this principle which justifies it by the power to stop vexatious process. This to my mind is the true principle that is to be extracted from Cockburn C.J.'s statement of the law and the one that I think should be applied in the criminal law as it is in the civil.

Accordingly, my Lords, I would hold that the general rule to be observed in criminal cases (I leave aside for the moment

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the question whether the Court of Criminal Appeal in JONES (*supra*) was right in thinking that an exception ought to be made where there is a charge of murder) is that set out in rule 3. This rule is in form permissive. So of course is the rule relating to joinder in civil cases originally introduced by the Common Law Procedure Act, 1852, s. 41. Both must, in my opinion, be read subject to the principle stated by Wigram V.-C. that "the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest." I think it is right to say that for many years past, in response to the observations of the Court of Criminal Appeal, rule 3 has in practice been treated in this way except when there is a charge of murder, when because of JONES (*supra*) the practice has been different. I must now consider whether the exceptional rule of practice laid down by JONES (*supra*) and LARGE (*supra*) ought to be sustained by the House; and if it ought not, what is the effect of that on this appeal.

In my opinion, the rule of practice in these two cases ought not to be sustained. I have given my reasons for thinking that even before 1915 the rule prohibiting the joinder of felonies had become obsolete. But until the Indictments Act in 1915 it had been part of our procedure for well over a century, being thought necessary for the benefit of the defence; and I can understand the feeling in 1918 that the Act could not have intended its complete destruction and that murder at least as an exceptional crime should be saved out of the wreckage. A charge of murder is in its nature a very grave charge; and I do not doubt that a judge would give weight to that factor if an application were made to him by the accused under section 5 (3) of the Act to sever it from a lesser charge. But I do not think that there is any justification for a rigid rule to be applied irrespective of prejudice or embarrassment to the defence. In my opinion, the exceptional

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rule of practice laid down in JONES (*supra*) and LARGE (*supra*) should no longer have effect.

The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 where it can properly be used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of thing that would, I think, clearly amount to a special circumstance. Under section 5 (3) of the Act a judge has a complete discretion to order separate trials of offences charged in one indictment. It must, therefore, follow that where the case is one in which, if the offences in the second indictment had been included in the first, the judge would have ordered a separate trial of them, he will in his discretion allow the second indictment to be proceeded with. *A fortiori*, where the accused has himself obtained an order for a separate trial under section 5 (3). Moreover, I do not think that it is obligatory on the prosecution, in order to be on the safe side, to put into an indictment all the charges that might conceivably come within rule 3, leaving it to the defence to apply for separation. If the prosecution considers that there ought to be two or more trials, it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any

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advantage that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order in the form made by Glyn-Jones J. in SMITH (1958) 42 Cr.App.R. 35; [1958] 1 W.L.R. 312.

It remains to determine what rule of practice should be applied in this particular case. Should it be the rule which your Lordships, if you are of my opinion, will declare as the right rule to govern future cases; or should it be the rule of practice in force at the time of the first trial? If the decision in JONES (*supra*) had embodied a rule of law, it might well be said that the prosecution would simply be in the unfortunate position of a party who has good grounds for thinking that he is acting as the law requires him to do and then finds that the decision upon which he is relying is upset. But a rule of practice is in my opinion different. When declared by a court of competent jurisdiction, the rule must be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute. The rule in JONES (*supra*) was accepted by both sides without challenge as governing the position at the first trial; and in his address to the jury in the passage which my noble and learned friend, Lord Morris of Borth-y-Gest, has quoted, counsel for the defence referred to the possibility of a second trial in the event of an acquittal. The rule must be applied in the present case though not in the future, and on that ground I would dismiss this appeal.

LORD PEARCE: My Lords, the court has an inherent power to protect its process from abuse. Lord Blackburn in METROPOLITAN BANK *v.* POOLEY (1885) 10 App.Cas. 210, at p. 220 said: "But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing—the court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the

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verdict of a jury or evidence taken in that way, but it was done by the court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the court; and in a proper case they did stay the action." And Lord Selborne L.C., at p. 214 said: "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure." Although their Lordships were there dealing with a civil action in the Queen's Bench Division, they were clearly not limiting the power to civil jurisdiction.

Just as in civil cases the court has constantly had to guard against attempts to relitigate decided matters, so, too, the court's criminal procedure needed a similar protection against the repetition of charges after an acquittal or even after a conviction which was not followed by a punishment severe enough to satisfy the prosecutor. It was, no doubt, to meet those two abuses of criminal procedure that the court from its inherent power evolved the pleas of *autrefois acquit* and *autrefois convict*. For obvious convenience these were pleas in bar and, as such, fell to be decided before the evidence in the second case was known. They thus tended to look to form rather than to the substance that lay behind it. Where either of these pleas was made out, the defendant was entitled to an acquittal as of right, and no question of discretion or abuse or injustice could arise. But there is no reason why these two pleas should exhaust the inherent power of the court. So, too, in civil matters the Rules of the Supreme Court (Orders 25 and 40) as to striking out vexatious pleadings and staying or dismissing the action did not exhaust the inherent jurisdiction of the court to go behind the form of the pleading and look to the substance that lay beneath it (see STEPHENSON *v.* GARNETT [1898] 1 Q.B. 677).

It is clear from several cases that the court in its criminal jurisdiction retained a power to prevent a repetition of prosecutions even when it did not fall within the exact limits of the pleas in bar. In WEMYSS *v.* HOPKINS (1875) L.R. 10

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Q.B.D. 378 the defendant was convicted under a statutory offence, that being a driver of a carriage he had struck a horse ridden by the prosecutor causing hurt and damage to the prosecutor. He was then summoned again for what was apparently a different offence, namely, that he did unlawfully assault, strike and otherwise abuse the prosecutor. In spite of their apparent differences the two offences were in fact founded on one and the same incident. On a case stated the second conviction was quashed. Blackburn J. said (at p. 381): "The defence does not arise on a plea of *autrefois convict*, but on the well-established rule at common law that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence." He later refers to the defence as a plea "in the nature of a plea of *autrefois convict*." Lush J. there pointed out (at p. 382) that the defendant's conduct became an act for which he could be punished under two statutes and that he could not be "convicted again for the same act under the other statute."

The words of Blackburn J. were approved in MILES (1890) 24 Q.B.D. 423 where Hawkins J. said (at p. 430): "With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois convict* . . . because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged . . . but it was a defence grounded, as Blackburn J. said in WEMYSS *v.* HOPKINS (*supra*) 'on the well-established rule at common law'," and he cites the words which I have quoted above. In the same case Pollock B. (at p. 436) said: "In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred, and

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therefore the rule of law *Nemo debet bis puniri pro uno delicto* applies, and if the prisoner were guilty of the modified crime only he could not be guilty of the same acts with the addition of malice and design." After citing WALKER (1843) 2 Moo. & Robb. 446 and STANTON (1851) 5 Cox 324 (where Erle J. referred to a previous conviction for common assault as an "estoppel" to a conviction for felonious assault), he continued: "These are decisions by single judges, but they were cited and approved of by the court of Queen's Bench in ELRINGTON (1861) 7 B. & S. 688 where Cockburn C.J. says (at p. 696): 'We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and whether a party accused of a minor offence is acquitted or convicted he shall not again be charged on the same facts in a more aggravated form.' This is not only the law, but it is consonant with sound sense and the just treatment of defendants."

In KING [1897] 1 Q.B. 214 where a conviction for obtaining goods by false pretences was held a bar to a further conviction for larceny of the same goods, Hawkins J. said (at p. 218): "The man had clearly been convicted of a misdemeanour in respect of obtaining credit for the same goods which were the subject of the charge of larceny; and it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not their legal operation. The course adopted is altogether inconsistent with what is right and just." That case was distinguished in BARRON, 10 Cr.App.R. 81; [1914] 2 K.B. 570 where the court took the narrower view that an acquittal of sodomy did not bar an indictment, on admittedly the same evidence, for indecent assault. Lord Reading C.J. (at pp. 84 and 575 of the respective reports) expressed the opinion that Hawkins J. did not intend to lay down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different, and that he was really saying that "having regard to the conviction of the defendant on the first

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indictment of obtaining credit for the *same* goods by false pretences and also by fraud, the judge should not, as a matter of fairness and in the exercise of a proper judicial discretion, have allowed the second trial to take place . . ." After citing the words of Cave J. in the same case he continued: "It would appear that the decision of the court was given, either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment." More recently in SAMBASIVAM'S case [1950] A.C. 458 the Judicial Committee affirmed the principle that *res judicata* applies to criminal as much as to civil proceedings (at p. 479) and that the effect of an acquittal is not completely stated by saying that the accused person cannot be tried again for the same offence. Evidence cannot be called in a later case which would controvert the acquittal.

The above cases show that a narrow view of the doctrines of *autrefois acquit* and *convict* which has at times prevailed does not comprehend the whole of the power on which the court acts in considering whether a second trial can properly follow an acquittal or conviction. A man ought not to be tried for a second offence which is manifestly inconsistent *on the facts* with either a previous conviction or a previous acquittal. And it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases. Instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underly the pleas.

Lord Alverstone C.J. in MILES (1909) 3 Cr.App.R. 13 and Lord Reading C.J. in BARRON (*supra*) have treated the power that lies beyond the limits of the actual pleas as a judicial discretion. Lord Goddard C.J. in R. *v.* LONDON QUARTER SESSIONS (CHAIRMAN), *ex p.* DOWNES (1953) 37 Cr.App.R. 148; [1954] 1 Q.B. 1 has, by clear implication, said that no such discretion or power exists. But that case was not expressly

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directed to this point, and I cannot accept the implication. The court has, I think, a power to apply, in the exercise of its judicial discretion, the broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and creates abuse and injustice. *A fortiori*, when an order is made by consent of both parties that the indictment shall remain on the file and shall not be prosecuted without the leave of the court, the matter is within the court's judicial discretion. I certainly do not accept the Crown's contention, as I understood it, that the prosecution can thereafter proceed with the indictment even if the judge in a proper exercise of his discretion refuses leave.

The maxim *nemo debet bis vexari* underlies both pleas and is a strong element in both. Estoppel and consistency in the court underlie *autrefois acquit*, but they have no relation to *autrefois convict*. For in the latter case no estoppel or inconsistency would result from a second prosecution. Lord Blackburn in WEMYSS's case (*supra*) based *autrefois convict* on the principle *transit in rem judicatam*; the offence has passed into a conviction and the offence has ceased to exist. That may be a satisfactory explanation except for those cases where there is a conviction for assault from which the victim subsequently dies and it has been held that a prosecution for murder can be maintained. It seems that the only way in which one can justify this departure from the normal application of the principle expressed in cases where a previous conviction for assault has barred a subsequent charge of aggravated assault, is to say that the court in adapting to the particular case its application of the general principle has, in the light of the victim's subsequent death, chosen to regard murder as so serious an offence that it will allow the second trial to proceed (see the article of Mr. Colin Howard on *res judicata* in the *Melbourne University Law Review*, Vol. 3, p. 101). In the present case, however, your Lordships are not primarily concerned with the problems that follow a conviction.

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In GOULD (1840) 9 C. & P. 364; BIRD (1851) 2 Den. 94; NORTON, 5 Cr.App.R. 13; [1910] 2 K.B. 496 and BEACH, *The Times*, September 26, 1957, the court looked at the facts that lay behind the charges. It is argued that it should do so only for a limited purpose, namely, to find whether in law the offences were the same and not whether the factual substance of the offences was the same. Whatever the limits of the pleas themselves, it is difficult to see why the court should not regard the full reality of the case if it is in truth seeking to apply the general principles. Certainly the civil courts have not allowed the same facts to be dressed up under a new cause of action. See STEPHENSON *v.* GARNETT [1898] 1 Q.B. 677, at p. 680 where A. L. Smith L.J. said: "I do not rest my decision upon the ground that the matter is *res judicata*, for I do not think it can be said that it is."

The limits of the inquiry are not, however, easy to define. Douglas J. in SEALFON'S case (1947) 332 U.S.Rep 575, at p. 579 said: "The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict." He refers to "the core of the prosecution's case." In cases of acquittal a defendant may have been acquitted on one of many grounds and it is, therefore, generally hard to find any precise issue that has been decided other than the broad issue of not guilty. But in several Australian cases the court has sought to find what are the real implications necessarily involved in the former verdict of acquittal. Where it can be shown that an issue has been decided in the defendant's favour, they have held that he may rely on that decision and that it cannot be challenged afresh. WILKES (1948) 77 C.L.R. 511; KEMP *v.* THE KING (1951) 83 C.L.R. 341; MRAZ *v.* THE QUEEN (No. 2) (1956) 96 C.L.R. 62. The principles of the cases on issue estoppel are clearly summarised by Heron and Hardie JJ. in BROWN *v.* ROBINSON (1960) S.R.(N.S.W.) 297. The principle established by those cases seems to me right, but they do not help the prisoner

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in the present case. Here the two real issues were murder intent and identity, and the verdict of the jury was guilty.

The Court of Criminal Appeal, without considering all the grounds of appeal, held that the prisoner had not had the benefit of a fair summing-up on identity. As he might otherwise have been acquitted on that ground, they quashed the conviction. Thus, the prisoner can claim the protection of a general verdict of not guilty. But this does not mean that he has been found not guilty on the issue of identity. I cannot accept Mr. Hauser's argument that by taking the verdicts of guilty on the other three defendants one can assume that the prisoner was not acquitted on intent, and that one must, therefore, attribute the verdict of not guilty to the issue of identity. It would be quite unreal to do so. And even if one were theoretically to deem the verdict of the Court of Criminal Appeal to be the verdict of the jury, then theoretically also the jury might have acquitted on intent. The issue estoppel cases are concerned to find out the practical inferences from the verdict. They afford no help to the appellant in the present case.

It might seem at first sight that the second prosecution here is a breach of the "well-established rule of our criminal law" referred to by Cockburn C.J. in ELRINGTON (*supra*) and approved by Pollock B. in MILES (*supra*) that "a series of charges shall not be preferred." Since the time when those words were spoken the joinder of charges in an indictment has been deliberately facilitated by the Indictments Act, 1915, and there is thus the more reason for saying that in general the prosecutor should join in one indictment all the charges that he wishes to prefer in respect of one incident. It would be an abuse if he could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence. In JONES, 13 Cr.App.R. 86; [1918] 1 K.B. 416, however, the Court of Criminal Appeal laid down a rule that in cases of murder other charges should not be joined. So, too, in manslaughter—LARGE (1939) 27 Cr.App.R. 65.

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With all respect I think that rule of procedure is inconvenient. The defendant can always apply for separate trials if any unfairness might otherwise be caused to him but he should be entitled, if he wishes, to have the whole matter dealt with.

This is, however, a matter on which the court is entitled to decide its practice consistently with its principles. I agree with the general principle enunciated by Cockburn C.J., but he was dealing with an ascending scale of charges and I do not think that he was intending to hold that the cases where second prosecutions in a descending scale of charges or on different crimes had been allowed were wrongly decided. In those days when there were technical difficulties with regard to the joinder of indictments such an assertion could not be justified. The court was entitled to lay down the rule of practice in JONES (*supra*) since it was, I think, basing its decision on the general fundamental principle of giving a fair trial to the prisoner. Where conflicting considerations of principle arise, the court must do the best it can to reconcile them.

In my opinion, therefore, no principle is automatically infringed by the practice laid down in JONES (*supra*) (even though your Lordships may think it undesirable in future) and, while that practice is maintained, one has to see whether a particular injustice arises from following the procedure thus laid down. The benefit which (as it now turns out) he would have obtained from having one trial was fortuitous. I do not regard this point as a valid reason for allowing the appeal and I see no injustice or abuse of process in allowing the trial of the second indictment.

I agree with the opinion of my noble and learned friend, Lord Devlin, save in so far as I am not in accord with his more general criticism of issue estoppel. I agree with his remarks as to the practice to be followed in future.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: Cowan, Lipson & Rumney, for the appellant.

[PRIVY COUNCIL]

ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO AND ANOTHER — APPELLANTS

AND

LENNOX PHILLIP AND OTHERS — RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO]

1994 June 7, 8, 9, 13, 14, 15, 16; July 11, 12, 13; Oct. 4

Lord Keith of Kinkel, Lord Goff of Chieveley, Lord Browne-Wilkinson, Lord Woolf and Lord Lloyd of Berwick

Trinidad and Tobago - Crime - Pardon - Pardon granted to insurgents conditional on safe return of hostages - Delay before release of hostages and surrender of insurgents - Detention and prosecution of insurgents for offences committed during insurrection - Whether pardon valid - Whether detention and prosecution contravening insurgents' constitutional rights - Constitution of the Republic of Trinidad and Tobago Act 1976 (No. 4 of 1976), Sch., ss. 4(a)(b), 14(1), 87(1)

Trinidad and Tobago - Crime - Abuse of process - Insurgents prosecuted for offences committed in course of insurrection - Insurgents claiming detention unlawful by reason of grant of pardon - Habeas corpus order made - Order not appealable - Pardon subsequently held to be invalid - Whether prosecution for same offences abuse of process

On 27 July 1990 the respondents participated in an armed insurrection intending to overthrow the lawful Government of Trinidad and Tobago. They seized buildings, including the Parliament building, and took the occupants hostage. People were killed and injured, and property was damaged. The Acting President decided to negotiate with the insurgents to try to seek a peaceful solution. A mediator was taken to the Parliament building where, after discussions between the hostages and their captors, a document entitled "Major Points of Agreement" was drawn up. The Acting President, pursuant to the power of pardon conferred by section 87(1) of the Constitution of the Republic of Trinidad and Tobago, signed a document which stated that as required by the Major Points of Agreement he granted an amnesty to all those involved in acts of insurrection commencing approximately 5.30 p.m. on 27 July and ending upon the safe return of all Members of Parliament held captive on 27 July, and that the amnesty was granted for the purpose of avoiding physical injury to them and was therefore subject to the complete fulfilment of the obligation safely to return them. The mediator took a copy to the Parliament building that evening but the hostages were not then released. Shooting outside continued and the insurgents made additional political demands. After further negotiations the insurgents surrendered on 1 August and all the hostages were released. The insurgents were arrested and charged with treason, murder and other offences committed during the insurrection. Relying on the pardon they sought leave to issue a writ of habeas corpus and applied for redress pursuant to section 14(1) of the

Constitution,[1] alleging that their detention and prosecution contravened their right to liberty and/or security of the person and the right not to be deprived thereof except by due process of law afforded by section 4(*a*), and their right under section 4(*b*) to the protection of the law. Leave having been granted and the proceedings consolidated, the judge made a habeas corpus order and ordered the respondents to be released from detention forthwith. He also granted a declaration that their detention and prosecution for offences in relation to the insurrection had contravened their rights under section 4(*a*) and (*b*) and he ordered damages for the infringement of those rights to be assessed by a judge in chambers and paid by the Attorney-General and the Director of Public Prosecutions. No appeal lay to the Court of Appeal in relation to the order of habeas corpus, and the Court of Appeal dismissed the appeal by the Attorney-General and the Director of Public Prosecutions against the judge's decision on the constitutional motion.

On appeal by the Attorney-General and the Director of Public Prosecutions to the Judicial Committee:-

Held, (1) that a pardon was an executive act of the state and not analogous to a contract and thus did not derive its authority from agreement; that a pardon could be subject to conditions, in which case its effectiveness but not its validity would depend on compliance with the conditions; that whether a pardon had been granted had to be determined objectively and the Acting President had granted a pardon to the respondents; and that since he had not been subjected to physical violence, pressure, imprisonment or similar direct action but had made his own decision to sign the pardon it had not been improperly procured or rendered invalid by duress (post, pp. 410E-G, 411A, 412H-413A, C-D).

Mustapha v.Mohammad [1987] L.R.C.Const. & Admin. 16 applied.

(2) Allowing the appeal, that the initial validity of the pardon had to be considered as at the time of the grant; that a pardon could only relate to offences already committed, and the power to grant a pardon under section 87(1) of the Constitution did not extend to offences not yet committed; that although a purposive construction should be applied in order to uphold the validity of a pardon, the Acting President had no power to grant a pardon taking effect at an uncertain time in the future and purporting to pardon offences committed in the meantime; that since at the time of the grant of the pardon compliance with the condition safely to return the hostages would probably not be reasonably practical until after a substantial period of time had elapsed in which the unlawful insurrection would continue, the Acting President could not grant a pardon applicable to continuing offences committed during that period even though in all the circumstances the delay in releasing the hostages had not been unreasonable; that the pardon was not valid if treated as an offer of a pardon capable of acceptance by compliance with a condition

1 Constitution of the Republic of Trinidad and Tobago, s. 4: "It is hereby recognised... that...there...shall continue to exist... (*a*) the right of the individual to...liberty, security of the person ... and the right not to be deprived thereof except by due process of law; (*b*) the right of the individual to ... the protection of the law;..."

S. 14: "(1) if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

S. 87(1): see post, p. 409H.

in a strictly limited period, since the respondents had not accepted the offer within such period, nor could it be treated as a statement of intention to grant a pardon since no pardon had subsequently been granted; that although the pardon might be valid as being a pardon subject to a condition to be fulfilled promptly or as soon as practicable, the insurgents had not complied with the condition and their eventual compliance could not bring it into effect; and that, accordingly, the respondents had not been granted a valid pardon, and so their initial prosecution and detention in respect of offences committed during the insurrection was lawful and their constitutional rights had not been infringed thereby (post, pp. 410F-G, 411C-D, F, 415A-G, 416D-E, F-417A, G-H, 418B).

Phillip v. Director of Public Prosecutions [1992] 1 A.C. 545, P.C. applied.

United States v. Klein (1871) 80 U.S. (13 Wall.) 128 distinguished.

But (3) that since the judge had made an order of habeas corpus, which was not appealable, despite the invalidity of the pardon granted to the insurgents it would be an abuse of process to seek to prosecute them again for offences committed in the course of the insurrection (post, p. 418A).

Quaere. Whether a pardon which is formally granted would ever be set aside for duress (post, p. 412B).

Decision of the Court of Appeal of Trinidad and Tobago reversed.

The following cases are referred to in the judgment of their Lordships:

Mustapha v. Mohammad [1987] L.R.C.Const. & Admin. 16
Phillip v. Director of Public Prosecutions [1992] 1 A.C. 545; [1992] 2 W.L.R. 211; [1992] 1 All E.R. 665, P.C.
Reg. v. Milnes and Green [1983] 33 S.A.S.R. 211
United States v. Klein (1871) 80 U.S. (13 Wall.) 128

The following additional cases were cited in argument:

Abbott v. Attorney-General of Trinidad and Tobago [1979] 1 W.L.R. 1342, P.C.
Bell v. Director of Public Prosecutions [1985] A.C. 937; [1985] 3 W.L.R. 73; [1985] 2 All E.R. 585, P.C.
de Freitas v. Benny [1976] A.C. 239; [1975] 3 W.L.R. 388, P.C.
Garland, Ex parte (1867) 71 U.S. (4 Wall.) 366
Hoffa v. Saxbe (1974) 378 F.Supp. 1221
Kaufman v. Gerson [1904] 1 K.B. 591, C.A.
Murphy v. Ford (1975) 390 F.Supp. 1372
Paquette, Ex parte (1942) 27 A.2d 129
Reg. v. Croydon Justices, Ex parte Dean [1993] Q.B. 769; [1993] 3 W.L.R. 198; [1993] 3 All E.R. 129, D.C.
Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42; [1993] 3 W.L.R. 90; [1993] 3 All E.R. 138, H.L.(E.)
Reg. v. Secretary of State for the Home Department, Ex parte Bentley [1994] Q.B. 349; [1994] 2 W.L.R. 101; [1993] 4 All E.R. 442, D.C.
Reg. v. Turner (Bryan) (1975) 61 Cr.App.R. 67, C.A.
Secretary of State for Home Affairs v. O'Brien [1923] A.C. 603, H.L.(E.)

APPEAL (No. 2 of 1994) with leave of the Court of Appeal of Trinidad and Tobago by the appellants, the Attorney-General of Trinidad and Tobago and the Director of Public Prosecutions, from the judgment of

the Court of Appeal of Trinidad and Tobago (Sharma and Ibrahim JJ.A., Hamel-Smith J.A. dissenting) given on 28 October 1993 dismissing their appeal from the judgment of Brooks J. delivered on 30 June 1992 in the High Court of Trinidad and Tobago, whereby he had declared that the detention and prosecution of the respondents, Lennox Phillip, also called Yasin Abu Bakr, and 113 others, for offences in relation to the insurrection which had commenced on 27 July 1990 and ended on 1 August 1990 contravened the right to liberty and/or security of the person and the right not to be deprived thereof except by due process of law, and was a contravention of the right to protection of the law, and had ordered that damages for the infringements of those rights of each of the respondents from the date of their detention be assessed by a judge in chambers pursuant to section 14 of the Constitution and paid to them by the Attorney-General and the Director of Public Prosecutions. Brooks J. had also granted the respondents an order of habeas corpus and had ordered them to be discharged forthwith out of the custody of the Commissioner of Prisons, and that decision was not appealable.

The facts are stated in the judgment of their Lordships.

George Newman Q.C. and *Denise Hackett* (of the Trinidad and Tobago Bar) for the Attorney-General. A pardon which purports to dispense with or suspend the operation of the law in relation to the intended beneficiaries is void, both as to offences already committed and as to those committed in future. Where there are continuing offences a pardon will be ineffective unless the beneficiaries cease to commit the offences immediately on being given notice of the pardon. The validity of a pardon must be determined as at the time of the grant.

The Acting President's power to grant a pardon derived from section 87(1) of the Constitution of the Republic of Trinidad and Tobago. Section 87(1) confers a discretion on the President to grant any person a pre-conviction pardon, and also empowers the President to grant a conditional pardon. The insurgents were required to release the hostages forthwith, i.e., after they had had due time for consideration and understanding of the pardon. The need to release the hostages forthwith required the insurgents to cease to be in armed insurrection. A person in armed insurrection against his own state has no right to bargain for his surrender. [Reference was made to *Hawkins's Pleas of the Crown*, 7th ed. (1795), vol. 2, pp. 529, 532-535, 540, 547; "Pardoning Power" (1865) 11 Op. Atty. Gen. 227-237 by James Speed, Attorney-General of the United States to the President, and *Phillip v. Director of Public Prosecutions* [1992] 1 A.C. 545.] The main purpose of the power conferred by section 87(1) is not to restore tranquillity at a time of insurrection but to forgive offences.

An offer of a pardon must be distinguished from the grant of a pardon. If the offer is accepted the recipient will be entitled to be granted a pardon or treated as if a pardon has been granted to him. If the document which the Acting President signed was an offer of a pardon the offer was not open for acceptance once due time for consideration and understanding of the offer by the insurgents had expired. The conduct of the state did not give rise to a defence of waiver or estoppel, or amount

to any form of deception which would disentitle the state from relying on the breach of the condition to which the pardon was subject.

The court has jurisdiction to inquire into the legality of the pardon. The Acting President granted the pardon as a result of illegitimate pressure from the insurgents and so the pardon was invalid. Where coercion has resulted in the grant of a pardon the state should be given the opportunity of deciding, after the coercion has ceased, whether to abide by or avoid the grant. The value of the power of pardon should be preserved by preventing those who have abused that power from retaining any benefit under it. It is accepted in international law that coercion exercised in the making of a treaty invalidates it. [Reference was made to the preamble to, and articles 1, 2, 3 and 6 of, the International Convention against the Taking of Hostages (1979) (Cmnd. 9100); *McNair, The Law of Treaties* (1961), p. 210 and *Kaufman v. Gerson* [1904] 1 K.B. 591.]

Section 87(1) of the Constitution requires a voluntary exercise of the power to grant a pardon if the pardon is to be valid. It is a principle of administrative law that a person entrusted with a discretion must not exercise it at the dictation of any other person or body. The opening words of the pardon indicate that the Acting President was not exercising his discretion but was acting solely by reason of the demands which the insurgents had made and the attendant circumstances. [Reference was made to *Dussault and Borgeat, Administrative Law*, 2nd ed. (1990), vol. 4, pp. 168-170.]

Ewart Thorne Q.C., Miriam Samaru and *Ian Benjamin* (all of the Trinidad and Tobago Bar) for the Director of Public Prosecutions. No pardon in favour of the respondents was ever promulgated. The Acting President did not intend when he signed the document that it should take effect as an amnesty or as the offer of a pardon.

If a pardon by its terms purported to pardon an offence committed after its grant it would be invalid because it would be exercising a suspending or dispensing power. The document clearly envisaged that the return of the hostages and the end of the insurrection would take place at the same time, but there was no express or implied condition in the pardon that the respondents should lay down their arms. The document thus left open the period during which offences covered by the pardon could be committed, but the condition of the pardon could not be complied with unless they laid down their arms forthwith. The provisions could not be severed. When the President exercises his power under section 87(1) the pardon is fully effective whether the beneficiary wishes to accept the pardon or not. The power under section 87(1) is derived from the royal prerogative and is not to be compared with the power of the President of the United States to grant a pardon. [Reference was made to section 6 of the Constitution of the Republic of Trinidad and Tobago Act 1976.]

Geoffrey Robertson Q.C. and *Phillippa Kaufmann* for the respondents. The grant of a pre-conviction pardon or amnesty is a binding exercise of state power in times of war and insurgency, the reneging on which constitutes a breach of faith: *United States v. Klein* (1871) 80 U.S. (13 Wall.) 128, 140. Such a pardon is different in class and consequence from the pardons analysed in *Hawkins's Pleas of the Crown*, 7th ed.,

1947

vol. 2, pp. 529-549. [Reference was also made to *Todd on Parliamentary Government in the British Colonies*, 2nd ed. (1894), pp. 359-361.]

Section 87(1) of the Constitution created a new power in the President to pardon persons who may have committed criminal offences prior to any charge being laid against them in relation thereto. The purpose of section 87(1) was not merely to forgive offences but it was to arm the President with a power, in times of armed rebellion, to offer an amnesty when it was prudent to do so. A hostage situation and the grant of immunity under unlawful pressure was specifically contemplated. [Reference was made to paragraph 208 of the Hyatali Commission on the Constitution (1987); *Phillip v. Director of Public Prosecutions* [1992] 1 A.C. 545, 550; "The Federalist No. 74" (1788), p. 222 and William Taft, "Amnesty - Power of the President" (1892) 20 Op. Atty. Gen. 330, 331-339 and the proclamations annexed thereto, at pp. 339-345.] The pardoning power extends to continuing offences. [Reference was made to William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977) William and Mary L.Rev., vol. 18, No. 3, pp. 475, 510-520; *Ex parte Garland* (1867) 71 U.S. (4 Wall.) 366; *United States v. Klein*, 80 U.S. (13 Wall.) 128 and *Murphy v. Ford* (1975) 390 F.Supp. 1372.]

Section 87(1) does not lay down any formality for the grant of a conditional pardon, which it clearly envisages. Such a pardon comes into effect to protect the beneficiary from prosecution once the condition is performed. The grant itself may be revoked on notice to the beneficiary prior to the performance of the condition but not thereafter. It may be revoked also on non-performance of a condition subsequent. A condition precedent attached to the grant may be amended, withdrawn, supplemented or clarified at any time prior to its fulfilment. The delivery of the pardon will, in an insurrectionary situation, usually be done by some form of proclamation. The proclamation of a conditional pardon is to be contrasted with an offer to grant an unconditional pardon to insurgents once they have surrendered which contemplates a further formal act by the grantor.

Section 87(1) enables the President to pardon continuing offences if his primary object is to bring criminality to an end and not to grant a dispensation against the breaking of the law in the future. The Acting President's pardon covered offences already committed and continuing offences such as treason, but not fresh offences. The charges against the respondents only related to offences committed before the grant and continuing offences commenced before that time. A pardon should be construed strictly against the grantor. [Reference was made to *Ex parte Paquette* (1942) 27 A.2d 129; the *Corpus Juris Secundum*, vol. 67A, ss. 21, 24, 25, pp. 28, 31-32; *Reg. v. Turner (Bryan)* (1975) 61 Cr.App.R. 67; *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769 and *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42.]

The Bill of Rights 1689 did not affect the prerogative power to grant a pardon (see *Wade and Bradley, Constitutional and Administrative Law*, 10th ed. (1985), pp. 62-63) although it forbade the King's practice of granting dispensations from the operation of licensing statutes and the like to his favourites. A "licence to offend" against the law is unconstitutional because it involves an encroachment by the executive on

the powers reserved in a democracy to the legislature and the judiciary. It is also contrary to the public interest because the interest in law enforcement is subordinated to the private interest of an individual in breaking the law.

The pardon should be given the simple meaning it bears on its face. It was an amnesty granted to all the insurgents to relieve them of any prosecution arising from their involvement in the insurrection, on condition that they returned safely to the authorities all the Members of Parliament held captive. The document cannot be construed as the purported grant of a pardon in respect of offences to be committed in the future.

The grant of an amnesty by the President cannot be invalidated by unlawful pressure or coercion which does not amount to a threat to the life and limb of the President. The will of the Acting President was not overborne so that he had no alternative but to grant a pardon. [Reference was made to *Mustapha v. Mohammad* [1987] L.R.C.Const. & Admin. 16.] The grant of the amnesty to the insurgents did not conflict with any doctrine of international law but, in any event, the Constitution would override any conflict there was. [Reference was made to article 3(1) of the International Convention against the Taking of Hostages (1979).]

The amnesty was conditional upon the safe return of the Members of Parliament. The courts below found as a fact that the condition had been fulfilled within a time which was reasonable in all the circumstances. The burden lies on the appellants to show that the finding is unsustainable. [Reference was made to *Abbot v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342 and *Bell v. Director of Public Prosecutions* [1985] A.C. 937.] The trial judge's decision, following that finding, to release the respondents on a writ of habeas corpus is unimpeachable: see *Secretary of State for Home Affairs v. O'Brien* [1923] A.C. 603.

The pardon could not protect the respondents from being sued by third parties damaged by their actions: *Hoffa v. Saxbe* (1974) 378 F.Supp. 1221.

The exercise of the pardoning power under section 87(1) is a discretionary act by the head of state guided by political considerations and is not justiciable. Section 38(1) of the Constitution is mandatory, and the President cannot elect to submit to the courts. The pardon must, in principle, receive the same analysis whether it is the state which seeks to disavow it or a private litigant who seeks to challenge its validity. The court is confined to considering whether the grant of the pardon was the deliberate act of the Acting President and was done in the performance of his official, public-interest functions. The pardoning power is akin to the royal prerogative of mercy, the exercise of which can only be reviewed on the basis of error of law relating to the scope of the power. [Reference was made to *de Freitas v. Benny* [1976] A.C. 239 and *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349.] The manner in which the executive of a state deals with an insurrection is not an appropriate subject for curial examination.

There is no absolute legal rule that a pardon can never be given to persons who have deliberately extracted it by criminal conduct. Such a

rule would fetter the discretion of the President to act according to his appreciation of the public interest in particular circumstances. A more limited rule invalidating any pardon procured by a threat to a hostage would be open to similar objection. In exceptional circumstances it may be in the public interest to give immunity from prosecution to criminals who demand it. State officials should be held to their promises and bargains with criminals: see *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769. An amnesty revocable at the option of the state is unlikely to be trusted by those to whom it is offered.

Newman Q.C. in reply. Although the state could not appeal against the judge's decision in the habeas corpus proceedings, it would not necessarily be an abuse of process for further criminal proceedings to be instituted against the respondents. The state's conduct subsequent to the pardon was not such as to render their prosecution an abuse of process if the pardon had not been validly granted. [Reference was made to *Reg. v. Milnes and Green* [1983] 33 S.A.S.R. 211.]

Section 87(1) does not confer a power to pardon offences not yet committed. Amnesty is not a different class of pardon from those analysed in *Hawkins's Pleas of the Crown,* 7th ed., vol. 2, pp. 529-552. The power of pardon cannot vary according to the objective for which the pardon may be granted. The debate of the Senate of Trinidad and Tobago referred to in Hansard, 24 March 1976, cols. 815-821 does not assist in the interpretation of section 87(1).

Neither *Ex parte Garland,* 71 U.S. (4 Wall.) 366 nor *United States v. Klein,* 80 U.S. (13 Wall.) 128 establishes that the United States President can pardon offences not yet committed: see William F. Duker, "The President's Power to Pardon: A Constitutional History," William and Mary L.Rev., vol. 18, No. 3, pp. 475, 525-526.

A proper inquiry into the facts has to be driven by the legal propositions to be derived from the facts and upon which the respective parties rely. A review by the Board of the factual findings of the courts below is essential because the reasons advanced by the state as to why the delay in the release of the hostages and the surrender of the insurgents occurred did not receive proper consideration. The insurgents breached the condition of the pardon and so it was no longer valid by the time they surrendered. A challenge to the legality of an exercise of power under section 87(1) is justiciable.

Cur. adv. vult.

4 October. The judgment of their Lordships was delivered by LORD WOOLF.

Lennox Phillip, also called Yasin Abu Bakr ("Abu Bakr"), and the 113 other respondents took part in an armed insurrection between Friday 27 July and Wednesday 1 August 1990. The insurrection was intended to overthrow the lawful Government of Trinidad and Tobago. After the insurrection had come to an end the respondents were arrested. On about 13 August they were charged with offences including treason, murder, unlawful and malicious setting fire, possession of ammunition, wounding with intent to do grievous bodily harm, assault and possession of firearms.

The respondents contend that their detention was unlawful. They rely on a pardon they had received during the course of the insurrection from the Acting President of Trinidad and Tobago, Joseph Emmanuel Carter. They commenced two sets of proceedings - the first being for leave to issue a writ of habeas corpus and the second being under section 14 of the Constitution of the Republic of Trinidad and Tobago for contravention of their right: (a) to liberty and/or security of the person and not to be deprived thereof except by due process of law and (b) to the protection of the law under section 4 of the Constitution.

The proceedings resulted in an earlier appeal to the Privy Council, *Phillip v. Director of Public Prosecutions* [1992] 1 A.C. 545. The Board allowed the appeals of the present respondents. In their judgment, which was delivered by Lord Ackner on 10 December 1991, the Board held that the respondents had established a prima facie case that they were the beneficiaries of a valid pardon which would render their detention in prison on the charges unlawful, and that it was therefore for the Commissioner of Prisons and the Attorney-General to justify their detention; accordingly, the respondents were entitled to a writ of habeas corpus as of right so that the lawfulness of their imprisonment could be immediately determined. They were also entitled to pursue their proceedings pursuant to section 14 of the Constitution. The Board held that it was not necessary for the proceedings to be deferred until after the validity of the pardon had been determined, upon the respondents making a special plea in bar to the indictment, when they were arraigned on the offences. In addition the Board directed that the habeas corpus and constitutional proceedings should be consolidated so that the validity of the pardon could be determined.

In those consolidated proceedings, on 30 June 1992, Brooks J. delivered judgment. He granted the respondents an order of habeas corpus and ordered that the respondents should be released from detention forthwith. The judge also granted a declaration that their detention and prosecution had contravened their constitutional rights as alleged and he ordered that the damages for the contravention should be assessed by a judge in chambers and paid by the state.

In Trinidad and Tobago, unlike the position now in the United Kingdom, there is no appeal against an order of habeas corpus. However there is an express right of appeal in "constitutional matters" under section 108(*a*) of the Constitution. The appellants appealed under that section to the Court of Appeal against the decision of Brooks J. The Court of Appeal, contrary to the contention of the respondents, held that there was jurisdiction to hear the appeal, but by a majority (Sharma and Ibrahim JJ.A., Hamel-Smith J.A. dissenting) dismissed the appeal. The present appeal is from that decision of the Court of Appeal.

On this appeal the respondents have not contested the decision of the Court of Appeal as to their jurisdiction. The issues have all depended upon the validity of the pardon. They are both of constitutional significance and practical importance to the appellants and the respondents. If the decision of the Court of Appeal is upheld, it will mean that the respondents, although they took part in an insurrection, will be entitled to such damages as the judge in chambers considers it is appropriate to

award. If on the other hand the appeal succeeds, then the respondents are at risk of being rearrested and tried; Mr. George Newman indicated on behalf of the appellants that, when the outcome of the present appeal is known, a decision will be taken as to what action, if any, in the way of further criminal proceedings is appropriate. To assist the authorities to come to their decision, Mr. Newman indicated that the Attorney-General and the Director of Public Prosecutions would welcome the views of the Board.

The grounds relied on by the appellants in order to establish the invalidity of the pardon are: (a) the pardon was obtained by duress and at the dictate of the respondents, (b) the pardon related to offences not yet committed and (c) the respondents did not comply with the condition to which it was subject. The respondents argued that, even if the pardon is invalid, it would now amount to an abuse of process to prosecute them in respect of the offences with which they have been charged. The Director of Public Prosecutions also argued that the pardon had not been properly constituted or promulgated. He was, however, refused leave to advance a further argument, in support of which he had prepared a supplemental case. This was that the pardon was also invalid or a nullity because under the Constitution the power of pardon can only be exercised on the advice of the cabinet and it had been issued without that advice.

The hearing before the Board lasted 10 days. A substantial proportion of that time was taken up by an examination of the evidence which was considered by Brooks J. as to what had happened during the insurrection. This was in the form of affidavits from those involved and transcripts of telephone communications which took place between the prime actors. There was, as one would expect, considerable disparity between the descriptions of the events given in the different affidavits but the witnesses were not cross-examined on their affidavits. In addition the transcripts were not timed or dated so there was considerable difficulty in determining what was their correct sequence and the precise times to which they related. It was only in the course of the hearing before the Board that the counsel who appeared before their Lordships, who also appeared in the courts below, were able for the first time to unravel the evidence in a reasonably satisfactory manner. Because of the difficulties in ascertaining the course of events the Board granted the parties a greater indulgence to reinvestigate the evidence than would normally be the case when the Board has the advantage of the views on the evidence of the courts below. However, even after hearing Mr. Newman at length on the facts, the Board is far from satisfied that the courts below, as Mr. Newman contended, were not fully aware of the salient features and effect of the evidence. The Board are happy to acknowledge that their judgments disclose that the courts dealt with this extremely sensitive and difficult case with great care and objectivity. The Board considers that it is unlikely that the explanation for the courts below not referring to or stressing certain features of the evidence, to which Mr. Newman attached particular importance, was that the courts below did not appreciate their significance. The explanation is more likely that the test which they applied in order to assess the validity of a pardon made this unnecessary. Their approach, as will appear hereafter, differs from that which the

Board takes as to certain critical issues on this appeal and because of this it is not necessary in this judgment to set out the facts other than in outline. However it is emphasised that their Lordships have scrutinised the evidence with great care. It was examined in detail, both in the course of argument and during the period that the Board adjourned in order to examine the evidence itself.

The facts

The respondents are members of a religious sect known as the Jamaat al Muslimeen. Shortly after 5.30 p.m. on Friday 27 July about 70 of the Muslimeen led by Abu Bakr, who is their Imam, stormed the Trinidad and Tobago television building while a second group of about 40 Muslimeen commanded by Bilaal Abdullah ("Abdullah") stormed the Parliament building ("the Red House") while it was in session. Among those in the Red House were the Prime Minister, Mr. Robinson and other ministers. The politicians in the Red House were held at gun point whilst visitors and civilians were allowed to leave.

The police headquarters which were opposite the Red House were set alight by a car bomb. A number of people were killed in the course of the attacks. Two vehicles were booby trapped and strategically placed outside the television building and were not disarmed until the following Wednesday 1 August. Abu Bakr appeared on television during the Friday evening and alleged that the government had been overthrown and that the Prime Minister and his cabinet were under arrest.

When the Acting President heard of the insurrection he set up his command post at Camp Ogden. He was joined there by his military chiefs who included Colonels Theodore and Brown and other government ministers, lawyers and senior policemen. The Acting President in due course made a television appeal for calm and at about 9 a.m. on the Saturday he declared a state of emergency. While the military chiefs initially devised a plan for storming both the Red House and the television building, it was agreed that given the risk to innocent lives the preferable course would be to open negotiations to seek a peaceful solution.

The Members of Parliament at the Red House were kept bound hand and foot and made to lie prone on the floor at gun point. During the Friday evening Abdullah wanted the Prime Minister to give orders for the troops to be withdrawn. He bravely did not co-operate and was shot and wounded. Minister Richardson was also shot and wounded. Subsequently there were discussions between Abdullah and two other ministers, Dookeran and Toney. This eventually resulted in Canon Clarke being enrolled as a mediator. Canon Clarke arrived at the Red House early on Saturday morning. While there he was provided with a document headed "Major Points of Agreement," a letter of resignation by the Prime Minister and a letter appointing Mr. Dookeran as Acting Prime Minister, which was signed by the 16 Members of Parliament who were detained. The "Major Points of Agreement," in addition to referring to the letter of resignation and the letter appointing Mr. Dookeran as Prime Minister, stated that there was to be a general election in 90 days, that Mr. Dookeran, upon his appointment, was to secure an amnesty and that

when Mr. Dookeran and Canon Clarke returned to the Red House with the amnesty "All [were] to be freed."

Canon Clarke and Mr. Dookeran then went to Camp Ogden and delivered the three documents. Canon Clarke explained that "there were many young people with guns [at the Red House] who were very agitated and would shoot at a moment's notice." He recommended that an amnesty should be given as a means of saving the Members of Parliament's lives.

Between midday and about 3 p.m. the same day Canon Clarke returned to the Red House for a short time with medical supplies and left with two letters, one recommending a pardon and the other advising against foreign intervention.

Initially, the Acting President was not prepared to sign a draft of an amnesty which had been prepared. But after Canon Clarke had expressed great fear for his life and those of the hostages, if he returned empty handed without some concrete response, the Acting President was persuaded to change his mind. He signed the draft and initialled a copy which he gave to Canon Clarke for delivery to the Muslimeen. He told Canon Clarke to tell them he had signed the original.

Canon Clarke arrived at the Red House with the amnesty after dark at a time when the Muslimeen, believing that the army were about to storm the building, were making preparations to execute members of the government whom they held. However tension then eased considerably and, according to Abdullah, he announced an end to "the hostage status." It is convenient to regard this as being the end of the first stage of the insurrection.

The second stage continued until early Monday evening, 30 July, when, as arranged by Abdullah with Abu Bakr's agreement, a broadcast was made by the Prime Minister and Minister Richardson in which they announced that as a result of negotiations an agreement had been reached between the authorities and the Muslimeen. This was hardly an accurate description of what had happened. The negotiations between those in the Red House and those outside in fact had been desultory and spasmodic. In particular there was no confirmation of Mr. Dookeran's appointment and several of the Members of Parliament in the Red House had contacted their wives to ask them to urge the Acting President to make the appointment as the delay was preventing them from coming home. In addition certain supplementary demands were put forward on behalf of the Muslimeen. These included the appointment of a senator from the Muslimeen, for Abu Bakr to be appointed Minister of National Security and for Mr. Dookeran to be advised by the opposition on the appointment of an interim government. There was however throughout the second stage continuous gun fire for which out of control members of the police force were at least partly responsible.

During the third stage, which followed announcements to the media, communications between those in the Red House and the representatives of the official government improved. Negotiations were conducted largely between Abdullah and Colonel Theodore. On the Tuesday morning, 31 July, the Prime Minister whose condition was deteriorating was released. However the surrender of the Muslimeen and the main body of

hostages was delayed. The government were insisting that the Muslimeen should do so unarmed but Abdullah on the Muslimeen's behalf was trying to establish an arrangement which would ensure that, if the Muslimeen laid down their arms and came out from the Red House and the television building, they would be taken to a destination where they would be safe. Eventually, in the middle of the day, on Wednesday 1 August, the surrender took place. All went substantially in accordance with the agreed arrangements except for one unfortunate incident. Quite contrary to those arrangements on their journey the Muslimeen were taken on a detour during which they were stopped, stripped and searched with the apparent object of finding the copies which had been made of the pardon.

Mr. Newman's criticisms of the findings in the courts below primarily related to the failure of the judges to attach sufficient significance to the extent to which the Muslimeen persisted in seeking agreement to their previous and new demands after Canon Clarke had returned to the Red House and the extent to which they were responsible for the gun fire which took place.

The judgments in the Court of Appeal and High Court

It is the findings of Sharma J.A. in the Court of Appeal which are particularly helpful to the respondents. The judge selected certain affidavits as being more creditworthy than others, basing himself on the fact that they were sworn only two-and-a-half months after the insurrection whereas the other affidavits were sworn many months later. This, it has to be accepted, is not a particularly firm basis upon which to treat one witness as more credible than another. However the judge was in a stronger position in relying on the transcripts, subject to their order being correctly unravelled. He found that the transcripts clarified the following matters:

> "Although there were references to requests for political demands after the grant of the amnesty, the making of these requests did not hinder the process of negotiating the construction of machinery for the safe release of the hostages. They were not backed by further threats or by suggestions that the 'hostages' would be killed. Nothing in these discussions indicated that the Muslimeen did not accept and were not trying to implement the condition of the amnesty. On Tuesday 31 July, for example, Bilaal Abdullah asked Abu Bakr about future elections and Abu Bakr responded 'those things are not our business we are not politicians.' The discussions concerning the political demands were encouraged by the state authorities for tactical reasons. At no point did the state authorities say to the Muslimeen - 'You have an amnesty, that is all you will get from us.' On the contrary they engaged in these discussions in a manner that would reasonably have led the Muslimeen to believe that they were open to negotiation. They did this not because they were open to negotiating but as part of their strategy, informed by consultations with an expert on hostage negotiations Dr. Schlossberj, to 'wear the Muslimeen down and try to maintain the initiative.' It may be that some of the Muslimeen mistakenly believed that the amnesty was connected with Minister Dookeran being appointed as Prime Minister and hence some of the references to this prospect. This explains the sense of the

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urgency among the Muslimeen as relayed by Canon Clarke and their ultimate resort to the International News Services on Monday 30 July after they were unable to contact the state authorities. The transcripts reveal that it would not have been safe whatever Colonel Theodore may have said, to release the hostages before Wednesday 1 August."

The judge also attributed the breakdown in communications in part to a psychological strategy by the authorities to stall the negotiations in the hope that it would make the Muslimeen more compliant. This is not an inaccurate assessment of the situation, but Mr. Newman is entitled to make the point that the adoption of these tactics would have been pointless if the Muslimeen were not making demands which the authorities were not prepared to accept.

The approach of the other members of the Court of Appeal did not require them to examine the evidence in the same way and they did not make findings as to what occurred after the grant of the pardon upon which the respondents particularly rely.

However Brooks J. also concluded that the delay in surrendering the hostages was not unreasonable and that a contributory factor for the delay was the shooting incidents for which the security forces were responsible. He also felt that there was continuing concern by all parties to ensure that the restoration of order had been achieved before the release could take place and that the Muslimeen had reasonable and understandable fear of reprisals. He found that "it was not a situation in which blame therefore could be cast entirely or substantially on one side or the other."

The power to pardon

The terms of the pardon, of which the respondents were provided with a copy, were:

"I, Joseph Emmanuel Carter, as required of me by the document headed Major Points of Agreement hereby grant an amnesty to all those involved in acts of insurrection commencing approximately 5.30 p.m. on Friday 27 July 1990 and ending upon the safe return of all Members of Parliament held captive on 27 July 1990. This amnesty is granted for the purpose of avoiding physical injury to the Members of Parliament referred to above and is therefore subject to the complete fulfilment of the obligation safely to return them."

Subject to the additional points raised by the Director of Public Prosecutions, which it is not necessary to resolve in order to determine this appeal, if the Acting President had authority to grant the pardon, then that authority is derived from section 87(1) of the Constitution which provides:

"The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof."

Section 87(1) of the Constitution has to be compared with the power which the President has under section 87(2) to pardon the subject of a pardon after he has been convicted. Prior to the Constitution there was already power to grant a pardon after conviction but the power contained in section 87(1) before conviction was created for the first time by the Constitution.

In his judgment on the earlier appeal to the Board in this case, *Phillip v. Director of Public Prosecutions* [1992] 1 A.C. 545, 550-551, Lord Ackner considered that the new power had been modelled on the power to pardon given to the President by the Constitution in the United States. He referred to the observation of Alexander Hamilton in "The Federalist No. 74" (1788), at p. 222, that it existed because "in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth." In an article "The President's Power to Pardon: A Constitutional History" by William F. Duker in William and Mary Law Review (1977) vol. 18, No. 3, p. 475, it is pointed out that the power of the President of the United States to pardon is in turn inherited from the prerogative or common law power of the monarch in England and, at p. 508, the United States courts "have looked to English jurisprudence for the meaning of a presidential power that corresponds to a power of the English Crown."

Formerly in England pardons were required in all cases to pass under the Great Seal. They can now be granted in England by warrant under the royal sign manual countersigned by the Secretary of State: see *Halsbury's Laws of England*, 4th ed., vol. 8 (1974), p. 607, para. 950. That these are the methods of grant indicates the formal nature of a pardon at common law. It is an executive act of the state. Both under English law and under the Constitution of Trinidad and Tobago a pardon should not be treated as being analogous to a contract. It does not derive its authority from agreement. It is not dependent upon acceptance of the subject of the pardon. In England its authority is derived from the prerogative and in Trinidad and Tobago its authority is dependent upon the Constitution.

A pardon can however be subject "to lawful conditions" as, in Trinidad and Tobago, the Constitution makes clear. Where a pardon is subject to a condition, then the protection provided by the pardon may not be conferred until the condition has been complied with. However while the effectiveness of the pardon would then depend upon compliance with the condition, non-compliance with the condition would not affect the time of the grant of the pardon. The grant of the pardon is not to be treated as deferred pending compliance with the condition. This can be of importance when considering the initial validity of the pardon since this has to be judged at the time of the grant; though a pardon which is initially valid may subsequently be rendered valueless before it has had any effect due to non-compliance with a condition to which it is subject.

A striking feature of this case is that the Acting President states that he never intended the pardon documents which he signed or initialled to take effect as a pardon, unless and until he had received a recommendation from the duly appointed Prime Minister that a pardon should be granted. However here the Board agrees with the approach adopted in the

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judgments in the lower courts that whether or not a pardon has been granted is to be determined objectively and in the circumstances which prevailed a pardon must be regarded as having been granted.

A pardon must in the ordinary way only relate to offences which have already been committed. As Lord Ackner, having examined the relevant English and other authorities, made clear in his judgment in the earlier appeal to the Board, *Phillip v. Director of Public Prosecutions* [1992] 1 A.C. 545, the effect of a pardon is to blot out, so far as the subject of the pardon is concerned, any responsibility which he has for any offences which are covered by the pardon. Such offences can no longer be a lawful cause for depriving him of his liberty or for taking proceedings against him in respect of the offence. It removes "the criminal element of the offence named in the pardon" but does not create any factual fiction or raise any inference that the person pardoned had not in fact committed the crime for which the pardon had been granted: see p. 557. However while a pardon can expunge past offences, a power to pardon cannot be used to dispense with criminal responsibility for an offence which has not yet been committed. This is a principle of general application which is of the greatest importance. The state cannot be allowed to use a power to pardon to enable the law to be set aside by permitting it to be contravened with impunity. In accord with this principle section 87(1) of the Constitution limits the President's power to grant a pardon to any person "respecting any offences that *he may have committed.*" It does not apply to offences not yet committed.

The President does, however, have the power as already mentioned to make the pardon subject "to lawful conditions." The pardon granted in this case was subject to a condition which required the Muslimeen to return safely all the Members of Parliament held captive and presupposed that the insurrection would only end upon their safe return. As this did not happen until the following Wednesday, it will be necessary to decide whether this pardon was in fact purporting to apply to offences not yet committed and, if so, whether this affected the validity of the pardon. These are different questions from the question which can also arise which is whether there was compliance with the condition which was imposed. In answering questions of this nature a technical and rigid approach is not to be used. Instead, in the case of a pardon, a purposive construction is to be adopted which seeks to uphold the validity of the pardon. If possible a condition will be construed in a way that means that if it does involve, whether expressly or by implication, trespassing on the principle that a pardon must not waive responsibility for future offences, the degree of trespass is strictly limited so that it is acceptable, taking into account that the objective of the pardon is, for example, the commendable one of bringing peacefully to an end an insurrection or rebellion. If this were not the approach, there would be the undesirable consequence that it would be impossible to grant a pardon subject to a condition requiring the prompt laying down of arms, since such a condition in the case of an insurrection of any size could never be complied with instantaneously.

The effect of duress

The principal characteristics of a pardon having been identified, it is now appropriate to examine in turn the grounds relied upon by the

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appellants to establish the invalidity of the pardon. The first of these is that the pardon was obtained by duress and at the dictate of the respondents. All the judges in the courts below rejected the appellants' arguments based on duress. Hamel-Smith J.A. alone would have allowed the appellants' appeal because the Acting President "was not exercising his own deliberate judgment under section 87(1) but was acting pursuant to the dictates of the agreement."

It is not necessary to decide on this appeal whether a pardon which is formally granted would ever be set aside for duress. For it to be capable of being set aside would require very exceptional circumstances, circumstances where, in the case of Trinidad and Tobago, it could be said that the document which records the purported grant of a pardon was not the President's document, notwithstanding that it bore his signature. Whether or not this is the situation has to be determined, not by applying contractual or equitable principles which govern agreements between individuals but principles which pay due regard to the fact that the pardon records the official decision of a head of state. Heads of state and their governments are faced regularly with situations where they are forced to make decisions when they are subject to very great pressure. Sometimes they are compelled to take action in the public interest which at the time they consider to be the lesser of two evils and which, if they had not been subject to outside forces, they would never dream of taking. Decisions which can involve even the life of their citizens have to be taken on behalf of the state. This is part of the heavy responsibility of the office and, at least in any but the most exceptional of situations, if a head of state or a government grants a pardon, it cannot avoid the consequences of that grant because it would have acted differently but for the pressure which existed.

Where the head of state has made a formal decision which in normal circumstances would constitute a pardon, it is important that the state should not be able to resile from the terms of that pardon except in the most limited of circumstances. Were this not to be the position, the advantages which can flow from the grant of a pardon could be lost since the prospective subject of a pardon would rapidly appreciate that it may not be possible for it to be relied on. The Constitution of Trinidad and Tobago supports this approach by providing in section 38(1) that the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions. However section 38(1) does not go so far as to prevent the courts from examining, as did the courts below, the validity of the pardon.

No precedent has been found for any court setting aside a pardon on the grounds of duress. The closest analogous situation which has been identified is the decision of Tan J. in the High Court of Malaysia in *Mustapha v. Mohammad* [1987] L.R.C.Const. & Admin. 16. In that case, in considering an allegation of duress in relation to the appointment and removal of a Chief Minister, Tan J., at p. 94, looked for guidance as to the meaning of duress from the *Oxford English Dictionary* and *Jowitt's Dictionary of English Law*, 2nd ed. (1977), vol. 1, pp. 671-672, both of which referred to direct physical violence, or pressure, or actual

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imprisonment to the person whose act is being challenged and regarded that degree of duress as being required in the situation there being considered. In the case of a challenge to the validity of a pardon at least direct action of this nature would be required to establish duress. The conduct relied upon in this case is not of this direct nature and the decisions in the courts below were clearly correct on this issue.

The Acting President was unhappy about signing the document which had been prepared by his legal advisers, but having considered the alternatives he did sign. He did not appreciate that he was in fact granting a pardon, but this was due to his misunderstanding of the legal consequences of what he was doing, not because he did not voluntarily sign and appreciate the terms of the document upon which the respondents rely.

Hamel-Smith J.A. attached importance to the reference made by the Acting President in the document that he was granting the pardon "as required of me by the document headed Major Points of Agreement." However this did not mean that the Acting President was not exercising his own judgment. The Acting President's initial reluctance to sign the document indicates that he was making his own decision and, if the pardon is otherwise valid, it cannot be impeached on the basis that the exercise of his discretion was pre-empted in some way by the Major Points of Agreement.

Before leaving the question of duress it should be pointed out that the appellants did not advance any separate argument that the pardon, in the circumstances which exist here, was from the start invalid because its grant was contrary to public policy. The argument would be that the Acting President had no jurisdiction to grant a pardon because of the existence of the insurrection with hostages being held against their will. Such an argument could provide a firm foundation for the head of state deciding as a matter of principle not to grant a pardon in these circumstances to avoid the risk of encouraging repetition of such conduct. It would however be going too far to say that the head of state lacked the jurisdiction to grant a pardon if he decided that this was the right policy. This of course is subject to the further submissions to which their Lordships now turn.

The effect of the condition

The second and third grounds relied upon by the appellants are interlinked. The pardon which was granted by the Acting President clearly contemplated that the insurrection would come to an end at the same time as the respondents complied with the condition safely to return the hostage Members of Parliament. It therefore followed that, if the pardon was treated as coming into existence when the document was handed to Canon Clarke to be communicated to the respondents, there was inevitably going to be a period before the condition could be complied with during which the insurrection would continue. It was conceivable that no individual act of violence would occur in the interim, but that what can loosely be described as the crime of being in a state of insurrection would continue. The appellants argue that this means that the pardon was a nullity from the outset. They also argue in the

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alternative that, if the pardon was initially valid, the condition at least required the respondents, on being informed of the terms of the pardon, forthwith to make it clear that the insurrection was at an end and that the hostages were free to leave the Red House. The respondents on the other hand argue that, at most, all that was required was that the condition should be fulfilled within a reasonable time and on the findings of the courts below this had happened.

The way the issue was dealt with by the judges did not in fact accord precisely with either the approach of the appellants or that of the respondents; however it was more closely related to the approach of the respondents. Brooks J., while accepting that the four day delay in returning the hostages could not "really be regarded as unreasonable," primarily based his conclusion on the fact that the matters relied upon by the appellants, which occurred subsequent to the pardon, did not invalidate the pardon because the pardon only "took effect upon the safe return of all the hostages." Until that occurred there could not be a breach of the pardon and so there had been no violation of the pardon. Sharma J.A. was also of the opinion that the pardon being conditional became effective when the Members of Parliament were released and the respondents had surrendered. He took the view that, no express time having been imposed for compliance with the condition, the condition had to be fulfilled within a reasonable time and in the circumstances he agreed with Brooks J. that this had been done. He was however also of the view that no new offence had been committed after the pardon was delivered. Ibrahim J.A. adopted a different approach. He regarded the condition as being a condition precedent to the pardon being effective. Its effectiveness was:

> "to be ascertained when the condition was fully satisfied. Till then, the respondents had nothing since it was open to the [Acting] President to revoke it altogether or attach other conditions or even revoke the original condition or amend it. These things he could not do after the condition was satisfied. At best, it can be said the respondents had an offer of amnesty which offer became crystallized into an amnesty when the condition was satisfied by them."

Hamel-Smith J.A. adopted a similar approach to Ibrahim J.A. He regarded section 87(1) as enabling the President to make a conditional offer of a pardon and "by the imposition of appropriate conditions . . . control the effect of any amnesty," and that the Acting President was:

> "allowing, in effect, the insurrection to continue and, one can assume, he was free to withdraw the offer if after a reasonable time the hostages were not released. That was his prerogative. He could have insisted that the hostages be released and the arms laid down on immediate delivery of the amnesty. While that might have been the most appropriate condition to attach, he did not, for whatever reason, consider it necessary. Without such a condition the effect of the purported amnesty was to allow the insurrection to continue until either the offer was withdrawn or the hostages released. The absence of such conditions could not have the effect of making the amnesty null and void as contended by the state."

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The references which have been made to the previous judgments in the courts below indicate that, except for the judgment of Sharma J.A., the question of whether or not it was reasonable to defer the surrender of the hostages until the Wednesday was not really central to the judges' reasoning. In this those judgments were correct. The Acting President had no power to grant a pardon which would take effect at some uncertain time in the future, and which, in the case of this pardon, purported to pardon any offences which were committed in the meantime. The pardon did not say it was only to take effect if the condition was performed within a reasonable time. But if that was the meaning of the pardon, then it would have been invalid. This would be because such a pardon would permit a significant period of time to elapse prior to it taking effect during which the commission of further offences was likely. At the time of the grant of the pardon it was certainly possible, if not probable, that because the respondents had other demands outstanding (contained in the Major Points of Agreement) they would want to negotiate further prior to the hostages being handed over. In this highly unstable situation, compliance with the condition would only be reasonably practical after the elapse of a substantial further period of time during which the unlawful insurrection would continue. The Acting President could not in anticipation of achieving a surrender grant a pardon which was capable of giving protection to continuing offences over such a lengthy period, even though the delay in releasing the hostages was not, in all the circumstances, unreasonable, as Brooks J. and Sharma J.A. both found. The grant of a pardon in such circumstances would amount, as already explained, to dispensing with the law in a way which is not permissible.

The alternative way of seeking to justify this pardon is to treat the Acting President as having made an offer of a pardon subject to a condition which had to be complied with by way of acceptance of the offer, in a strictly limited period, perhaps not best described as immediately or forthwith as Mr. Newman argued but within the sort of period conveyed by the use of the words promptly or as soon as practical (which may amount to very much the same thing). This would give practical effect to an offer of a pardon but would not amount to an impermissible licence to offend in the meantime. It would be difficult to interpret the document in this way. It would also involve adopting an inappropriate contractual approach to a non-contractual executive action by the Acting President. However, in any event, this interpretation would not assist the respondents because the time which elapsed before it could be said the offer was "accepted" was excessive.

A third approach involves attempting to treat the document as a statement of an intention to grant a pardon in the future if the respondents complied with the conditions laid down. Again the language of the actual document does not support this approach. However even if it did there would be the difficulty that no grant was made after compliance with the condition and a statement of intention could not fetter the discretion of the Acting President so that he could be compelled to honour his stated intention. In the courts below reliance was placed upon the decision of the Supreme Court in *United States v. Klein* (1871) 80 U.S. (13 Wall.) 128. In that case the opinion of the court was given by Chase C.J. It was

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a case involving a proclamation by the President granting an amnesty to all those who took part in the civil war, provided, inter alia, they swore an oath of allegiance. Chase C.J. treated the proclamation as an offer of a pardon although it was never followed by a formal grant of a pardon. In respect of that offer he said, at p. 142:

> "It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promise took full effect."

In that case the court was not however concerned with the problems created by the pardon being regarded as a licence to commit offences prior to it coming into effect. In relation to the President's pardoning power, Mr. Duker's article in William and Mary Law Review (1977) vol. 18, No. 3, p. 475 significantly states, at p. 526:

> "Because the power to pardon is given only for 'offenses against the United States,' the crime must precede the pardon; it may not be anticipated. Otherwise the power that allows presidential clemency for the consequence of a violation would be a power to dispense with the observance of the law."

The situation which arises in this case cannot therefore be overcome by treating the document not as a pardon itself but as a conditional offer of a pardon or a statement of an intention to grant a pardon in the future. The best that can be achieved, in order to give validity to this pardon, would be to construe it as requiring the condition to be fulfilled not within what was in all the circumstances a reasonable time, that is by Wednesday 1 August, but as a pardon subject to a condition which was to be complied with, as already mentioned, either promptly or as soon as practicable. This would involve the Muslimeen, when the pardon was received, acknowledging that, the pardon having been granted, they wished to treat the insurrection as at an end and, subject to the reasonable needs of self-defence, their laying down their arms and releasing the hostages. While it might be said that even on this approach there was a technical disapplication of the law, this can be accepted because of the willingness of the courts to lean towards giving effect to a pardon and to accommodate this technicality.

To uphold this pardon on this basis is of no practical assistance to the respondents. On any interpretation of the facts the respondents took a different approach. Having received the pardon, they sought to achieve their other objectives which were reflected in the Major Points of Agreement. Although the period of negotiation may have been protracted by the tactics perfectly properly adopted by Colonel Theodore to bring the insurrection to a peaceful conclusion, until the end of the second stage of the insurrection, the Muslimeen were still intent on achieving their broader objectives. They were certainly not surrendering or treating the insurrection as at an end. In doing this they were not complying with the condition to which the pardon was subject and as a result, even on the most charitable interpretation, the pardon was no longer capable of being brought into effect by complying with the condition to which it was

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subject. It follows that Brooks J. and the majority of the Court of Appeal were wrong in treating the pardon as valid.

It may be said that this approach is undesirable. It unduly constrains the use of a pardon for beneficial purposes so as to avoid acts of terrorism and insurrection. It is not accepted that this needs to be the case. It is desirable that it should be appreciated by those who wish to obtain the protection of a pardon which is subject to a condition of the sort which existed here, that the condition has to be complied with promptly. It cannot be used as a base upon which to achieve further indulgences.

Abuse of process

In common law jurisdictions there exists a separate ground of protection for those who surrender in reliance on a conditional offer or promise of a pardon. The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so. It could well be an abuse of process to seek to prosecute those who have relied on an offer or promise of a pardon and complied with the conditions subject to which that offer or promise of a pardon was made. If there were not circumstances justifying the state in not fulfilling the terms of its offer or promise, then the courts could well intervene to prevent injustice: see *Reg. v. Milnes and Green* [1983] 33 S.A.S.R. 211.

The possibility of abuse of process arises on the facts of this case. On the findings of the judges in the courts below the Muslimeen in all the circumstances acted reasonably after the pardon was granted. On any view of the facts, as was pointed out in the judgments in the courts below, the Acting President thereafter prior to the surrender did not give any indication that the validity of the pardon was in question. On the contrary the negotiations which resulted in the ultimate surrender of the Muslimeen and the release of the hostages unharmed were conducted on the basis that they were entitled to the benefit of the pardon. However whether the facts give rise to an abuse of process would have been a question for the trial judge in the event of further criminal proceedings. Here to those facts there has to be added the very significant factor that to prosecute the Muslimeen now because of a decision of the Board that the pardon is invalid would be inconsistent with the decision of Brooks J. that they were entitled to an order of habeas corpus. That part of the decision of Brooks J. was final. It could not be the subject of an appeal and it would in the opinion of the Board, because of this, inevitably be a manifest abuse of process to circumvent the provision of the law of Trinidad and Tobago, that an order of habeas corpus is not subject of appeal, by bringing a further prosecution relying on the outcome of an appeal under the Constitution.

The result therefore of the decision of the Board is that the pardon was and is invalid. That means that it was not unlawful to initiate a prosecution of the Muslimeen in relation to the events arising out of the insurrection and to arrest them for the purposes of that prosecution. However in those proceedings the Muslimeen could well have been in a position to raise a plea in bar on the basis of abuse of process. The Board does not venture an opinion as to whether that plea would have succeeded;

it would have been a decision for the court before whom the trial was to take place. However, the order of habeas corpus having been made, the Board is able to assist the Attorney-General and the Director of Public Prosecutions, as they requested, by saying that after the order of habeas corpus was made it would be an abuse of process to seek once more to prosecute the Muslimeen for the serious offences committed in the course of the insurrection.

As the prosecution was not initially unlawful the detention of the Muslimeen in connection with the prosecution was also not unlawful or contrary to the Constitution. The fact that the prosecution could be subsequently stopped either by the trial judge accepting a plea based on an allegation of abuse of process or, as occurred here, an order of habeas corpus being made would not affect the lawfulness of any previous detention. Accordingly the constitutional claim of the respondents should not have succeeded. Their Lordships therefore allow the appeal and set aside the declaration granted by Brooks J. to the respondents and his order for damages to be assessed. In relation to costs, the Board does not interfere with the order for costs made by Brooks J. in respect of the respondents' application for habeas corpus but directs that otherwise there should be no order for costs either before the Board or in the courts below.

Appeal allowed.
No order as to costs of constitutional proceedings.

Solicitors: Charles Russell; Simons Muirhead & Burton.

S. S.

[PRIVY COUNCIL]

HUI CHI-MING — APPELLANT

AND

THE QUEEN — RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1991 April 15, 16; Aug. 5

Lord Bridge of Harwich, Lord Oliver of Aylmerton, Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Lowry

Crime - Evidence - Conviction of principal offender - Defendant and principal offender separately tried for murder - Principal offender convicted of manslaughter - Whether verdict admissible in evidence at defendant's trial

Crime - Homicide - Murder - Joint enterprise - Mental element of secondary party - Direction to jury

Crime - Abuse of process - Prosecution for murder - Principal offender convicted of manslaughter - Secondary parties other than defendant pleading guilty to manslaughter - Prosecution's offer to accept plea of guilty to manslaughter rejected by defendant - Whether prosecution of defendant for murder abuse of process

A.'s girlfriend told him that her brother's friend, whom she described, had tried to intimidate her into breaking off their relationship. A., carrying a length of water pipe and accompanied by the defendant and four other youths, went to "look for

someone to hit." A man fitting the description was eventually seized and A. hit him with the pipe, causing injuries from which he later died. No witness saw the defendant hit the man, who was an innocent victim, or play any particular part in the assault. A. was charged with murder with three of the group, but two pleaded guilty to manslaughter and the other was acquitted on the direction of the judge. The jury acquitted A. of murder but convicted him of manslaughter, and he was sentenced to six years' imprisonment. The defendant was arrested and charged with manslaughter but he was indicted for murder with another youth whose plea of guilty to manslaughter was accepted. The defendant refused an offer by the prosecution to accept a plea of guilty to manslaughter and was tried for murder. The prosecution's case was that he had participated in a joint enterprise in which A. had murdered the victim. The defence sought to adduce evidence of A.'s acquittal of murder and conviction of manslaughter only but the prosecution's objection was upheld by the judge. In directing the jury with regard to joint enterprise the judge told them, inter alia, that the defendant would be guilty of murder if he lent himself to a criminal enterprise knowing that a potentially lethal weapon was being carried by one of his companions, and it was used with an intent sufficient for murder, if they were sure beyond reasonable doubt that the defendant had contemplated that in the carrying out of the common unlawful purpose one of his partners might use a lethal weapon with the intention of at least causing really serious harm. The judge did not direct the jury that for the defendant to be guilty of murder it was necessary for A. to have contemplated the possibility of at least grievous bodily harm being caused. The defendant was convicted of murder and sentenced to death. The Court of Appeal dismissed his application for leave to appeal against conviction.

On the defendant's appeal to the Judicial Committee:-

Held, dismissing the appeal, (1) that the verdict of a different jury at the earlier trial was irrelevant since it was merely evidence of their opinion; and that evidence that A. had been convicted only of manslaughter was inadmissible at the separate trial of the defendant and had properly been excluded (post, p. 42G-43A).

Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587, C.A. and *Reg. v. Luk Siu-keung* [1984] H.K.L.R. 333 applied.

Reg. v. Hay (1983) 77 Cr.App.R. 70, C.A. and *Reg. v. Cooke (Gary)* (1986) 84 Cr.App.R. 286, C.A. distinguished.

(2) That where one of the participants in a common unlawful enterprise committed an offence other than that initially agreed upon, the contemplation of all the parties when the agreement was made was relevant to the issue whether or not the further offence was within their common purpose, but it was unnecessary in every case to prove that the offence charged had been contemplated by the principal offender as well as by a secondary party before the latter could be convicted, since a secondary party would have had the requisite intent to be guilty of that offence if he had foreseen that the principal might commit such an act as part of the joint venture and had participated in it with that foresight; and that, accordingly, the judge had been under no duty to direct the jury that prior contemplation by A. of the possibility of death or grievous bodily harm being caused to the victim was required for the defendant to be convicted of

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murder, and the directions on joint enterprise had been correct (post, pp. 51G-52B, D, G, 53C-D, F).

Chan Wing-Siu v. The Queen [1985] A.C. 168, P.C. and *Reg. v. Hyde* [1991] 1 Q.B. 134, C.A. applied.

Johns v. The Queen (1980) 143 C.L.R. 108 explained.

(3) That the prosecution of the defendant for murder rather than manslaughter was not so unfair or wrong as to constitute an abuse of process which should have led the judge to refuse to allow the trial to proceed; and that, although the defendant's conviction for murder when the principal offender had been convicted of manslaughter only and the prosecution had accepted pleas of guilty to manslaughter from three other participants was a serious anomaly, there was ample evidence to support the defendant's conviction and no ground for interfering with it (post, p. 56H-57B, D).

Connelly v. Director of Public Prosecutions [1964] A.C. 1254, H.L.(E.) and *Reg. v. Humphrys* [1977] A.C. 1, H.L.(E.) considered.

Decision of the Court of Appeal of Hong Kong affirmed.

The following cases are referred to in the judgment of their Lordships:

Chan Wing-Siu v. The Queen [1985] A.C. 168; [1984] 3 W.L.R. 677; [1984] 3 All E.R. 877, P.C.
Connelly v. Director of Public Prosecutions [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401, H.L.(E.)
Hollington v. F. Hewthorn & Co. Ltd. [1943] K.B. 587; [1943] 2 All E.R. 35, C.A.
Johns v. The Queen (1980) 143 C.L.R. 108
Myers v. Director of Public Prosecutions [1965] A.C. 1001; [1964] 3 W.L.R. 145; [1964] 2 All E.R. 881, H.L.(E.)
Reg. v. Andrews-Weatherfoil Ltd. [1972] 1 W.L.R. 118; [1972] 1 All E.R. 65, C.A.
Reg. v. Burton (1875) 13 Cox C.C. 71
Reg. v. Cooke (Gary) (1986) 84 Cr.App.R. 286, C.A.
Reg. v. Hay (1983) 77 Cr.App.R. 70, C.A.
Reg. v. Humphrys [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497, H.L.(E.)
Reg. v. Hyde [1991] 1 Q.B. 134; [1990] 3 W.L.R. 1115; [1990] 3 All E.R. 892, C.A.
Reg. v. Luk Siu-keung [1984] H.K.L.R. 333
Reg. v. Slack [1989] Q.B. 775; [1989] 3 W.L.R. 513; [1989] 3 All E.R. 90, C.A.
Reg. v. Wakely [1990] Crim.L.R. 119, C.A.
Reg. v. Ward (1986) 85 Cr.App.R. 71, C.A.
Rex v. Turner (1832) 1 Mood. 347
Sambasivam v. Public Prosecutor, Federation of Malaya [1950] A.C. 458, P.C.

The following additional cases were cited in argument:

Reg. v. Cogan [1976] Q.B. 217; [1975] 3 W.L.R. 316; [1975] 2 All E.R. 1059, C.A.
Reg. v. Hancock [1986] A.C. 455; [1986] 2 W.L.R. 357; [1986] 1 All E.R. 641, H.L.(E.)

APPEAL (No. 4 of 1991) with special leave by the defendant, Hui Chi-ming, from the judgment of the Court of Appeal of Hong Kong

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(Cons V.-P., Kempster and Clough JJ.A.) given on 30 December 1988 dismissing his application for leave to appeal against his conviction of murder on 27 April 1988 in the High Court before de Basto J. and a jury.

The facts are stated in the judgment of their Lordships.

Martin Thomas Q.C. and *Robert Britton* for the defendant. A. was acquitted of murder and convicted of manslaughter and so the jury could not have been satisfied that he had had the intent necessary for murder; nevertheless, the case against the defendant was presented on the basis that A. had had such intent. Evidence of A.'s acquittal of murder should have been admitted for the jury to consider it at the defendant's trial. Alternatively, in view of the verdict in relation to A., it was an abuse of process to prosecute the defendant for murder rather than manslaughter. Where the principal party to an offence has been tried before a secondary party the Crown has a special responsibility not to prosecute the secondary party for a more serious offence than that of which the principal was convicted. The defendant's prosecution was therefore unjust, unfair and wrong.

The defendant was initially charged with manslaughter but indicted for murder. His co-accused pleaded not guilty to murder but guilty to manslaughter, and the Crown accepted that plea. Crown counsel offered to accept a plea of guilty to manslaughter from the defendant but the offer was refused. The only reasonable inference is that the purpose of charging the defendant with murder was to put unfair pressure on him to plead guilty to manslaughter, for in Hong Kong the death penalty still exists for murder.

In a murder trial the question of a plea of guilty to manslaughter usually emanates from the defence. The Crown should not suggest it unless there are special circumstances, for example, medical evidence showing that the accused is suffering from diminished responsibility. It is the responsibility of prosecuting counsel to charge the accused with the offence which in his professional judgment is properly disclosed by the evidence. For prosecuting counsel to persist with the charge of murder after he had formed the view that a verdict of guilty of manslaughter would be proper was an abuse of process, the only effect of which was to put pressure on the defendant to plead guilty to manslaughter.

On the trial of a secondary party for murder on the basis of a common intent the Crown must prove (a) that the act committed had been in the contemplation of both the principal and the secondary party as an act which might be done in the course of carrying out the primary criminal intention, and (b) that the principal intended to kill or do serious bodily injury at the time he killed. The judge left the case to the jury on the basis that if the defendant contemplated that the principal would strike a blow with murderous intent, that was sufficient for them to convict the defendant of murder, whereas in fact they also had to be satisfied that A. had intended to kill or cause really serious harm.

The case for the Crown was that all six youths were equally involved in all that had happened to the deceased, but that it was probable and almost certain that it was A. who had wielded the metal pipe. Having

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regard to the verdict in relation to A. it was anomalous for the jury to consider a count of murder against the defendant, and the judge, in fairness to the defendant, should have withdrawn that count from them. [Reference was made to *Reg. v. Luk Siu-keung* [1984] H.K.L.R. 333.]

A. P. Duckett Q.C., Deputy Crown Prosecutor, Hong Kong, and *Cheung Wai-sun*, Senior Crown Counsel, Hong Kong, for the Crown. The executive can commute the sentence imposed on the defendant and substitute a fixed term of imprisonment. This has been done following every murder conviction in Hong Kong since 1965.

The issue of abuse of process should be considered as at the time when the indictment was filed. Clearly, this was a murderous attack. A group attacked the victim and one of them wielding a water pipe inflicted injuries from which the victim died. Murder was the appropriate charge against the attacker and anyone assisting him.

The case against the defendant was put to the jury on the bases that (1) there was a joint intention to cause serious injury and (2) the defendant was a participant in joint unlawful conduct, namely an assault. In relation to the latter basis there was no need to establish that the defendant intended to cause serious injury because he would be guilty of murder if he realised that in the course of the unlawful conduct one of the other parties might inflict serious bodily injury and death in fact resulted. At the defendant's trial the onus was on the Crown to prove an intention by A. or someone else to cause serious bodily injury and, also, participation in the attack by the defendant. [Reference was made to *Reg. v. Hyde* [1991] 1 Q.B. 134.]

The Crown accepted pleas of guilty to manslaughter by the other secondary parties on the basis that they had not realised the possibility of A. inflicting serious bodily injury. In making the offer to accept a similar plea from the defendant the Crown took into account the consideration that juries were sympathetic towards secondary parties and so there was a real possibility that the defendant might only be convicted of manslaughter. The other possibility was that he would be completely acquitted. That was why the Crown decided to accept pleas of guilty to manslaughter from the other secondary parties and offered to accept such a plea from the defendant, despite the Crown's belief that he was guilty of murder and that there was a strong case of murder. Once the jury rejected the defendant's evidence that he was a peacemaker, the only conclusion was that he was there as a party to the incident, and so he was properly convicted of murder. A.'s acquittal of murder was a perverse verdict.

It is immaterial whether a plea of guilty to manslaughter is offered by the defence or an offer to accept such a plea is made by the Crown. Prosecuting counsel acted in good faith. He realised the anomaly but he did not make the offer in order to threaten or pressurise. He raised the matter in open court because of his genuine concern in case the defendant was facing the danger of a conviction for murder when he wanted to plead guilty to manslaughter. Prosecuting counsel might have been concerned that his offer to accept a plea of guilty to manslaughter had not been communicated to the defendant. If, however, pressure was applied, the defendant did not plead guilty to manslaughter. There was

no abuse of process. The Crown's conduct was entirely consistent with the view that this was a murderous attack. It was a separate trial with a different accused, and so the Crown could properly allege that the defendant was guilty of murder. The authorities show that a secondary party can be convicted even though the primary party is acquitted: see *Reg. v. Cogan* [1976] Q.B. 217.

The defendant refused to plead guilty to manslaughter and so the Crown had to continue with the prosecution for murder. There was evidence to support that charge and it would have been improper for the Crown not to proceed merely because others involved had pleaded guilty to manslaughter. No abuse of process occurred. [Reference was made to *Reg. v. Luk Siu-keung* [1984] H.K.L.R. 333.]

Thomas Q.C. in reply. If prosecuting counsel thinks that a plea of guilty to manslaughter adequately meets the case, he proceeds on the basis of that plea. If he thinks it is improper to accept the plea the issue should be decided by the jury and the murder trial should proceed.

In a murder case prosecuting counsel should never approach the defence before trial and offer to accept a plea of guilty to manslaughter unless new facts have come to light. Once there is evidence of murder it is the duty of prosecuting counsel to place it before the jury. It would be improper for him to seek to shorten the proceedings by offering to accept a plea of guilty to a lesser offence.

The judge misdirected the jury on joint enterprise in relation to the alternative way in which the matter was put to the jury. A proper direction should have highlighted the requirement that the prosecution had to prove that A. killed with the necessary intent, and that he did so as part of the common enterprise with the express or tacit authority of the defendant. [Reference was made to *Chan Wing-Siu v. The Queen* [1985] A.C. 168; *Reg. v. Hancock* [1986] A.C. 455; *Reg. v. Hyde* [1991] 1 Q.B. 134 and *Reg. v. Wakely* [1990] Crim.L.R. 119.]

The use of "contemplation" by Sir Robin Cooke in *Chan Wing-Siu v. The Queen* creates a problem. "Contemplation" can mean foresight but he used it to mean authorisation. If a secondary party did not intend that, for example, the person should be attacked with murderous intent, there must be more than mere foresight that that might happen. There must be authorisation. It would be illogical if a secondary party would be guilty of an offence which went beyond the common intention if he foresaw that one of the participants might commit such offence, but other secondary parties too unintelligent to think that, would not be guilty. A principal might only have had an intention to threaten someone with a stick but had lost his temper and gone beyond the common intention of the group by striking the victim with the stick and killing him. It would be artificial if only the secondary parties who foresaw that that might happen were guilty of murder. Contemplation and foresight should only be an aspect of the common intention. The common purpose is what the group authorise among themselves. *Chan Wing-Siu v. The Queen* [1985] A.C. 168 ought not to be interpreted as imposing liability for murder on a secondary party who merely foresaw that the principal might go beyond the common enterprise.

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At the defendant's trial the evidence of A.'s conviction of manslaughter, and therefore A.'s acquittal of murder, and evidence of the pleas of guilty to manslaughter by other secondary parties, were admissible as directly relevant to the issue of common intent. The rule in *Hollington v. F. Hewthorn & Co. Ltd.* [1943] K.B. 587 abolished by the Civil Evidence Act 1968 in England and Wales, and by section 62 of the Evidence Ordinance (Laws of Hong Kong, 1984 rev., c. 8), never applied in criminal proceedings. In England and Wales such an issue is today concluded by section 74 of the Police and Criminal Evidence Act 1984, which provides that the fact that a person other than the accused has been convicted of an offence shall be admissible where to do so is relevant to any issue in those proceedings. No similar provision has been adopted in Hong Kong.

If the principal party has been convicted of murder that is admissible at the trial of a secondary party if it is necessary to prove in that trial that the principal had a murderous intent. A criminal conviction can be adduced in evidence in another criminal case relating to the same incident. There is a link between the two trials. [Reference was made to *Reg. v. Hay* (1983) 77 Cr.App.R. 70 and *Reg. v. Gary Cooke* (1986) 84 Cr.App.R. 286.] If the jury at the first trial were not satisfied that there was a common murderous intent, the jury at the second trial were entitled to be told that.

Duckett Q.C. called upon further with regard to authorities relating to joint enterprise. The law is correctly stated in *Reg. v. Hyde* [1991] 1 Q.B. 134. *Chan Wing-Siu v. The Queen* [1985] A.C. 168 was properly interpreted in *Reg. v. Hyde.* [Reference was also made to *Johns v. The Queen* (1980) 143 C.L.R. 108.] The law was properly applied by the judge in the defendant's trial.

When a person participates in a venture with a primary purpose, he tacitly agrees with that purpose and also with the possibility of what may happen while carrying it out. Authorisation comes within that situation.

Thomas Q.C. in further reply. In *Johns v. The Queen*, 143 C.L.R. 108 the High Court of Australia was not saying that if a party to a joint venture foresaw that another party might act beyond the common purpose the limits of the common purpose were expanded. Only if the act is within the contemplation of more than one, so that they authorise it between themselves, is the common purpose to that extent expanded.

Cur. adv. vult.

5 August. The judgment of their Lordships was delivered by LORD LOWRY.

This is an appeal by special leave from a judgment of the Court of Appeal of Hong Kong exercising its criminal jurisdiction (Cons V.-P., Kempster and Clough JJ.A.) given on 30 December 1988 and refusing the defendant's application for leave to appeal against his conviction for murder in a trial before the High Court of Hong Kong (de Basto J. and a jury) on 27 April 1988.

The grounds of this appeal (which, as the Criminal Procedure Ordinance of Hong Kong, c. 221, makes clear, falls to be considered on

the same principles as those which apply to appeals under the United Kingdom Criminal Appeal Act 1968) are (1) the exclusion from evidence of the fact that the alleged principal offender had at an earlier trial been acquitted of murder and convicted of manslaughter; (2) alleged misdirection of the jury by the trial judge as to the participation of an accomplice in a common unlawful enterprise; (3) the alleged abuse of process constituted by the prosecution of the defendant for murder after the alleged principal offender had merely been convicted of manslaughter.

Their Lordships will examine these grounds with more particularity after adverting to the facts, which may be summarised as follows.

Miss Lo Kwai-ying ("Mui Mui") had a boyfriend, Ah Po, of whom her parents and her brother strongly disapproved. He asked his friend, Ah Hung, to speak to his sister. He attempted to frighten her by describing Ah Hung as the "Southern Boxing Champion:" this was quite untrue. Ah Hung tried to intimidate her into giving up Ah Po. She was upset. After he left, she telephoned Ah Po at a park at Lei Yue Mun pier, told him what had happened and gave him a description of Ah Hung, in particular, that he was tall, wearing glasses and had a red stain on his chest. Ah Po told his friends, including the defendant, that Mui Mui had been bullied. He wanted his friends to go to the Yau Tong Estate to look for Ah Hung and "to look for someone to hit."

Ah Po left with two other youths in a taxi: he was carrying a length of water pipe. The defendant went with two others in a following taxi. At the estate, they stood together in the vicinity of a bus stop, waiting for a man answering to the description of Ah Hung. A number of people were approached by some of the youths and asked if they were the "Southern Boxing Champion." A bus arrived and a number of passengers climbed on board. As the bus moved off, a tall man wearing glasses ran after it to catch it. He was seized by four, five or six of the group: the evidence conflicted as to the number. He was struck by the metal pipe, wielded, as the Crown alleged, by Ah Po. The man, who was not Ah Hung and was a perfectly innocent victim, received numerous bruises, three wounds to the head and fractures in two places to his skull. He later died from his injuries. Some time after this Ah Po called out "Let's go" and the group of six left. When they got back to the pier, a number of them remonstrated with Ah Po who agreed that he had gone over the top. The group then went by ferry to Ah Po's house, where they spent the night. No witness saw the defendant speak to anyone or strike a blow, or play any particular part in the assault on the victim. Ah Po was arrested on 30 June 1986.

On 6 January 1987, Ah Po and three of the group who had accompanied him, were indicted for murder before the High Court of Hong Kong. All four pleaded not guilty. Ah Po was tried by a jury before Hooper J. The second defendant changed his plea to guilty of manslaughter on the fourteenth day of the trial and was remanded in custody for a new trial, at which he renewed his plea of guilty to manslaughter and was sentenced to three years' imprisonment. The third defendant pleaded guilty to manslaughter at the outset and his plea was accepted by the Crown: he was sentenced to five years' imprisonment; this sentence was reduced to four years on appeal. The fourth defendant

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was acquitted and discharged on the fourth day of the trial by direction of the judge, the Crown offering no further evidence against him. The trial lasted until 6 February 1987.

The defence of Ah Po at his trial was that he had nothing to do with the incident. He did not suggest provocation or diminished responsibility. By unanimous decision of the jury, Ah Po was acquitted of murder and convicted of manslaughter. He was sentenced to six years' imprisonment.

The defendant, who had no previous convictions, was arrested on 19 October 1987. He was initially charged with manslaughter by the police, on advice from the Legal Department of the Attorney General's Chambers. But on the advice of another Crown counsel, Mr. Gerber, who received the brief to prosecute, the defendant was indicted for murder. The same procedure was followed with another friend of Ah Po, Sze Hoi-tai, who was arrested on 3 November 1987, charged with manslaughter but subsequently jointly indicted with the defendant for murder.

On the first day of the trial, Sze pleaded not guilty to murder but guilty to manslaughter, and the Crown accepted the plea: he was subsequently sentenced to three years' imprisonment. Crown counsel offered to accept a plea of guilty to manslaughter from the defendant, but the offer was refused.

The defendant sought leave to appeal against his conviction on two principal grounds corresponding to grounds (1) and (2) already referred to. He also attacked the judge's conduct of the trial and his summing up on a number of grounds which are no longer relied on and which their Lordships therefore need not discuss. In refusing leave to appeal the Court of Appeal, quite correctly, as their Lordships will explain, rejected the defendant's first submission on the ground that the conclusion reached by the jury at the trial of Ah Po was irrelevant and therefore inadmissible at the separate trial of the defendant. The court was also satisfied with the judge's directions on the question of joint enterprise. Their Lordships now turn to the grounds of appeal advanced before the Board.

1. *Evidence of the principal offender's acquittal*

The prosecution's case at the defendant's trial was, as it had been at the trial of Ah Po, that Ah Po, encouraged and assisted by the other members of the group of six, had attacked the man who was running to catch the bus and beaten him severely with the metal pipe, thereby inflicting grievous injuries from which the victim died. Thus, although Ah Po had only been convicted of manslaughter, the prosecution at the defendant's trial presented their case against the defendant on the basis that Ah Po had been guilty of murder. The defendant's counsel, in order that the jury might know of the result of the earlier trial, wished to adduce evidence of Ah Po's acquittal of murder and conviction only of manslaughter. The prosecution, however, objected to this course and the trial judge upheld the objection. Their Lordships have no doubt that he was right to do so, because the verdict reached by a different jury

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(whether on the same or different evidence) in the earlier trial was irrelevant and amounted to no more than evidence of the opinion of that jury.

Authority is clearly against the defendant on this point. Their Lordships first refer to *Hollington v. F. Hewthorn & Co. Ltd.* [1943] K.B. 587 where, in an action for damages arising out of a road traffic accident, evidence of the defendant's conviction for careless driving was held to be inadmissible. Even though one proceeding was criminal and the other civil, the observations of Goddard L.J., at pp. 593-594, are greatly in point. In *Reg. v. Luk Siu-keung* [1984] H.K.L.R. 333, which the Crown relied on at the trial, one Ho Kin-on stabbed a victim, was separately tried on charges of murder and robbery and was convicted of manslaughter and robbery. The appellant was later charged with murder and robbery as a participant in the unlawful enterprise and was convicted on both charges. On a Governor's reference the appellant argued that the trial judge should have withdrawn the issue of murder from the jury (1) in view of the favourable terms in which he had directed the jury and (2) because the principal offender had only been convicted of manslaughter. The Court of Appeal rejected these arguments on the ground (1) that the judge would have been wrong to withdraw murder from the jury, since there was evidence to support that charge against the appellant and (2) as a general proposition, which applied in the instant case, that a person may properly be convicted of aiding and abetting an offence even though the principal offender has been acquitted. In the latter connection their Lordships refer also to *Reg. v. Burton* (1875) 13 Cox C.C. 71.

Starting from the general rule that all evidence which is sufficiently relevant to an issue is admissible and that evidence which is irrelevant or insufficiently relevant should be excluded (*Myers v. Director of Public Prosecutions* [1965] A.C. 1001), it is the irrelevance of the outcome of an earlier trial, as illustrated by cases such as *Rex v. Turner* (1832) 1 Mood. 347, that makes evidence of that outcome inadmissible. The exceptions to the rule, some of which the defendant relied on, do nothing to undermine the trial judge's ruling in the present case. In *Reg. v. Hay* (1983) 77 Cr.App.R. 70 the accused had signed a statement confessing to arson and burglary. The offences were unconnected and he was tried first on the arson charge, of which he was acquitted. When tried on the burglary charge the accused unsuccessfully tried to have the entire statement, containing also a confession to the burglary, and the result of the arson trial put before the jury. Having been convicted of burglary, he succeeded in his appeal since the Court of Appeal, applying the principle enunciated in *Sambasivam v. Public Prosecutor, Federation of Malaya* [1950] A.C. 458, held that the jury should have been told that he had been acquitted of arson and that his acquittal was conclusive evidence that he was not guilty of arson and that his confession to that offence was untrue, because evidence to that effect was relevant to the question whether the confession to the burglary was also untrue. A significant link in the chain of reasoning was that it was the appellant himself who had been acquitted in the first trial and, as Lord MacDermott had said in *Sambasivam v. Public Prosecutor, Federation of Malaya*, at p. 479:

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"The effect of a verdict of acquittal . . . is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

In *Reg. v. Gary Cooke* (1986) 84 Cr.App.R. 286 it was held by the Court of Appeal that counsel should have been allowed to bring out in cross-examination the circumstances and the result of an earlier trial. A, B and C were alleged to have made admissions to the same detective constable. B and C were tried first on a charge of robbery and acquitted. There was a clear inference from the acquittal that the jury had disbelieved the detective contable's evidence and the Court of Appeal, in allowing A's appeal from his conviction at a later trial (based on his alleged admissions to the same detective), held that his counsel ought to have been allowed to bring out the circumstances in which B and C had been acquitted because they were so relevant to the credibility of the detective constable. As Parker L.J. put it, at p. 293:

"In the present case although the acquittal and its circumstances which were sought to be relied on related to different accused and a different offence, the circumstances were that the credibility of Detective Constable Spreckley was a vital matter and the offences and interviews were so closely connected that the defence ought in our judgment to have been allowed to bring the matter out."

A study of the cases, including those which were canvassed in *Reg. v. Cooke*, shows that some exceptional feature is needed before it will be considered relevant (and therefore admissible) to give evidence of what happened in earlier cases arising out of the same transaction. The logic of the defendant's submission here may be tested by asking what ruling the trial judge out to have given if the defendant or another member of the group had been tried first and found guilty of murder and subsequently, on the trial of Ah Po, the Crown had tendered evidence of the conviction of an accomplice for murder at the earlier trial.

2. *Alleged misdirection with regard to joint enterprise*

At the trial of the defendant the judge, when charging the jury, gave directions with regard to the doctrine of acting unlawfully in concert which their Lordships think it convenient to set out in full, adding numbers to the paragraphs for ease of reference:

"1. The Crown does not suggest that it was the [defendant] who held the water pipe at any stage nor does the Crown suggest that it was the [defendant] who inflicted the fatal blow or blows. But the Crown does not have to prove to you that the [defendant] even laid a finger on the deceased. It is not necessary for the Crown to prove which particular individual caused the fatal blow or blows which resulted in the death of the deceased. The Crown says that, in the circumstances of this case, to constitute murder, it is not necessary for the Crown to prove who precisely struck the fatal blow or blows.

"2. The Crown in this case relies on the well known doctrine of acting in concert, and the law on that is this: where two or more persons embark upon a joint unlawful enterprise and going to assault someone - even punching someone on the nose is an unlawful enterprise - each is liable for the consequences of such acts of the others as are done in the pursuance of that joint enterprise and also for the unusual consequences of such acts if these arise from the execution of the agreed joint enterprise.

"3. But if one of the adventurers goes beyond what has been expressly, or tacitly, agreed as part of the common enterprise, his co-adventurers are not liable for the consequences of that unauthorised act. It is for you, as a jury, to decide whether what was done was part of the joint enterprise, or went beyond it and was an act unauthorised by the joint enterprise.

"4. Let me give you an example of that - that last portion. Let's say three men decide to go and burgle a house and, whilst two of them are going round looking for things to steal, the third man comes across a woman and he there and then rapes her. Now all three men would be guilty of burglary but the other two would not be guilty of rape because that was never in their contemplation. The intention was to steal and it was not within their contemplation that anyone should be raped.

"5. It is important that you thoroughly understand the doctrine or the concept of common intent, so I will rephrase what I have just said to you a moment ago.

"6. It is not only the person who inflicts the fatal blow or blows who is criminally responsible. The law says that if two or more persons reach an understanding or arrangement that they will commit a crime, and, as I have said, assaulting someone is a crime, and whilst that arrangement is still in being, they are both present and one or other of them does, or they do between them, in accordance with their arrangement all the things necessary to constitute the crime, then they are all equally guilty of it provided the crime does not go beyond their understanding or arrangement.

"7. It is not necessary that the understanding or arrangement be express. It can be tacit. It can be arrived at by means of actions or words. People who go and do something wrong do not go to a solicitor's office and have a contract drawn up and signed, sealed and delivered. They do not want to advertise what they are going to do.

"8. The Crown may establish the count of murder against the [defendant] by proving the [defendant] was present and that the deceased was killed in accordance with an understanding or arrangement to which the [defendant] was a party and that that understanding or arrangement included the intent charged, that is either to kill or to cause grievous bodily harm.

"9. The Crown may establish the offence charged against the [defendant] by proving that the [defendant] was present when the victim was attacked in accordance with an understanding or

arrangement to which the [defendant] was a party, and that understanding or arrangement included the intent either to kill or to cause grievous bodily harm.

"10. The [defendant] would also be guilty if he lent himself to a criminal enterprise knowing that a potentially lethal weapon was being carried by one of his companions, and in the event it is in fact used by one of his partners with an intent sufficient for murder. Then he too will be guilty of that offence if you are sure beyond reasonable doubt that the [defendant] contemplated that in the carrying out of the common unlawful purpose, one of his partners in the enterprise might use a lethal weapon with the intention of at least causing really serious bodily harm. It is what the [defendant] in fact contemplated that matters.

"11. You may remember, members of the jury, that the [defendant] was asked by Mr. Gerber this question, and I am reading from - I have had it transcribed. The question is 'You realised very well that there was a very real danger that somebody was going to get a terrible beating, didn't you?' And the [defendant's] answer was 'That was just what I thought.' And you may interpret that to mean, it is a matter for you, that the [defendant] foresaw the very real possibility that somebody was going to receive a terrible beating.

"12. You may also remember the evidence of the [defendant] that Ah Po whom he had known for a number of years, several years, and I think he had been at school together with him although in different classes. He told you that Ah Po was comparatively hot tempered.

"13. Members of the jury, if you are satisfied that the [defendant] was present and that he shared an intention with his companions that the victim should be assaulted, you might ask yourselves 'Did the [defendant] contemplate that in the carrying out of the common unlawful purpose, that is the assault of the victim, that one of his partners in the enterprise *might*,' I did not say 'would,' '*might* use that water pipe with the intention of causing at least really serious bodily injury?' If the answer is 'Yes,' then you would find the [defendant] guilty.

"14. If on the other hand, you are satisfied that the [defendant] was present and that he shared an intention with his companions that the victim should be assaulted and caused some injury, but some injury less than some really serious bodily injury, then he would not be guilty of murder but he would be guilty of manslaughter.

"15. If you conclude that it was a reasonable possibility that the [defendant] though present did not share any intention with the others that the victim should in any way be assaulted, then he would be entitled to an acquittal."

The defendant's case at the trial was put by his counsel, Mr. Percy, in the following terms:

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"He went along not to join with the others in any common purpose that they devised amongst themselves but to prevent his friends or friend getting into trouble. He was there in the opposite capacity, not to assist them attack someone, but to dissuade them from getting into trouble."

In the alternative he argued that the common intention of the group of six was not the intention to kill or to cause grievous bodily harm and that if, as the Crown contended, Ah Po had any such intention the whole group did not share it. Mr. Percy put it thus:

"I would suggest that if there was indeed a common purpose shared by all of them, then you would expect all of them to equip themselves even with a water pipe either to use in defence or attack, but that wasn't done. No other person except for Ah Po armed himself with any weapon, that is the evidence. And the simple reason for that is that Ah Po was the only one who wanted revenge. No one had any interest in protecting Ah Po's girlfriend from anything. What interest did the others have? Misguided loyalty, is that going to be suggested as the reason for assisting Ah Po? I would suggest, members of the jury, that that dissolves this so-called common purpose."

The directions in paragraph 15 above were clearly designed to cover the defendant's primary case, but the only inference which can be drawn is that the jury did not accept the reasonable possibility that either paragraph 14 or paragraph 15 accorded with the facts. On the contrary, the jury must have been satisfied that what happened accorded with the situation described in paragraphs 8 and 9 or else in paragraphs 10 and 13 of the directions. This of course also necessarily involves the jury's acceptance that Ah Po was guilty of murder.

The defendant's basic proposition in his written case was:

"On the trial of a secondary party for murder on the basis of a 'common intent,' the Crown must prove: (a) that the act was in the contemplation of both the principal and secondary party as an act which might be done in the course of carrying out the primary criminal intention; and (b) that the principal party intended to kill or to do serious bodily injury at the time he killed."

No question arises on this appeal in relation to proposition (b), because the judge (in paragraph 10) gave the appropriate direction to the jury. It is with the defendant's basic proposition (a) that their Lordships are here concerned. The case then noted that the trial judge left the issue of intent to the jury on two bases. Having explained that a party is liable for the consequences of such acts of the others as are done pursuant to a common criminal enterprise, and emphasising that a party is not liable for the consequences of an act which goes beyond that which has been expressly or tacitly agreed, he said:

(1) "The Crown may establish the count of murder against the [defendant] by proving the [defendant] was present and that the deceased was killed in accordance with an understanding or

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arrangement to which the [defendant] was a party and that that understanding and arrangement included the intent charged, that is either to kill or to cause grievous bodily harm."

The judge's alternative directions on intent was recited in the [defendant's] case as follows:

(2) "Then [the defendant] too will be guilty of [murder], if you are sure beyond reasonable doubt that the [defendant] contemplated that in the carrying out of the common unlawful purpose, one of his partners in the enterprise might use a lethal weapon with the intention of at least causing really serious harm. It is what the [defendant] in fact contemplated that matters . . . if you are satisfied that the [defendant] was present and that he shared an intention with his companions that the victim should be assaulted, you might ask yourselves, 'Did the [defendant] contemplate that in the carrying out of the common unlawful purpose, that is the assault of the victim, that one of his partners might . . . I did not say 'would' . . . might use the water pipe with the intention of causing at least really serious bodily injury?' If the answer is 'Yes,' then you would find the [defendant] guilty."

Their Lordships would here observe that direction (1) noted above (which corresponds to paragraphs 8 and 9 of the directions) contemplates the straightforward case where a crime is agreed upon and carried out according to plan: the principal and the accomplices will all be guilty. Direction (2) (which corresponds to paragraphs 10 and 13) contemplates that one partner (the principal) may *in carrying out the common unlawful purpose* commit an act which, although *not mutually arranged in advance*, is within the contemplation of an accessory, who will in this case also be guilty of murder in the circumstances described. The typical example is of a group of men who set out on a bank robbery as the planned crime. One, who to the knowledge of his companions has a loaded revolver, shoots a bank clerk or a watchman dead and generally all will be guilty of murder. What the judge said adapts that concept to the possible circumstances of the present case.

The printed case, when adverting to contemplation of the consequences, cites the observation of Sir Robin Cooke in *Chan Wing-Siu v. The Queen* [1985] A.C. 168, 175:

"It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

The defendant's basic proposition was then repeated:

"The correct principle is expressed in *Johns v. The Queen* (1980) 143 C.L.R. 108 where the High Court of Australia approved the statement by Street C.J. in the Supreme Court of New South Wales: 'an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was *within the*

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> *contemplation of both himself and the principal* in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture.' The crux of that dictum is that the act must be *within the contemplation of both parties.* For the Crown to establish murder against a secondary party on the basis that he contemplated, or authorised, an attack with murderous intent, it is necessary to prove that the primary party himself so contemplated." (Emphasis supplied.)

The written submissions on this part of the appeal concluded with this proposition:

> "If reliance is to be placed simply on the foresight of the secondary party, then the judge ought in any event to direct the jury to consider whether the risk *as recognised by the accused* was sufficient to make him a party to the crime committed by the principal."

As to this last submission, which was based on a passage in *Chan Wing-Siu v. The Queen* [1985] A.C. 168, 179, their Lordships consider that on the facts of the present case the judge put the case to the jury both adequately and correctly in paragraphs 10 to 13 of his directions.

Mr. Thomas, who appeared for the defendant before the Board, made two further points. The first, which stemmed from the defendant's basic proposition, was that the judge should have told the jury that, for the defendant to be guilty of murder, it was necessary that Ah Po contemplated the possibility of at least grievous bodily harm being caused when the unlawful agreement to assault Ah Hung was made; otherwise his severe attack on the victim, though intended when it was made, would have gone beyond what was authorised by the agreement. The second point was that Sir Robin Cooke's equation in *Chan Wing-Siu v. The Queen* [1985] A.C. 168 of contemplation with authorisation meant that an accomplice who merely *foresees* the further and additional act of the principal is not thereby rendered liable for that act. Neither point poses any problem on the assumed basis that the jury found the unlawful joint enterprise to be one of the first type, which was covered by paragraphs 8 and 9 of the judge's directions ("type 1"). Both points were directed to the question of guilty intent on the part of the accomplice in relation to an unlawful joint enterprise of the second type (as their Lordships for the purposes of argument will assume the crime to have been), which was dealt with in paragraphs 10 and 13 of the directions ("type 2"). Paragraph 10 clearly recalls Sir Robin Cooke's reference in *Chan Wing-Siu v. The Queen*, at p. 175, to the accomplice's "contemplation" of "a crime foreseen as a possible incident of the common unlawful enterprise," which tends to indicate, not surprisingly, that the judge's directions were based on *Chan Wing-Siu v. The Queen.*

The principle enunciated in *Chan Wing-Siu v. The Queen* has since been clearly stated by Lord Lane C.J. in the Court of Appeal (Criminal Division) in *Reg. v. Ward* (1986) 85 Cr.App.R. 71 and *Reg. v. Slack* [1989] Q.B. 775, in both of which *Chan Wing-Siu v. The Queen* [1985] A.C. 168 was expressly approved and applied, and most recently in *Reg.*

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v. Hyde [1991] 1 Q.B. 134, which also applied *Chan Wing-Siu v. The Queen*. Having referred to *Reg. v. Slack* [1989] Q.B. 775 Lord Lane C.J. said in *Reg. v. Hyde* [1991] 1 Q.B. 134, 138-139:

"There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim but, for example, to commit burglary. The victim is assaulted and killed as a possibly unwelcome incident of the burglary. The latter type of case may pose more complicated questions than the former, but the principle in each is the same. A must be proved to have intended to kill or to do serious bodily harm at the time he killed. As was pointed out in *Reg. v. Slack* [1989] Q.B. 775, 781, B, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have had an express or tacit understanding with A that such harm or death should, if necessary, be inflicted.

"We were there endeavouring, respectfully, to follow the principles enunciated by Sir Robin Cooke in *Chan Wing-Siu v. The Queen* [1985] A.C. 168, 175: 'The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.'

"It has been pointed out by Professor J. C. Smith, in his commentary on *Reg. v. Wakely* [1990] Crim. L.R. 119, 120-121, that in the judgments in *Reg. v. Slack* [1989] Q.B. 775 and also in *Reg. v. Wakely* [1990] Crim. L.R. 119 itself, to both of which I was a party, insufficient attention was paid by the court to the distinction between on the one hand tacit agreement by B that A should use violence, and on the other hand a realisation by B that A, the principal party, may use violence despite B's refusal to authorise or agree to its use. Indeed in *Reg. v. Wakely* we went so far as to say: 'The suggestion that a mere foresight of the real or definite possibility of violence being used is sufficient to constitute the mental element of murder is prima facie, academically speaking at least, not sufficient.'

"On reconsideration, that passage is not in accordance with the principles set out by Sir Robin Cooke which we were endeavouring to follow and was wrong, or at least misleading. If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points

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> out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder. That being the case it seems to us that the judge was correct when he directed the jury in the terms of those passages of the summing up which we have already quoted. It may be that a simple direction on the basis of *Reg. v. Anderson* [1966] 2 Q.B. 110 would, in the circumstances of this case, have been enough, but the direction given was sufficiently clear and the outcome scarcely surprising. That ground of appeal, which was in the forefront of the arguments of each of the appellants, therefore fails."

That passage from the judgment in *Reg. v. Hyde* correctly states, in their Lordships' opinion, the law applicable to a joint enterprise of the kind described, which results in the commission of murder by the principal as an incident of the joint enterprise.

Against that background their Lordships consider the two arguments set out above. The first can be readily disposed of on the facts by pointing out that Ah Po's arming himself with the water pipe before setting out showed unequivocally what he *did* contemplate at that stage. The connection between the argument and the facts to which it was directed was tenuous, to say the least.

Counsel's submission, however, was based on the passage already cited from *Johns v. The Queen* (1980) 143 C.L.R. 108, 130-131. The issue in that case was whether an accessory before the fact is, like a principal in the second degree, responsible for an act constituting the offence charged if such act was contemplated as a *possible* incident of the common purpose, or whether it has to be established as a *likely or probable* consequence of the way in which the crime was to be committed. The court unanimously accepted the former alternative. But, in the course of their judgment, Mason, Murphy and Wilson JJ. stated the law in the manner already quoted, requiring the act to have been within the contemplation of *both the principal and the accessory* as an act which might be done in the course of carrying out the primary criminal intention. It is on the basis of that passage that the defendant contends that the secondary party cannot be liable unless the relevant act was within the contemplation of both the principal and the secondary party.

Johns v. The Queen is a leading case on the law relating to accessories. It was specifically relied on by Sir Robin Cooke in *Chan Wing-Siu v. The Queen* [1985] A.C. 168, in which the same central issue fell to be considered. It is, however, plain that, in the passage upon which the defendant relies, attention was being concentrated on those cases in which the question is whether the act of the principal falls within the common purpose of the parties. This appears from the immediately succeeding sentence in the judgment of Mason, Murphy and Wilson JJ., at p. 131 (not quoted in the written case for the defendant), which reads:

> "Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise."

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In such a case the contemplation of both parties will be relevant. But, as appears from Sir Robin Cooke's judgment in *Chan Wing-Siu v. The Queen* (and as was recognised by Lord Lane C.J. in *Reg. v. Hyde* [1991] 1 Q.B. 134, departing in this respect from some of the observations contained in the earlier judgments in *Reg. v. Slack* [1989] Q.B. 775 and *Reg. v. Wakely* [1990] Crim.L.R. 119), the secondary party may be liable simply by reason of his participating in the joint enterprise with foresight that the principal may commit the relevant act as part of the joint enterprise. We therefore find Sir Robin Cooke focusing upon the contemplation of the secondary party alone, as in the following passage, at p. 178:

> "In some cases in this field it is enough to direct the jury by adapting to the circumstances the simple formula common in a number of jurisdictions. For instance, did the particular accused contemplate that in carrying out a common unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm?"

In practice, of course, in most cases the contemplation of both the primary and the secondary party is likely to be the same; if there is an alleged difference, it will arise where the secondary party asserts in his defence that he did not have in contemplation the act which was in the contemplation of the principal. But their Lordships are unable to accept that in every case the relevant act must be shown to have been in the contemplation of *both* parties before the secondary party can be proved guilty.

Let it be supposed that two men embark on a robbery. One (the principal) to the knowledge of the other (the accessory) is carrying a gun. The accessory contemplates that the principal may use the gun to wound or kill if resistance is met with or the pair are detected at their work but, although the gun is loaded, the only use initially contemplated by the principal is for the purpose of causing fear, by pointing the gun or even by discharging it, with a view to overcoming resistance or evading capture. Then at the scene the principal changes his mind, perhaps through panic or because to fire for effect offers the only chance of escape, and shoots the victim dead. His act is clearly an incident of the unlawful enterprise and the possibility of its occurrence as such was contemplated by the accomplice. According to what was said in *Chan Wing-Siu v. The Queen* [1985] A.C. 168 the accomplice, as well as the principal, would be guilty of murder. Their Lordships have to say that, having regard to what is said in *Chan Wing-Siu v. The Queen* and the cases which applied it, they do not consider the prior contemplation of the principal to be a necessary additional ingredient. In their opinion the judge had no duty to direct the jury to that effect in paragraphs 10 and 13 of the relevant passage in his summing up.

In none of the cases reviewed, including the case under appeal, was the prior contemplation of the principal a live issue. But it must be recognised that to hold the accomplice to be guilty in the example their Lordships have posed is consistent with *Chan Wing-Siu v. The Queen* and *Reg. v. Hyde* [1991] 1 Q.B. 134.

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Their Lordships appreciate that the hypothetical example they have given is largely theoretical. Rarely, if ever, will a case arise in which the accessory, but not the principal, contemplates the possibility of a further relevant offence and, if the facts appeared to support such a hypothesis, the defence would no doubt seize the opportunity to contend that the accomplice himself had not been proved to have contemplated something which was not in the mind of the principal. Alternatively, he might contend that the principal's further act had gone beyond the contemplated area of guilty conduct, with the result that the accessory to the planned offence was not criminally liable for the new offence. In truth, the point taken by the defendant was academic; but, for the reasons they have given, their Lordships reject it as unsound.

The defendant's second point relies on Sir Robin Cooke's use of the word "authorisation" as a synonym for contemplation in the passage already cited from his judgment in *Chan Wing-Siu v. The Queen* [1985] A.C. 168, 175. Their Lordships consider that Sir Robin used this word - and in that regard they do not differ from counsel - to emphasise the fact that mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit *as a possible incident of the common unlawful enterprise* and must, with such foresight, still have participated in the enterprise. The word "authorisation" explains what is meant by contemplation, but does not add a new ingredient. That this is so is manifest from Sir Robin's pithy conclusion to the passage cited: "The criminal culpability lies in participating in the venture with that foresight."

Their Lordships are satisfied that the trial judge accurately conveyed that idea to the jury by paragraph 10 of his directions.

This was a strong case of at least tacit agreement that Ah Hung should be attacked accompanied by foresight, as admitted by the defendant, that a very serious assault might occur, even if that very serious assault had not been planned from the beginning. It is, moreover, easier to prove against an accomplice that he contemplated and by his participation accepted the use of extra force in the execution of the planned assault than it normally would be to show contemplation and acceptance of a new offence, such as murder added to burglary.

Their Lordships therefore reject all the criticisms of the judge's directions to the jury on joint enterprise.

3. *Abuse of process*

The defendant contended that in the circumstances to prosecute the defendant for murder rather than manslaughter amounted to an abuse of process which would have justified and even called for the trial judge's refusal to allow the prosecution to proceed. It is unfortunate, in a matter involving the exercise of discretion, that no application based on this ground was considered suitable to be made either in the court of trial or in the Court of Appeal of Hong Kong (both of which courts would have been specially qualified to form a view), but this Board, even at this stage, has jurisdiction to intervene in a proper case.

It will be remembered that Ah Po, though charged with murder, was convicted of manslaughter and that the defendant, when arrested nearly

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two years after the event, was originally charged with manslaughter but was later indicted on a charge of murder. The defendant's written case contained the following submissions:

> "The decision of Crown counsel to substitute the original charge of manslaughter with a charge of murder was oppressive and an abuse of the process of the court in the following circumstances: (1) the primary party had been acquitted of murder and convicted of manslaughter; (2) the pleas of the three other participants, of guilty to manslaughter, had been accepted by the Crown; (3) there was no evidence that the [defendant] had played any particular part or struck any particular blow in the incident; (4) Crown counsel was at all times prepared to accept a plea from the [defendant] of guilty to manslaughter; (5) the only reasonable inference to be drawn from (1) to (4) above, is that the purpose of charging the [defendant] with murder was to put unfair pressure upon the [defendant] to plead guilty to the lesser charge; (6) the [defendant] in advancing his defence of non-participation, was unfairly put at risk of a conviction of a capital offence; (7) the result is that the [defendant] has been sentenced to death, while his co-accused, including the primary party, received merely prison sentences varying between three and six years."

The submission proceeded to say that the trial judge or the Court of Appeal (though not requested to do so) "ought to have intervened to prevent an abuse of its procedure."

The defendant supported his submission with a citation from the speech of Lord Salmon in *Reg. v. Humphrys* [1977] A.C. 1, 46:

> "I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred."

The doctrine of abuse of process and the remedy of refusal to allow a trial to proceed are well established. As Lord Reid said in *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1296, there must always be a residual discretion to prevent anything which savours of abuse of process. The main modern authorities are *Connelly v. Director of Public Prosecutions* and *Reg. v. Humphrys* [1977] A.C. 1 and their Lordships refer to those cases for statements of principle.

In *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1300-1301, Lord Morris of Borth-y-Gest said:

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"I consider that if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it and if there is no plea in bar which can be upheld the court cannot direct that the prosecution must not proceed. I agree with what was said by Lord Goddard C.J. in *Reg. v. Chairman, County of London Quarter Sessions, Ex parte Downes* [1954] 1 Q.B. 1, that once an indictment is before the court the accused must be arraigned and tried thereon unless (on a motion to quash or demurrer pleaded) the indictment is held to be defective in substance or form and is not amended, or unless matter in bar is pleaded and the plea is tried or confirmed in favour of the accused or unless (after the indictment is found) the Attorney-General enters a nolle prosequi or unless the court has no jurisdiction to try the offence disclosed by the indictment. In that case Lord Goddard said that he knew of no power in the court to quash an indictment because it is anticipated that the evidence would not support the charge: indeed, the only ground on which the court can examine the depositions, before arraignment, is to see whether (in a case where there is a count for which there has not been a committal) the depositions disclose the offence covered by that count. There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process in the court."

In *Reg. v. Humphrys* [1977] A.C. 1, 24, Viscount Dilhorne said:

"Where an indictment has been properly preferred in accordance with the provisions of that Act [Administration of Justice (Miscellaneous Provisions) Act 1933], has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise the existence of such a degree of omnipotence is, as my noble and learned friend Lord Edmund-Davies has said, unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is not a general power to control the procedure of a court so as to avoid unfairness."

And, at p. 25:

"It does not appear to me to have been necessary in *Connelly v. Director of Public Prosecutions* to decide whether a judge had power to stop any prosecution in limine, and while I recognise that some of the speeches contained observations of a very general and far-reaching character, I cannot see any reason for thinking that any

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members of the House would have held that a judge could, in his discretion, prevent the trial of a person for perjury after the alleged perjury had secured his acquittal on the ground that in the judge's view as a matter of policy the prosecution should not have been brought, was unfair, oppressive and an abuse of process. In this connection I regard the observations of Lord Morris of Borth-y-Gest as very pertinent."

Also in *Reg. v. Humphrys* Lord Edmund-Davies said, at pp. 52-53:

"It is clear that autrefois acquit was not available to Humphrys. But it by no means follows that cases falling outside the rules governing the two special pleas in bar must proceed even though they appear as oppressive as any which happen to fall within those rules. Notwithstanding certain of my observations in delivering the judgment of the Court of Criminal Appeal in *Connelly v. Director of Public Prosecutions*, at pp. 1276-1277, I am now satisfied that, in the words of Lord Parker C.J. in *Mills v. Cooper* [1967] 2 Q.B. 459, 467: '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."

Cases cited earlier in this judgment show that the trial of a secondary offender can proceed although the alleged principal has been acquitted in an earlier trial. In such circumstances abuse of process has not even been suggested: see, for example, *Reg. v. Luk Siu-keung* [1984] H.K.L.R. 333. Their Lordships now turn to the numbered arguments listed in the defendant's case.

(1) This point has been dealt with above. (2) The Crown acted consistently by accepting pleas of guilty to manslaughter from all the secondary parties and were willing to accept such a plea from the defendant. (3) The absence of evidence that the defendant had played a particular part or struck a blow did not mean that there was not a case of murder against him. (4) The fact that Crown counsel was prepared to accept a plea of guilty to manslaughter from the defendant (as from the other secondary parties) did not mean that it was an abuse of process to indict and prosecute him for murder. The defendant ran a defence which, if successful, would have resulted in his acquittal and to have accepted a manslaughter plea would have been quite in order. (5) Their Lordships cannot agree that the only reasonable inference to be drawn from points (1) to (4) above was that the defendant was charged with murder in order to put unfair pressure on him to plead guilty to manslaughter. There was a strong prima facie case of murder, but it was understandable, in view of the outcome of the earlier trial, that the defendant was originally charged with manslaughter. It was equally understandable (and consistent with good faith) that the charge was amended to one of murder on the advice of Crown counsel. There was no evidence, in their Lordships' opinion, of bad faith on the part of the Crown nor, in view of the evidence, could the charge of murder be called an overcharge, much less a deliberate overcharge. (6) Their Lordships consider that the defendant was not unfairly put at risk of a conviction for murder, since there was ample evidence to support that

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conviction and since the first jury's acquittal of Ah Po, once his defence of non-participation was rejected, was perverse. (7) The sentence of the primary party was due to his good fortune in being acquitted of murder and the sentences of the co-defendants were due to their having pleaded guilty to manslaughter, as the defendant could have done, instead of advancing a defence of non-participation which was rejected by the jury.

Having reviewed the facts, their Lordships find no aspect of the case which can credibly be described as an abuse of process, that is, something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding. There can be no suggestion that the defendant was the victim of a plea bargaining situation since he did not plead guilty to the lesser offence. There was no sign of fraud or deceit and, as between the Crown and the defendant, the charge was fair.

Their Lordships recognise that it would be permissible to ask whether the Crown should have persisted in seeking a verdict of guilty of murder when a finding of manslaughter would have produced equality among the accused. There seem to be two answers. One is that, provided the case was conducted with propriety, it is difficult to see how the judge could properly have intervened to prevent counsel from seeking or the jury from returning a verdict which was justified by the evidence. The other answer is that, if it was not an abuse to indict and prosecute for murder, it could scarcely be an abuse to seek a verdict which was justified by the evidence.

That a serious anomaly occurred cannot be denied, but

> "As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another:" *Reg. v. Andrews-Weatherfoil Ltd.* [1972] 1 W.L.R. 118, 125, *per* Eveleigh J.

If he had been tried with Ah Po there can be no doubt (since Ah Po did not have a special defence) that the defendant would not have been found guilty of murder. But, as Cons V.-P. observed in the Court of Appeal:

> "[This] is a matter that may well be of importance and be taken into account in another quarter, but so far as the courts are concerned it was not a relevant matter for the jury's consideration."

More specifically, as their Lordships feel justified in recalling, giving judgment in the similar case of *Reg. v. Luk Siu-keung* [1984] H.K.L.R. 333, 339, Li J.A. said:

> "It is always open to the Governor-in-Council to exercise his prerogative of mercy to commute the sentence to a suitable term as an act of humanity. As far as the law is concerned, there is nothing we can do."

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Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed.

Solicitors: Philip Conway Thomas; Macfarlanes.

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Douglas Johnston Esq Barrister

Re Barings plc and others (No 2) Secretary of State for Trade and Industry v Baker and others

CHANCERY DIVISION
JONATHAN PARKER J
12–15, 18–22 MAY, 2, 3, 5 JUNE 1998

COURT OF APPEAL, CIVIL DIVISION
SWINTON THOMAS, WALLER AND CHADWICK LJJ
8, 9 JUNE 1998

Company – Director – Disqualification – Stay of proceedings – Abuse of process – Double jeopardy principle – Director having successfully resisted disciplinary proceedings brought by Securities and Futures Authority on substantially same charges – Whether disqualification proceedings an abuse of process – Whether proceedings should be stayed – Company Directors Disqualification Act 1986.

The Secretary of State for Trade and Industry issued proceedings against B and nine other former directors of companies in a group, seeking disqualification orders under s 6 of the Company Directors Disqualification Act 1986. Disqualification orders were made against seven of the former directors, and at the commencement of the substantive hearing against the remaining three, B applied for a stay of the proceedings on the ground that the prosecution of the proceedings against him would infringe the principle of double jeopardy (or the collateral attack principle), since he had already successfully resisted disciplinary proceedings brought against him by the Securities and Futures Authority (the SFA) in which the same, or substantially the same charges were made against him as were made by the Secretary of State in the disqualification proceedings; alternatively that, in the circumstances, the prosecution of the proceedings against him would be unfair, unjust and oppressive. B contended that, in substance, the SFA was the Secretary of State in another guise (an emanation of the State). The judge dismissed the application, holding that an analysis of the structure of statutory regulation and of the constitution and rules of the SFA demonstrated that the SFA was not an emanation of the State, and that to hold that the Secretary of State was, in effect, bound by the decisions of the SFA tribunals would be to sanction the imposition of a restriction on her powers and duties under the 1986 Act which would be inconsistent both with the express terms and the underlying purpose of the Act. B applied to the Court of Appeal for leave to appeal.

Held – Having regard to the overriding need to preserve public confidence in the administration of justice, the court would stay proceedings on the ground of abuse of process where to allow them to continue would bring the administration of justice into disrepute among right-thinking people. In the instant case, the issues on which the court would need to adjudicate in the disqualification proceedings were not the same as those which had already been investigated and adjudicated on in the SFA proceedings, and the judge had appreciated that. The charges against B in the SFA proceedings were that he had failed to act with the due care and skill of a prudent manager, whereas in the disqualification

proceedings, the relevant question was whether B's conduct as a director had fallen so far short of the competence required of a director that the court ought to reach the conclusion that he was unfit to be concerned in the management of any company, and the proceedings would involve an investigation into what responsibility B had as a director for his company's insolvency. It followed that to allow the disqualification proceedings to continue would not risk bringing the administration of justice into disrepute among right-thinking people, and an appeal would serve no useful purpose. Accordingly, the application would be dismissed (see p 335 *a b j* to p 336 *b*, p 338 *c* to p 339 *a d* to *j*, p 340 *b c j* to p 341 *a* and p 343 *f g*, post).

Dictum of Lord Diplock in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729 applied.

Notes

For stay of proceedings on the ground of abuse of process, see 37 *Halsbury's Laws* (4th edn) para 443.

For the powers and duty of the court to make disqualification orders generally, see 7(2) *Halsbury's Laws* (4th edn 1996 reissue) paras 1417–1427.

For the Company Directors Disqualification Act 1986, s 6, see 8 *Halsbury's Statutes* (4th edn) (1991 reissue) 786.

Cases referred to in judgments

Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338, [1990] 2 WLR 1437, CA.

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, [1994] 1 AC 42, [1993] 3 WLR 90, HL.

Blackspur Group plc, Re, Secretary of State for Trade and Industry v Davies, Re Atlantic Computers plc, Secretary of State for Trade and Industry v Ashman [1998] 1 BCLC 676, [1998] 1 WLR 422, CA; *affg* [1997] 2 BCLC 96, [1997] 1 WLR 710.

Christy (Thomas) Ltd (in liq), Re [1994] 2 BCLC 527.

Cooke v Purcell, Cooke v Whitbread, A-G v Purcell (1988) 14 NSWLR 51, Aust CA.

Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

Iberian UK Ltd v BPB Industries plc [1997] ICR 164.

R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening) [1987] 1 All ER 564, [1987] QB 815, [1987] 2 WLR 699, CA.

R v Securities and Futures Authority, ex p Panton [1994] CA Transcript 767.

R v Statutory Committee of Pharmaceutical Society of GB, ex p Pharmaceutical Society of GB [1981] 2 All ER 805, [1981] 1 WLR 886.

Reichel v Magrath (1889) 14 App Cas 665, HL.

Saeed v Inner London Education Authority [1985] ICR 637.

Sevenoaks Stationers (Retail) Ltd, Re [1991] 3 All ER 578, [1991] Ch 164, [1990] 3 WLR 1165, CA.

Walton v Gardiner, Walton v Herron, Walton v Gill (1993) 112 ALR 289, Aust HC; *affg* sub nom *Gill v Walton, Herron v Walton, Gardiner v Walton* (1991) 25 NSWLR 190, Aust CA.

Williams (Rex) Leisure plc, Re [1994] 4 All ER 27, [1994] Ch 350, [1994] 3 WLR 745, CA.

Cases also cited or referred to in skeleton arguments

Atlantic Computers plc, Re, Secretary of State for Trade and Industry v Ashman (26 June 1997, unreported), Ch D.

Benson v Northern Ireland Road Transport Board [1942] 1 All ER 465, [1942] AC 520, HL.

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ER 465, [1942] AC 520,

Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd, Ulster Marine Insurance Co Ltd v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132, CA.
Brind v Secretary of State for the Home Dept [1991] 1 All ER 720, [1991] 1 AC 696, HL.
Bugdaycay v Secretary of State for the Home Dept [1987] 1 All ER 940, [1987] AC 514, HL.
Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, HL.
Davern v Messel (1984) 53 ALR 1, Aust HC.
Dept of Education and Science v Taylor [1992] IRLR 308.
Derbyshire CC v Times Newspapers Ltd [1992] 3 All ER 65, [1992] QB 770, CA.
DPP v Humphrys [1976] 2 All 497, [1977] AC 1, HL.
Eckersley v Binnie (1988) 18 ConLR 1, QBD and CA.
El Capistrano SA v ATO Marketing Ltd [1989] 2 All ER 572, [1989] 1 WLR 471, CA.
Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54, [1977] 1 WLR 510.
Grayan Building Services Ltd (in liq), Re [1995] Ch 241, CA.
Green v US (1957) 355 US 184, US SC.
Jago v District Court of New South Wales (1989) 168 CLR 23, Aust HC.
Kaufmann v Credit Lyonnais Bank [1995] CLC 300.
Lewis v Mogan [1943] 2 All ER 272, [1943] KB 376, DC.
Living Images Ltd, Re [1996] 1 BCLC 348.
Lo-Line Electric Motors Ltd, Re [1988] 2 All ER 692, [1988] Ch 477.
McIlkenny v Chief Constable of West Midlands Police Force [1980] 2 All ER 227, [1980] QB 283, CA.
Medical Practitioner, Re a [1959] NZLR 784, NZ CA.
Melton Medes Ltd v Securities and Investments Board [1995] 3 All ER 880, [1995] Ch 137.
Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1978] 3 All ER 571, [1979] Ch 384.
R v Association of Futures Brokers and Dealers Ltd, ex p Mordens Ltd (1990) Times, 6 September.
R v Bates, ex p O'Brien (1997) 116 NTR 1, Aust SC.
R v Beedie [1998] QB 356, CA.
R v Hayes (1987) 29 A Crim R 452.
R v Hogan, R v Tompkins [1960] 3 All ER 149, [1960] 2 QB 513, CCA.
R v Institute of Chartered Accountants in England and Wales, ex p Brindle [1994] BCC 297, CA.
R v Maxwell (19 September 1996, unreported) CCC.
R v Metropolitan Police Disciplinary Tribunal, ex p Police Complaints Authority (1992) Times, 25 March.
R v Miles (1890) 24 QBD 423, CCR.
R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, CA.
R v Police Complaints Board, ex p Madden [1983] 2 All ER 353, [1983] 1 WLR 447.
R v Secretary of State for Trade and Industry, ex p McCormick [1998] BCC 379, QBD and CA.
R v Tait (1979) 24 ALR 473, Aust FC.
Rantzen v Mirror Group Newspapers (1986) Ltd [1993] 4 All ER 975, [1994] QB 670, CA.
Secretary of State for Home Affairs v O'Brien [1923] AC 603, [1923] All ER Rep 442, HL.
Secretary of State for Trade and Industry v Griffiths [1998] BCC 386, CA.
Smith v Linskills (a firm) [1996] 2 All ER 353, [1996] 1 WLR 763, CA.
US v Wilson (1975) 420 US 332, US SC.
X v Austria No 4212/69 (1970) 35 CD 151, E Com HR.
Yuen Kun-yeu v A-G of Hong Kong [1987] 2 All ER 705, [1988] AC 175, PC.

Application

Ronald Baker applied for a stay of the proceedings brought against him, and also against Andrew Tuckey and Anthony Gamby, by the Secretary of State for Trade and Industry seeking disqualification orders under s 6 of the Company Directors Disqualification Act 1986, on the ground that the proceedings would infringe the principle of double jeopardy, since he had successfully resisted disciplinary proceedings brought against him by the Securities and Futures Authority. The facts are set out in the judgment.

Charles Hollander and *Jasbir Dhillon* (instructed by *Fox Williams*) for Mr Baker.

Michael Briggs QC and Matthew Collings (instructed by *Stephenson Harwood*) for Mr Tuckey.

Mr Gamby appeared in person.

Elizabeth Gloster QC, Malcolm Davis-White and *Edmund Nourse* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

5 June 1998. The following judgment was delivered.

JONATHAN PARKER J.

Introduction

On 21 February 1997 the Secretary of State for Trade and Industry issued proceedings against ten former directors of companies in the Barings Group, seeking disqualification orders under s 6 of the Company Directors Disqualification Act 1986 (the Disqualification Act). The proceedings arose out of the collapse of the Barings Group in February 1995, caused by the notorious unauthorised trading activities of a single trader in Singapore, Nick Leeson. Following the collapse, the relevant companies were placed in administration.

In respect of seven out of the ten respondents, disqualification orders have since been made (either under the Carecraft procedure or on an unopposed basis), leaving three respondents remaining, one of whom is Mr Ron Baker (the first respondent on the record).

After a number of interlocutory hearings, including a pre-trial review, the substantive hearing against the three remaining respondents began on Tuesday, 12 May 1998 and is estimated to last several weeks. The Secretary of State appears by Miss Elizabeth Gloster QC, Mr Malcolm Davis-White of counsel and Mr Edmund Nourse of counsel; Mr Baker by Mr Charles Hollander of counsel and Mr Jasbir Dhillon of counsel. One of the other respondents, Mr Andrew Tuckey, is represented by leading and junior counsel (Mr Michael Briggs QC and Mr Matthew Collings); the remaining respondent, Mr Anthony Gamby, appears in person.

In the course of her opening on 12 May, Miss Gloster told me that she had been informed by Mr Hollander that he wished to apply for a stay of the proceedings against Mr Baker. No previous indication had been given by or on behalf of Mr Baker that such an application might be made—in particular, nothing was said at the pre-trial review (at which Mr Hollander attended) about the possibility of such an application being made. In the circumstances I directed Mr Hollander to issue a notice of motion formulating the precise terms of the relief which Mr Baker sought, and I indicated that I would hear the application at an early stage in the proceedings and in any event before any evidence was called. In the

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event, I heard the application immediately following the opening speeches. I now deliver judgment on it (today being day 12 of the hearing).

Mr Baker seeks either a stay of the entire proceedings as against him, alternatively a stay of the proceedings as against him save in so far as they relate to one particular factual matter referred to in the affidavit evidence as 'the SLK Receivable'. He founds his case for a stay on the submission that the prosecution of the proceedings against him (alternatively the prosecution of the proceedings in so far as they relate to matters other than the SLK Receivable) would infringe the principle of double jeopardy, by reason of the fact that he has already successfully resisted disciplinary proceedings brought against him by the Securities and Futures Authority (the SFA) in which the same, or substantially the same, charges were made against him as are made by the Secretary of State in these proceedings; further or alternatively that in those circumstances the prosecution of these proceedings against him would be unfair, unjust and oppressive. The application for a stay is opposed by the Secretary of State.

Background facts

Mr Baker is in his mid-forties. In 1974 he qualified as an accountant in Australia. In 1982 he joined Bank of America (Australia) Ltd in Melbourne, working in corporate finance. In 1985 he came to London with his family to set up an Australian desk at Bank of America (International) Ltd. In April 1987 he accepted an offer by Bankers Trust International Ltd to head its Non-US Dollar Eurobond Syndicate Desk in London. By the time he left Bankers Trust, in January 1992, Mr Baker was in charge of its Eurodollar and corporate fixed income business, including trading and sales. In April 1992 Mr Baker joined Barings.

The holding company of the Barings Group was Barings plc. Barings plc had two operating subsidiaries, namely Baring Bros & Co Ltd (BB & Co) and Baring Asset Management Ltd (BAM). BAM does not come into the picture, for present purposes. BB & Co had a number of major operating subsidiaries, including Baring Securities Ltd (BSL). BSL in turn had a number of operating subsidiaries, including Baring Securities (Japan) Ltd (BSJ), Baring Futures (Singapore) Pte Ltd (BFS) and Baring Securities (London) Ltd (BSLL). In 1992 BB & Co conducted the investment banking and corporate finance business of the group; BSL carried on its stockbroking and agency business.

The business carried on by BSL had been acquired by BB & Co in 1984 from Henderson Crosthwaite, a London stockbroker with connections with the Asian equity markets. In the late 1980s BSL was a significant force in the Japanese warrant market, making substantial profits from the distribution and trading of equity warrants.

BSJ was the principal subsidiary of BSL, with offices in Tokyo and Osaka. BSJ conducted both agency trading (that is to say trading on behalf of clients outside the Barings Group) and proprietary or 'house' trading (that is to say trading on behalf of companies in the Barings Group) in equities and derivatives, including futures and options. BFS was incorporated in Singapore, as an indirect subsidiary of BSL, in order to allow Barings to trade on the Singapore International Monetary Exchange (SIMEX), the derivatives exchange of Singapore. BSLL was a company through which certain of the proprietary trading activities of the Barings Group were booked.

Both BSL and BSLL were authorised by the SFA to carry on investment business in the United Kingdom.

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On joining Barings in April 1992, Mr Baker was appointed a director of BB & Co. Mr Baker was registered by the SFA as a director, and was thereby authorised to conduct investment business, pursuant to the provisions of the Financial Services Act 1986.

In the spring of 1993 it was decided to reorganise the activities of the Group, and, as part of this reorganisation, to combine the activities of BB & Co and BSL into a single operational or business unit, to be known as Barings Investment Bank (BIB).

BIB was in turn to comprise a number of organisational sub-groups, including the Financial Products Group (FPG). During 1993 Mr Baker became the head of FPG.

As from 1 January 1994 FPG was responsible for the proprietary business carried on by BFS; and as from 1 January 1995 it was also responsible for BFS's agency business. At all material times, Leeson was the general manager of BFS, and responsible both for BFS's trading activities (the front office) and for its administrative activities (the back office).

On Thursday, 23 February 1995 Leeson absconded from Singapore. On the following day, from a hotel in Malaysia, Leeson tendered his resignation with immediate effect. Over the next few days it became clear that Leeson had, through massive unauthorised trading in futures and options in a secret account designated '88888', brought about the collapse of the Barings Group.

On 1 May 1995 Barings served three months' notice of termination of Mr Baker's employment, instructing him not to work during the period of notice.

On 20 July 1995 the SFA suspended Mr Baker's registration as a director and notified him that it intended to carry out an investigation into his involvement in the collapse of Barings. On 14 March 1996 the SFA instituted proceedings against Mr Baker before the SFA disciplinary tribunal, alleging that he had failed to act with due skill care and diligence in that he had failed properly to understand and monitor the 'switching business' (comprising various types of arbitrage) undertaken by BFS—in effect, by Leeson—on SIMEX; that he had failed to organise and control the internal affairs of FPG by not ensuring that there were adequate arrangements for the proper supervision of staff and proper compliance procedures; and that in consequence he was no longer fit to be registered with SFA as a director.

The hearing commenced before the SFA disciplinary tribunal on 16 October 1996 and lasted 15 days. The SFA was represented by leading and junior counsel; Mr Baker was represented by Mr Hollander of counsel.

On 12 November 1996 the tribunal stated its decision orally. It cleared Mr Baker of all charges save the charge that he had failed properly to monitor the switching business carried on by BFS, which latter charge the tribunal found to be established. On 18 December 1996 the tribunal handed down its reasons in writing. It reprimanded Mr Baker in respect of the one charge which the tribunal found to have been made out, and directed that he make a contribution of £7,500 towards the SFA's costs of the hearing.

By letter dated 29 January 1997 the Secretary of State notified Mr Baker of her intention to commence disqualification proceedings against him.

On 10 February 1997 a meeting took place at the offices of the Treasury Solicitor between Mr Baker, his solicitors, Messrs Fox Williams, Mr Hollander, Mr Latif (of the Disqualification Unit) and two representatives of the Treasury Solicitor. In an affidavit sworn on this application Mr Patrick Chillery (principal examiner in the Disqualification Unit) deposes that his understanding is that at that meeting specific reference was made by Mr Baker's legal advisers to the concept of double

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jeopardy in the context of the SFA proceedings (although Mr Baker was not at that stage prepared to supply the Secretary of State with a copy of the SFA tribunal's judgment), and that careful consideration was given to all the representations made by or on behalf of Mr Baker. In the event, however (as Mr Chillery deposes), the Secretary of State was of the view that it was expedient in the public interest that a disqualification order under s 6 of the Disqualification Act be made against Mr Baker, and disqualification proceedings against him and nine other respondents were commenced on 21 February 1997. Mr Chillery further deposes that at all times since the commencement of the disqualification proceedings the Secretary of State has remained of the view that it is expedient in the public interest that a disqualification order under s 6 of the Disqualification Act should be made against Mr Baker. Mr Chillery's evidence is not challenged.

Mr Baker appealed against the SFA tribunal's decision, his appeal being heard by the SFA disciplinary appeal tribunal in May 1997. The appeal hearing lasted some six days. On 11 June 1997 the SFA appeal tribunal handed down a written judgment allowing Mr Baker's appeal and setting aside the order that he be reprimanded and the order that he contribute to the SFA's costs. A further hearing subsequently took place on the question of costs, as a result of which the SFA was ordered to contribute £50,000 towards Mr Baker's costs, on the ground that the SFA had conducted the proceedings unreasonably.

In the meantime, the disqualification proceedings were progressing through their interlocutory stages. As I mentioned at the outset of this judgment, along the way the proceedings against seven of the respondents were concluded, either under the Carecraft procedure or on an unopposed basis. So far as the remaining three respondents (including Mr Baker) are concerned, a pre-trial review took place on 13 March 1998 (attended by Mr Hollander representing Mr Baker) in the course of which various matters were discussed, including a timetable for the completion of a number of outstanding administrative and procedural matters prior to the commencement of the substantive hearing. No mention was made by Mr Hollander at the pre-trial review of the possibility of an application by Mr Baker to stay the proceedings against him. The various outstanding matters identified at the pre-trial review were duly dealt with, and the substantive hearing began on Tuesday, 12 May 1998.

As I understand the position, the first intimation the Secretary of State received of a proposed application to stay the disqualification proceedings against Mr Baker was on 12 May when Mr Hollander told Miss Gloster of his intention to make such an application. This is an aspect to which I must return. However, in opposing the application Miss Gloster did not place any reliance on the lateness of the application or the lack of advance notice of it, and accordingly in adjudicating on the application I put all such procedural considerations completely out of my mind.

I turn, then, to the arguments addressed to me by Mr Hollander and Miss Gloster.

The arguments

It is common ground between Mr Baker and the Secretary of State that this court has jurisdiction, both under RSC Ord 18, r 19 and under its inherent jurisdiction, to stay or strike out civil proceedings (including disqualification proceedings) which are an abuse of process. Further, it is common ground that civil proceedings (including disqualification proceedings) may be stayed or struck out as an abuse notwithstanding that, on a strict application, the doctrines of res judicata and issue estoppel do not apply.

In *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529 an attempt by the six men convicted of the Birmingham bombings to relitigate in civil proceedings the issue whether their confessions ought to have been received in evidence before the jury was held by the House of Lords to be an abuse. Lord Diplock began his speech in that case (with which the rest of the House agreed) as follows ([1981] 3 All ER 727 at 729, [1982] AC 529 at 536):

> 'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

Later in his speech in *Hunter*'s case [1981] 3 All ER 727 at 733, [1982] AC 529 at 541, Lord Diplock said:

> 'The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'

Thus, it is clear on authority that the court's inherent jurisdiction to prevent abuse of process in civil proceedings extends to cases where, notwithstanding that the doctrines of res judicata and issue estoppel are inapplicable, the circumstances are such that the issue or prosecution of proceedings would be vexatious or oppressive as amounting to an attempt to relitigate a case which has already in substance been disposed of by earlier proceedings—where, to use Lord Diplock's expression, the proceedings amount to a collateral attack on a decision in earlier proceedings. This aspect of the court's inherent jurisdiction to prevent abuses of its process is sometimes referred to as 'the double jeopardy rule'. In my judgment, however, the expression 'double jeopardy rule' is misleading in so far as it implies the existence of some absolute rule: as I see it, the question whether proceedings should be struck out or stayed on grounds of double jeopardy must remain a matter for the discretion of the court, in the light of the circumstances of each particular case. Lord Diplock's disavowal of the word 'discretion' in this context makes it clear that once the court has concluded, after weighing all the relevant circumstances, that a particular proceeding is an abuse of its process, it has a duty to act to prevent that abuse continuing. I would prefer to call the relevant principle the 'collateral attack principle', and I will use that term hereafter in this judgment.

As an example of the application of the collateral attack principle, Mr Hollander cites *Reichel v Magrath* (1889) 14 App Cas 665. In that case it was the defendant, not the intending plaintiff, who was held to be guilty of abuse of process. The facts were in summary as follows. Reichel brought an action

against his bishop claiming that he was the vicar of a certain benefice, and that an instrument of resignation which he had executed was null and void. The court held against him. Subsequently Magrath, in his capacity as lawful vicar of the benefice, commenced an action against Reichel claiming, among other things, an injunction against Reichel preventing Reichel from depriving him of enjoyment of the house and lands. Reichel sought to put in a defence setting up the same case as that which had failed in his action against the bishop (ie that Reichel was the lawful vicar of the benefice). The court at first instance struck out the defence as an abuse, and the Court of Appeal affirmed that decision. Reichel's appeal to the House of Lords was dismissed. Lord Halsbury LC said (at 668):

> '... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'

In *Reichel*'s case and *Hunter*'s case the previous decisions the subject of collateral attack were decisions of the English courts (the previous decision in *Hunter*'s case being the decision of the trial judge on the voire dire followed by the verdict of the jury on the facts), but the collateral attack principle has also been applied in the context of decisions of an industrial tribunal. Thus, in *Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338 the applicant, together with some 1,500 other women engaged as colliery canteen workers, complained to an industrial tribunal they had been unfairly treated, contrary to the Equal Pay Act 1970. The tribunal ordered that sample cases be selected for trial, but on the basis that the decisions in the cases selected should not be binding on other claims. The applicant did not put her claim forward for selection, notwithstanding that she was kept fully informed at all stages of the selection process. In consequence, her claim was stayed while the sample process was completed. In due course the tribunal rejected the sample claims, and its decision was upheld by the Employment Appeal Tribunal. The applicant sought to proceed with her claim, and applied for the stay to be lifted. The tribunal held that although the decision on the sample cases was not technically binding on her, to lift the stay would amount to allowing the applicant to relitigate the factual issues raised and decided in the sample cases, which would be an abuse of process. On that basis, it struck out the applicant's claim. The Employment Appeal Tribunal upheld that decision. The applicant's appeal to the Court of Appeal was dismissed. Stuart-Smith LJ said ([1990] 2 All ER 981 at 989, [1990] 2 QB 338 at 354):

> '... if the matter were relitigated on the applicant's claim, she would merely invite the tribunal to reach different findings of fact on the same evidence, as a result perhaps of different arguments being addressed to it. That, in my judgment, is not in the interests of justice; nothing could be calculated to cause a greater sense of injustice in those who lost in [the sample cases], if some other tribunal reached a different result on the same evidence.'

In *Iberian UK Ltd v BPB Industries plc* [1997] ICR 164 Laddie J applied the collateral attack principle in a case where the previous decision was a decision of the European Commission in competition proceedings; and this despite the fact that (as he held) the proceedings of the Commission were administrative and not judicial and therefore could not be described as civil proceedings. In that case, the plaintiff issued proceedings in the High Court against the defendant claiming

breaches of art 86 of the EC Treaty. Previously, the plaintiff had complained to the European Commission that the defendant had breached art 86. The Commission found breaches of art 86, and imposed substantial fines on the defendant. In the subsequent High Court proceedings, an order was made for a preliminary hearing of the issue whether the findings of fact and conclusions of the Commission were admissible and/or conclusive in the English courts. The plaintiff contended that by virtue of the principles of res judicata and/or issue estoppel it was not open to either party to relitigate the issues which had been determined by the Commission. The plaintiff further contended that it would be an abuse of process to deny the correctness and applicability of the conclusions of the Commission. Laddie J held (as noted above) that the proceedings of the Commission were administrative and not judicial, and thus could not be described as civil proceedings. In consequence, the doctrine of issue estoppel did not apply. On the other hand, he held that it was an abuse of process for the defendants to mount a collateral attack on the Commission's decision in proceedings against any party before any national court. In the course of his judgment, Laddie J said (at 179–180):

> 'Approaching the matter as one of principle, it appears that the question to be decided can be put as follows. In all the circumstances of this case should the complainant and investigatee be allowed to open up and dispute in these proceedings the final conclusions of fact or law reached in competition proceedings in Brussels and Luxembourg? If the answer to that is in the negative, it does not matter whether it is categorised as a part of the law of res judicata—i.e., that the complainant and investigatee are bound by those conclusions—or as part of the law of abuse of process—i.e., that any attempt by either of them to challenge the conclusions is improper. In either case the same public policy considerations are at work ... I have already held that, in investigating the plaintiff's complaint, the Commission was not a civil court within our terminology and the plaintiff and the defendants were not parties to a lis. But that does not do justice to the realities of the situation ... It would be wrong to discount the importance of the role played by the Commission as prosecutor. Nevertheless in large part the proceedings involved a head to head dispute between the plaintiff and the defendants as to whether or not the defendants had abused their dominant position ... A layman who said that the plaintiff and the defendants were engaged in a major antitrust battle with each other in front of the Commission could not be accused of misunderstanding what was going on.'

Later, Laddie J concluded (at 188):

> '... for the defendants to deny the correctness of the plaintiff's allegations of abuse of a dominant position amounts to an abuse of process since it would involve a collateral attack on binding decisions of the Commission ...'

In submitting that the collateral attack principle applies in the instant case, Mr Hollander relies strongly on the decision of the High Court of Australia in *Walton v Gardiner, Walton v Herron, Walton v Gill* (1993) 112 ALR 289. The factual background to that decision was in summary as follows. In 1986, complaints against three medical practitioners were referred to a medical tribunal set up under statute. The complaints alleged misconduct between 1973 and 1977. The New South Wales Court of Appeal ordered a permanent stay of the complaints against two of the medical practitioners on the ground that they were an abuse

of process given the long delay which had occurred since the events of which complaint was sought to be made. Subsequently, the tribunal itself stayed the proceedings against the third medical practitioner. In 1991, following the publication of a Royal Commission report which reported adversely on the conduct of the medical practitioners, fresh complaints were made against them which, although not the same as the earlier complaints, arose out of the same course of conduct and raised issues which substantially overlapped with the issues raised by the original complaints. The New South Wales Court of Appeal once again stayed the complaints on the ground of abuse of process (*Gill v Walton, Herron v Walton, Gardiner v Walton* (1991) 25 NSWLR 190). The High Court of Australia (by a majority of 3 to 2) affirmed that decision. The judgment of the majority includes the following passage (112 ALR 289 at 298):

> 'The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail. Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them. Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings.'

Later in the judgment (at 390), the majority turns to question of the status of the medical tribunal, in the context of an attempt to relitigate issues already disposed of by earlier proceedings:

> 'In its application to the tribunal, the concept of abuse of process requires some adjustment to reflect the fact that the jurisdiction of the tribunal, which is not a court in the strict sense, is essentially protective—ie protective of the public—in character. None the less, the legal principles and the decided cases bearing upon the circumstances which will give rise to the inherent power of a superior court to stay its proceedings on the grounds of abuse of process provide guidance in determining whether, assuming jurisdiction to do so, the circumstances of a particular case are such as to warrant an order being made by the Supreme Court staying proceedings in the tribunal on abuse of process grounds. In particular, in a context where the disciplinary power of the tribunal extends both to the making of an order permanently removing a medical practitioner from the register with consequent loss of entitlement to practise and to the imposition of a fine ... there is plainly an analogy between the concept of abuse of a court's process in relation to criminal proceedings and the concept of abuse of the tribunal's process in relation to disciplinary proceedings. In that regard, it is relevant to mention that we do not read any of the provisions of the Act as expressly or impliedly cutting

down the scope of the general supervisory jurisdiction of the Court of Appeal to stay proceedings in the tribunal on abuse of process grounds.'

Mr Hollander seeks to draw a direct analogy between the facts and the decision in *Walton v Gardiner* and the instant case.

Returning to English authority, Mr Hollander submits that there is a parallel to be drawn between the instant case and *Re Thomas Christy Ltd (in liq)* [1994] 2 BCLC 527. In that case a liquidator brought misfeasance proceedings against one of the former directors of the company. The respondent counterclaimed compensation for unfair dismissal. Previously the Secretary of State had applied for, and obtained, a disqualification order against the respondent under s 6 of the Disqualification Act. The order was made following a full hearing. In the subsequent proceedings the liquidator submitted that it would be an abuse of process to re-open issues which had been raised and adjudicated upon in the disqualification proceedings. Jacob J accepted this submission, observing that there was a massive overlap between the issues raised in the liquidator's proceedings and the issues raised in the earlier disqualification proceedings. In the course of his judgment, Jacob J said (at 537):

'The Companies Court of the Chancery Division of the High Court has found, after a full trial, [the respondent] guilty of the five wrongful acts specified above. To allow relitigation of those [issues] before the self-same court would seem absurd to Joe Citizen who through his taxes pays for the courts and whose own access to justice is impeded by court congestion. Doing this case twice over would make no sense to him ...'

Mr Hollander submits that a similar absurdity would result if the disqualification proceedings against Mr Baker were allowed to proceed.

Mr Hollander submits that the SFA and the Secretary of State acting in the role assigned to her by the Disqualification Act are both, as he puts it, 'emanations of the State' (an expression which is more usually to be found in the context of an issue as to the application of European Commission Directives). He points out that the SFA is a regulatory body recognised by the Securities and Investment Board (now called the Financial Services Authority but hereafter referred to as the SIB), pursuant to powers conferred on the Secretary of State by the Financial Services Act 1986 and delegated to the SIB. He submits that the SFA tribunal is governed by substantially the same public policy consideration as that which underlies the jurisdiction conferred on the court by the Disqualification Act, viz that of protecting the public from the commercial activities of persons unfit to be engaged in such activities; and that both involve penal sanctions and restrictions on an individual's personal liberty. He submits that the Secretary of State cannot escape the application of the collateral attack principle merely by delegating her statutory powers. He prays in aid the approach adopted by Donaldson MR in *R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening)* [1987] 1 All ER 564 at 577, [1987] QB 815 at 838–839, where he said:

'In this context I should be very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted.'

Mr Hollander advocates a similar approach in the instant case, bearing in mind particularly (a) that decisions of the SFA are susceptible of judicial review

(see *R v Securities and Futures Authority, ex p Panton* [1994] CA Transcript 767); and (b) that (as he submits) the charges against Mr Baker in the SFA proceedings and in the disqualification proceedings are substantially similar.

Mr Hollander submits that in deciding whether to stay the disqualification proceedings against Mr Baker the court must undertake a weighing process in which the particular considerations of fairness and justice to Mr Baker are weighed against the more general considerations of public interest, including the legitimate public interest in disqualifying unfit directors and the need to maintain public confidence in the administration of justice.

So far as Mr Baker's personal position is concerned, in his principal affidavit in the disqualification proceedings Mr Baker describes the pressures, both financial and personal, which he has had to face since the collapse of Barings, with particular reference to the personal and financial consequences of having to face two separate sets of proceedings calling in question his fitness to act as a director. In para 1.4.24 of his affidavit he summarises the position as follows:

> 'The stress over the last two years has been intense, not only for myself, but more so for my wife and daughter. I have faced likely ruin of my previously highly successful career. I have endured constant criticism and misinformation in the Press and in books published. I have spent my available resources on legal costs and my available time working on legal cases'.

Mr Hollander stresses that his argument for a stay is based on the particular circumstances of the instant case. He submits that the instant case is an exceptional case, in which considerations of fairness and justice to Mr Baker plainly outweigh the public policy considerations referred to above. On that basis, he submits that the collateral attack principle applies, and that the disqualification proceedings should be stayed.

Miss Gloster submits that the collateral attack principle does not apply in the instant case. Even if (which the Secretary of State does not accept) the charges against Mr Baker in the SFA proceedings were substantially similar to those made in the disqualification proceedings, the two sets of proceedings cannot (Miss Gloster submits) be equated, so as to attract the application of the collateral attack principle. She submits that the SFA cannot be regarded as an agency of the state, and she stresses the differences between the regulatory regime set up by the Financial Services Act 1986 and the statutory powers and duties of the Secretary of State under the Disqualification Act. She further draws attention to the wider scope of a disqualification order, in preventing a respondent from being concerned in the management of any company, whether or not that company carries on business in the financial services sector. She submits that there is nothing in principle or authority which justifies the conclusion that the Secretary of State is effectively bound by the decisions of the SFA tribunals, or that her statutory powers and duties under the Disqualification Act are somehow restricted or qualified by the SFA proceedings and/or the course which those proceedings took.

Miss Gloster submits that it is for the Secretary of State and no one else to decide whether disqualification proceedings should be brought, and that it cannot amount to an abuse for her to decline to accept a non-statutory alternative in the form of a decision of a domestic disciplinary tribunal. In support of this submission Miss Gloster relies on the recent decision of the Court of Appeal in *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies, Re Atlantic*

Computers plc, Secretary of State for Trade and Industry v Ashman [1998] 2 BCLC 676, [1998] 1 WLR 422. Giving the judgment of the court, Lord Woolf MR made a number of general observations on the Disqualification Act, including the following ([1998] 1 BCLC 676 at 680, [1998] 1 WLR 422 at 426):

> 'Parliament has designated the Secretary of State as the proper public officer to discharge the function of making applications to the court for disqualification orders. There is a wide discretion to do so in cases where it appears, in the prescribed circumstances, that "it is expedient in the public interest that a disqualification order should be made". In any particular case it may be decided that the public interest is best served by making and continuing an application to trial; or by not making an application at all; or by not continuing a pending application to trial; or by not contesting at trial points raised by way of defence or mitigation. All these litigation decisions are made by the Secretary of State according to what is considered by her to be "expedient in the public interest". They are not made by the court or by other parties to the proceedings.'

Later in the same section of the judgment, Lord Woolf MR said ([1998] 1 BCLC 676 at 681, [1998] 1 WLR 422 at 427):

> 'Applications under the 1986 Act are not ordinary private law proceedings, even when heard and determined by a civil court. They are made, and can only be properly be made, in cases where it is considered "expedient in the public interest" to seek a disqualification order in the specified statutory form which, when made, has serious penal consequences. The unique form of the order and the special procedure for obtaining it are prescribed by the 1986 Act.'

Miss Gloster submits, relying on Lord Diplock's reference to 'another court of competent jurisdiction' in the passage from his speech in *Hunter's* case [1981] 3 All ER 727 at 733, [1982] AC 529 at 541, which I quoted earlier in this judgment, and on the decisions of the Divisional Court in *R v Statutory Committee of Pharmaceutical Society of GB, ex p Pharmaceutical Society of GB* [1981] 2 All ER 805, [1981] 1 WLR 886 and of Popplewell J in *Saeed v Inner London Education Authority* [1985] ICR 637, that the collateral attack principle does not in any event apply where the earlier proceedings were before a domestic disciplinary tribunal such as the SFA tribunal (in *Ex p Pharmaceutical Society of GB* it was a medical tribunal; in *Saeed's* case it was the local education authority), since such a tribunal is not a court of competent jurisdiction.

Miss Gloster asks rhetorically whether Mr Hollander's argument would be the same had the SFA tribunal found the charges against Mr Baker to have been made out, or whether the argument depends upon the fact that Mr Baker was exonerated; pointing out that it would be absurd if a finding of misconduct by a disciplinary tribunal precluded subsequent disqualification proceedings based upon the same misconduct. She further submits that if Mr Hollander's argument is right, it follows that a decision is required to be taken before disqualification proceedings are commenced as to whether or not they should be preceded by domestic disciplinary proceedings—a process which is not easily reconciled with the Secretary of State's powers and duties under the Disqualification Act, as analysed by the Court of Appeal in *Re Blackspur Group plc*.

Miss Gloster submits that the Australian case of *Walton v Gardiner* is clearly distinguishable from the instant case. In *Walton v Gardiner* a second set of

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proceedings was sought to be commenced before the same tribunal, in circumstances where the earlier proceedings had been struck out as an abuse by reason of delay. None of those factors, she submits, is present in the instant case. Nor, she submits, is there a parallel between the instant case and *Re Thomas Christy Ltd*. In the first place, in *Re Thomas Christy Ltd* the earlier proceedings were, as the judge said, before 'the self-same court'. In the instant case, they are not. In the second place, Jacob J regarded it as 'particularly important' that the liquidator, although not formally a party to the disqualification proceedings, was intimately involved in them. In the instant case, submits Miss Gloster, the Secretary of State was not involved to any extent with the SFA proceedings.

Finally, should her earlier submissions not be accepted, Miss Gloster draws attention to various detailed differences between the charges made in the SFA proceedings and the allegations made in the disqualification proceedings, submitting that although they arise out of the same course of professional conduct, the charges in the two sets of proceedings are not substantially similar.

Conclusions

I turn first to Miss Gloster's submission that the collateral attack principle cannot apply in the instant case since the SFA tribunals were not courts of competent jurisdiction.

The collateral attack principle is, as Lord Diplock made clear in *Hunter*'s case, but one aspect of the court's inherent jurisdiction to prevent abuse of its process. In *Hunter*'s case, the particular abuse was—

> 'the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made *by another court of competent jurisdiction* in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.' (See [1981] 3 All ER 727 at 733, [1982] AC 529 at 541; my emphasis.)

However, I do not understand Lord Diplock to be saying that the collateral attack principle cannot apply unless the earlier decision has been made by a court of competent jurisdiction. Lord Diplock introduced that passage I have just quoted with the words: 'The abuse of process which the instant case exemplifies ...' As I read that passage from his speech, Lord Diplock is focusing on the particular factors present in *Hunter*'s case: I do not understand him to be delimiting the circumstances in which a collateral attack on an earlier decision may constitute an abuse of process. As Lord Diplock himself said in the opening paragraph of his speech in *Hunter*'s case [1981] 3 All ER 727 at 729, [1982] AC 529 at 536:

> 'It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

In the *Iberian UK Ltd* case (where the previous decision was that of a European administrative tribunal), Laddie J (at 179) concluded (as noted earlier) that 'the same public policy considerations are at work'. On that footing, he held that it would be an abuse for the defendants to mount a collateral attack on the earlier decision. In the course of his judgment, Laddie J (at 191) referred to *Hunter*'s case as follows:

'The *Hunter* case was concerned with whether a litigant could relitigate an issue determined in previous proceedings before a competent court to which he was a party. In this case it can be said that the decision of the Commission was not a decision of a competent court, although that argument would not apply to the decisions of the Court of First Instance and Court of Justice. However, *in view of the special position held by the Commission in relation to competition issues and the public policy considerations set out earlier in this judgment, I think that the underlying rationale in Hunter's case applies here as well.* To adopt the sentiments of Jeremy Bentham, to allow the defendants to argue afresh here all those points which they argued and lost in the course of eight or nine years of detailed proceedings before the competition authorities in the European Community would be absurd. I can see no compelling reason why they should be allowed a second bite at the cherry for the purpose of persuading the English courts to come to a conclusion inconsistent with that already arrived at in Europe.' (My emphasis).

I respectfully agree with the approach of Laddie J to the application of the collateral attack principle, and with his recognition of the public policy considerations which underlie the application of the principle.

I turn next to the two further authorities relied on by Miss Gloster in support of her submission that in order for the collateral attack principle to apply the previous decision must have been a decision of a court of competent jurisdiction.

In *Ex p Pharmaceutical Society of GB* three medical students, members of the Pharmaceutical Society, were convicted of criminal offences. Subsequently, the Society commenced disciplinary proceedings against them. The chairman of the disciplinary tribunal ruled that the tribunal had no jurisdiction to hear the complaints. The society applied for judicial review of tribunal's decision, seeking an order of certiorari to quash the decision and an order of mandamus directing the tribunal to proceed to hear the complaints. The Divisional Court of the Queen's Bench Division allowed the society's application. There were two issues before the Divisional Court. The first issue was whether the tribunal's decision was right. The Divisional Court concluded that it was not. The second issue was whether the maxim that no one is to be twice punished for the same offence applied. As to the second issue, Lord Lane CJ, delivering the judgment of the court, said ([1981] 2 All ER 805 at 811, [1981] 1 WLR 886 at 894):

'I can ... deal with this matter very briefly because counsel for the [tribunal] has not sought to argue against the contention advanced by the society that the maxim ... has no reference to tribunals such as this one at all. First of all, although the facts might be the same before the Central Criminal Court and before the tribunal the offence and the findings are totally distinct; and second, it is plain on the authorities that a tribunal such as this is not a court of competent jurisdiction to which the maxim applies.'

In context, and notwithstanding that the point does not seem to have been fully argued, it is clear (to my mind) that Lord Lane CJ was concerned with the double jeopardy principle as it applies in the criminal law, where it is to be found enshrined in the twin doctrines of autrefois acquit and autrefois convict. Moreover, *Ex p Pharmaceutical Society of GB* was decided before the House of Lords decision in *Hunter's* case. In my judgment, *Ex p Pharmaceutical Society of GB* is not authority for the proposition that in the context of civil proceedings the

collateral attack principle only applies where the decision the subject of collateral attack was a decision of competent jurisdiction.

Equally, Popplewell J's reference in *Saeed's* case to a court of competent jurisdiction was made in the context of the double jeopardy principle as it applies in the criminal law: what one might term the strict double jeopardy principle. Moreover, it is material to note that, having held that the strict double jeopardy principle did not apply in relation to proposed domestic disciplinary proceedings, Popplewell J went on to address broad public policy considerations of unfairness and oppression.

I accordingly conclude, in agreement with the approach of Laddie J in the *Iberian UK Ltd* case, that it is not a prerequisite for the application of the collateral attack principle that the decision the subject of the collateral attack should be a decision of a court of competent jurisdiction. The collateral attack principle falls to be applied in the context of the broad public policy question posed by Lord Diplock in *Hunter's* case, namely whether in all the circumstances of the particular case the issue or prosecution of the proceedings in question 'would ... be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'. If the answer is that it would, then the court has a duty to stay or strike out the proceedings as an abuse. That is not to say that the status of the previous decision, and its relationship (if any) with the subsequent proceedings, are not important factors in deciding whether the collateral attack principle applies in a particular case. Plainly they are important factors. But I reject the submission that the collateral attack principle cannot apply unless the previous decision was a decision of a court of competent jurisdiction. In my judgment that would result in too rigid an application of the principle.

On that footing, I proceed to consider whether the collateral attack principle applies in the particular circumstances of the instant case.

In the first place, I reject Mr Hollander's submission to the effect that in substance the SFA is the Secretary of State in another guise ('an emanation of the State'), with the consequence that in commencing disqualification proceedings against Mr Baker the Secretary of State can be said to be taking a second bite at the cherry. An analysis of the structure of regulation under the Financial Services Act 1986 and of the constitution and rules of the SFA demonstrates, in my judgment, that this submission is unsustainable.

So far as it is material to the instant case the position under the Financial Services Act 1986 is in summary as follows.

The Financial Services Act 1986 regulates the carrying on of investment business, as defined in s 1. A key element in the regulatory scheme is regulation by self-regulatory bodies, which are in effect trade or professional associations.

The regulatory structure created by the Financial Services Act 1986 consists of essentially three tiers. At the first tier, the Financial Services Act 1986 confers regulatory powers on the Secretary of State. These powers were transferred from the Secretary of State to the Treasury by the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, with effect from 7 June 1992.

At the second tier, certain of the Treasury's powers (formerly exercisable by the Secretary of State) have been delegated to a 'designated agency', namely the SIB, pursuant to s 114 of the Act. The Treasury does however retain a number of important residual powers. Paragraph 1(1) of Sch 9 to the Financial Services Act 1986 provides as follows:

'A designated agency shall not be regarded as acting on behalf of the Crown and its members, officers and servants shall not be regarded as Crown servants.'

Thus, the SIB is not an executive arm of government acting on behalf of the Secretary of State.

As a precondition of its acceptance of delegated powers, the SIB had to meet a number of requirements laid down by the Financial Services Act 1986, including the adoption of a constitution providing for a chairman and governing body consisting of persons appointed by (and liable to removal by) the Treasury and the Governor of the Bank of England acting jointly. The governing body must include persons with relevant experience of investment business, and the composition of the body must be 'balanced' (see Sch 7, para 1).

At the third tier the SIB is in turn empowered to recognise certain self-regulating bodies. There are two main forms of self-regulating body: Self-Regulatory Organisations (SROs) and Recognised Professional Bodies (RPBs). To obtain recognition, an SRO must comply with certain requirements set out in Sch 2 to the Financial Services Act 1986. These requirements are aimed at ensuring that the SRO exercises regulatory control over its members corresponding to the SIB's control over persons directly authorised by it. The SIB has power to revoke its recognition of an SRO, or to direct changes to its rules, in order to ensure compliance by the SRO with the relevant statutory requirements. The SIB also retains certain regulatory and control functions exercisable directly by it, but there are limitations on these functions in the case of persons regulated by an SRO. There are currently three SROs, of which the SFA is one.

It is important to note that the Financial Services Act 1986 does not vest any enforcement powers in the SROs. The power of an SRO to enforce its rules and regulations against its members is a contractual power, arising from the contract of membership. Mr Hollander submitted that this cannot be the case in relation to the SFA, since if it were the case decisions of the SFA would not be amenable to judicial review. In my judgment, that is a non sequitur. The SFA is amenable to judicial review because it operates in the public domain.

I turn, then, to the SFA. The SFA is a company limited by guarantee, the primary object of which is—

'to regulate the carrying on of investment business of any kinds which the Board may from time to time authorise by enforcing rules which are binding on persons carrying on business of those kinds either because they are members of the Company or because they are otherwise subject to its control'.

Appointments to the board of the SFA are confirmed by the company in general meeting. Nominations for appointment to the board are made by a nominating committee of the board, but five or more member firms may nominate an alternative candidate to stand against a committee nominee. There is no power in the Treasury or the SIB to appoint members of the board of the SFA or to control its composition, although para 5(1) of Sch 2 to the Financial Services Act 1986 requires that arrangements relating to the composition and functions of an SRO 'must be such as to secure a proper balance (a) between the interests of the different members of the organisation and (b) between the interests of the organisation or its members and the interests of the public'. Paragraph 5(2) of Sch 2 provides as follows:

'The arrangements shall not be regarded as satisfying the requirements of this paragraph unless the persons responsible for those matters include a

number of persons independent of the organisation and its members sufficient to secure the balance referred to in sub-paragraph 1(b) above.'

Article 26 of the SFA's articles of association provides that at a general meeting on a show of hands every member present in person shall have one vote. Article 27 provides that on a poll the number of votes which a member has is determined according to the number of persons who are registered in respect of that member.

A memorandum submitted by the SFA to the Treasury and Civil Service Select Committee in June 1994 contains the following description of the SFA's status and functions:

> 'SFA's remit is to regulate market-makers, brokers, arrangers and advisers to securities and derivative markets. As at 31 March 1994, it had accepted as members 1,275 firms, and thereby become responsible for their regulation under the Financial Services Act ... The size of member firms has a very wide range. Eighty per cent of the total membership comprises firms with ten or fewer individuals registered with SFA as being directors or other persons having a direct impact on investor protection ... SFA requires directors of member firms and all other persons regarded as important in terms of investor protection (mainly those with a direct relationship with investors) to be personally registered with SFA. The number of registered persons now totals some 36,750 ... SFA's regulatory arrangements are operated by the executive staff, subject to close scrutiny by several Committees of the Board, whose work in turn is reported to the Board. With the exception of the Chief Executive, members of the Committees and the Board are non-executive. A majority of the Board are [sic] industry practitioners, as is the Chairman. The Committees comprise Board members, both practitioners and independents, and co-opted expert practitioners ... *SFA's regulation operates on the basis of powers deriving from its contract with each firm admitted to membership and each responsible person or representative registered with it. These powers allow it to set its own rules, apply SIB principles and core rules, give interpretative guidance on the meaning of the rules, monitor their adherence, and discipline or expel firms or persons not adhering to them. Rule making is preceded by a process of consultation with the membership. The more important decisions about discipline and expulsion are made by the Enforcement Committee and are subject to an independent appeal process ...*' (My emphasis).

As the above extract makes clear, the SFA's disciplinary jurisdiction over its members derives from its rules: ie it is founded in contract, not in statute. In that respect, of course, it differs from the court's jurisdiction under the Disqualification Act. There are two other material differences between the two jurisdictions. In the first place, the SFA may only bring proceedings against its members or others registered with it who breach its own standards as defined in its rules (see rr 7-23 and 7-24). The basic criteria for assessing whether a person is 'fit and proper' to be registered by the SFA are set out in appendix 3 to the rules. The five criteria are: financial integrity and reliability; absence of convictions or civil liabilities; possession of suitable experience and educational or other qualifications; good reputation and character; and efficiency, honesty and fairness. Thus, the test of 'fitness' under the SFA rules is materially different to that which applies under the Disqualification Act. In the second place, the consequences of disciplinary proceedings by the SFA are materially different from those which flow from a disqualification order. Withdrawal of registration by the

SFA only affects an individual's ability to work for companies registered with the SFA and operating in the financial services sector, whereas a disqualification order under the Disqualification Act prevents an individual from being concerned in the management of any company during the period of disqualification (subject only to leave being granted under s 17).

Rule 2-24(1) of the SFA rules provides that a firm which appoints a person to a senior position (the categories are specified) must ensure that the appointee applies to be registered with the SFA. Sub-paragraph (2) of the rule provides as follows:

> 'Every applicant for admission as a registered person must agree in writing in a form acceptable to SFA to commit no act or omission which places the firm in breach of any of the rules of SFA and to be bound by and subject to the Enforcement Rules and his admission shall be conditional upon his so doing.'

Mr Baker became a registered person pursuant to that rule, thereby becoming bound by the enforcement rules of the SFA.

The above summary will (I trust) suffice to demonstrate: (a) that the SFA is not to be regarded for present purposes as the Secretary of State in another guise or (if it be different) as an 'emanation of the State'; and (b) that the regulatory regime set up by the Financial Services Act 1986, providing for the recognition of SROs which must have rules and practices designed to ensure that its members and others are fit and proper persons to carry on business in the financial services sector, is a separate regime from that which is exists under the Disqualification Act. As the Court of Appeal observed in *Re Blackspur Group plc* [1998] 1 BCLC 676 at 681, [1998] 1 WLR 422 at 427, the Disqualification Act provides for a 'unique form of the order and [a] special procedure for obtaining it'. The Secretary of State has a pivotal role in the operation of that 'special procedure', for which there is no equivalent in relation to the SFA.

For those reasons, I reject Mr Hollander's submission that the SFA is an 'emanation of the State', in the context or for the purposes of the collateral attack principle. The fact is that, as Miss Gloster submitted, prior to the commencement of the disqualification proceedings the Secretary of State had not had an opportunity of putting her case against Mr Baker. The Secretary of State neither controlled the SFA proceedings nor did she participate in them. In the instant case, in contrast to the *Iberian UK Ltd* case, there has been no previous 'head-to-head dispute' between the Secretary of State and Mr Baker.

Further, to hold that the Secretary of State is, in effect, bound by the decisions of the SFA tribunals would, in my judgment, be to sanction the imposition of a restriction on her powers and duties under the Disqualification Act which would be inconsistent with both the express terms and the underlying purpose of the Act.

So far as the express terms of the Disqualification Act are concerned, I refer once again to the Court of Appeal's analysis of the Act in *Re Blackspur Group plc*, and to its recognition of the central role conferred on the Secretary of State in operating the statutory machinery leading to the making of a disqualification order.

So far as the underlying purpose of the Act is concerned, in *Re Sevenoaks Stationers (Retail) Ltd* [1991] 3 All ER 578 at 583, [1991] Ch 164 at 176 Dillon LJ said:

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In *Re Rex Williams Leisure plc* [1994] 4 All ER 27 at 41, [1994] Ch 350 at 368 Hoffmann LJ said: 'The Secretary of State has a public duty to apply for the disqualification of unfit directors.'

I am unable to see how the underlying purpose of the Disqualification Act could be fully achieved, or the Secretary of State's public duty under that Act properly fulfilled, if her ability to apply for a disqualification order where it appears to her expedient in the public interest to do so is liable to be (in effect) foreclosed by an earlier decision of a disciplinary tribunal in proceedings over which she had no control and in which she did not participate.

I therefore reach the conclusion that no such limitation ought to be placed on the Secretary of State in the performance of her functions under the Act.

That being so, the fact that the charges brought against Mr Baker in the SFA proceedings were (as I am satisfied they were) substantially the same as those now brought against him in the disqualification proceedings (save that the SFA proceedings did not include any allegations relating to the 'SLK Receivable') cannot in my judgment affect the position.

Nor, in my judgment, are the decisions in *Walton v Gardiner* and *Re Thomas Christy Ltd* of assistance in the instant case, for the reasons submitted by Miss Gloster (as summarised earlier in this judgment).

Mr Hollander submitted that the Secretary of State has been, in effect, placed at an unfair advantage in the disqualification proceedings by reason of the access which she has had to documents in the possession of the SFA. I am not satisfied that the Secretary of State has been placed at any material advantage in this respect. On the contrary, the majority of the documents in question appear as exhibits to Mr Baker's own affidavits.

I conclude, therefore, that the collateral attack principle does not apply in the instant case.

As to Mr Baker's position, I naturally recognise (as, I have no doubt, does the Secretary of State) the stresses and strains on an individual—both personal and financial—which will almost invariably result from being involved in two separate and substantial sets of proceedings. On the other hand, I cannot go so far as Mr Hollander when he submitted that the circumstances of the instant case are 'extreme' and 'almost unique'. But even if I agreed with those epithets, that would not lead me to conclude that the disqualification proceedings against him ought to be stayed. So to conclude would, in my judgment, be to undermine substantially the statutory role, powers and duties of the Secretary of State under the Disqualification Act and substantially to frustrate the underlying purpose of the Act. Public policy dictates that the court's inherent jurisdiction should be exercised in such a way as so far as possible to prevent, rather than to encourage, such consequences.

For the reasons which I have attempted to express, therefore, I reject Mr Baker's application for a stay.

Procedural considerations

Having adjudicated on the application for a stay, I must now return to the procedural considerations which arise from the lateness of the application and from the fact that there was no advance notice of it prior to the commencement of the substantive hearing.

Of particular concern in this connection is the fact that no mention was made by Mr Hollander at the pre-trial review of the possibility of an application for a stay being made. In consequence, the substantive hearing has had to be interrupted in order to accommodate the hearing of application. Argument on the application occupied more than two days of court time, and I took a further day and a half of court time to write the judgment. In the result, a total of five court days has been lost to the substantive hearing. This in turn has meant that the estimated timetable for the substantive hearing now has no more than a curiosity value.

In any event, one might have expected that notice of at least the possibility of an application would have been given long before the stage of pre-trial review. After all, as recounted in the judgment, the question of possible double jeopardy was expressly raised by Mr Hollander in the course of the meeting with representatives of the Treasury Solicitor on 10 February 1997, before the disqualification proceedings were even commenced.

When I asked Mr Hollander for an explanation of this, he responded:

> 'We had in mind originally that we would research and consider this point and deal with it as part of our skeleton opening. In the circumstances we simply did not, because of this instruction or re-instruction issue [a reference, as I understand it, to a temporary withdrawal of instructions by Mr Baker], have time to deal with it. I was not in a position to refer to it in the skeleton opening because we simply had not done any of the research, and I was in no position to know ... whether there was a point that was proper to take in front of your Lordship or not.'

I said at the time that I did not regard that explanation as in the least bit adequate, and I regret to say that I remain of that view. If counsel appearing at a pre-trial review regards himself as unable to assist the court and the other parties by alerting them to the possibility (and it may be no more than that), of which he is aware, that a further interlocutory application may be made which (if made) would inevitably disrupt the substantive hearing, then the pre-trial review is reduced to a futile exercise. I cannot stress too strongly the requirement for co-operation by the parties with each other and with the court at the stage of the pre-trial review, if the pre-trial review process is to stand any chance of achieving its intended and much-desired purpose of disposing of the litigation in the most efficient and cost-effective way, for the benefit of the parties and the public.

In the instant case, had Mr Hollander mentioned the possibility of an application for a stay at the pre-trial review, steps could have been taken to arrange for the application (if proceeded with) to be heard and adjudicated upon prior to the commencement of the substantive hearing. As it is, the consequence of his not doing so has been disruption and delay which is unfair to the other parties and which has thrown the timetable for the substantive hearing into chaos.

I can only express the earnest hope that such a situation does not occur again. It makes a mockery of case management.

Application dismissed. Leave to appeal refused.

Celia Fox Barrister.

Application for leave to appeal

Mr Baker applied for leave to appeal. Mr Tuckey and Mr Gamby took no part in the proceedings. The facts are set out in the judgment of Chadwick LJ.

Charles Hollander and *Jasbir Dhillon* (instructed by *Fox Williams*) for Mr Baker.

Elizabeth Gloster QC, Malcolm Davis-White and *Edmund Nourse* (instructed by the *Treasury Solicitor*) for the Secretary of State.

CHADWICK LJ (giving the first judgment at the invitation of Swinton Thomas LJ). This is an application for leave to appeal from a decision of Jonathan Parker J given in the course of proceedings brought by the Secretary of State for Trade and Industry under the Company Directors Disqualification Act 1986 (the Disqualification Act) against former directors of Barings plc and associated companies. The circumstances in which the application is made cannot be regarded as other than unsatisfactory.

The Barings Group collapsed in February 1995, following the discovery of unauthorised trading on a massive scale on the part of an individual trader in its Singapore office. Administration orders were made on 26 and 27 February 1995 in the High Court in London in relation to Barings plc itself, one of its principal operating subsidiaries, Baring Bros & Co Ltd (BB & Co), and operating subsidiaries of BB & Co, Baring Securities Ltd (BSL) and Barings Securities (London) Ltd (BSLL). On 21 February 1997 the Secretary of State commenced the present proceedings against ten former directors. Disqualification orders have since been made, either under the Carecraft procedure or without opposition, against seven out of those ten directors.

The substantive trial in relation to the remaining three directors commenced before Jonathan Parker J on 12 May 1998. It was estimated to last several weeks. On the first day of the trial the judge was told that one of the respondents, Mr Ron Baker, wished to apply for a stay of the proceedings against him. No previous indication of that intention had been given to the court or to counsel for the Secretary of State; notwithstanding that there had been an earlier pre-trial review at which counsel instructed on behalf of Mr Baker had been present. In the event, the judge was obliged to hear the application immediately following the opening speeches and before any evidence had been called. He delivered judgment on Friday, 5 June 1998. That was the twelfth day of the trial. He dismissed the application for a stay and refused leave to appeal from that decision. But, as he was bound to do in the circumstances, he adjourned the further hearing of the trial so that Mr Baker might have an opportunity to seek leave from this court. It is that application which is now before us.

We have heard the application for leave as a matter of urgency—with the appeal itself listed to be heard before us if leave were granted—so that, whether or not leave is granted, the trial (which, in any event, continues against the other two directors) can proceed without further disruption. The effect has been that other appeals, listed to be heard at the beginning of this week, have been displaced; no doubt to the considerable inconvenience of the parties and their advisers. This unsatisfactory position could have been avoided if notice of Mr Baker's intention to seek a stay of these proceedings had been given—as it should have been given—at the pre-trial review. As the judge rightly observed, counsel's failure to give notice of so fundamental an application at the appropriate time has led to disruption and delay which is unfair to the other parties in these proceedings—and, I would add, to the parties whose appeals have

been displaced to make way for this application—and has thrown the timetable for the trial into chaos. The course adopted has made a mockery of the case management of these proceedings. It is essential that counsel in heavy proceedings should recognise and fulfil their responsibilities in this respect both to the court and to other court users in relation to orderly and effective case management. Having said that, I am conscious that I may not have a full appreciation of the constraints under which counsel for Mr Baker may have been labouring in the present case. In those circumstances it is inappropriate to criticise him personally.

The basis of Mr Baker's application to the judge for a stay was that the present proceedings constitute an abuse of the process of the court; in that they infringe the principle against double jeopardy—alternatively, subject him to unacceptable unfairness, oppression and injustice—in the circumstances that he has already had to face disciplinary proceedings brought by the Securities and Futures Authority (the SFA) in respect of what is said to be substantially the same conduct as that upon which the present disqualification proceedings are founded.

The SFA proceedings extended over a period from 20 July 1995 (when Mr Baker was sent a notice of investigation) until 23 September 1997 (when the disciplinary appeal tribunal finally disposed of all matters before it). In the course of the SFA proceedings Mr Baker attended, with solicitors and counsel, at a 15-day oral hearing before the SFA disciplinary tribunal and conducted his appeal in person over five days before the appeal tribunal. All charges against him were dismissed. The appeal tribunal ordered the SFA to pay £50,000 towards Mr Baker's costs. It is not surprising that Mr Baker feels that 'enough is enough'. It is understandable that he feels that the Secretary of State is acting oppressively in pursuing the present proceedings in which—as Mr Baker sees it—the same ground will be raked over again in minute detail and at huge expense. It is impossible not to feel sympathy for a respondent faced with the enormous stress of resisting prolonged disqualification proceedings brought by a government department with all the resources of the state behind it. That sympathy is no less in circumstances in which no allegation of dishonesty is made; and in which his conduct has already been vindicated before the body having regulatory powers under the Financial Services Act 1986.

But, as the judge appreciated, sympathy for Mr Baker in his predicament is not a ground for staying proceedings brought against him under the Disqualification Act. It is not in dispute that the proceedings were commenced because it appeared to the Secretary of State that it was expedient in the public interest that a disqualification order under s 6 of the Act should be made against Mr Baker. That is the necessary precondition prescribed by s 7 of the Act. Nor is it in dispute that the Secretary of State continues to take the view that, notwithstanding the outcome of the appeal in the SFA proceedings, it remains expedient in the public interest that a disqualification order should be sought. The decisions whether or not to commence, and thereafter to pursue, applications to the court for disqualification orders have been entrusted by Parliament to the Secretary of State. It is for her, and not for the court, to make those decisions: see the judgment of this court in *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies, Re Atlantic Computers plc, Secretary of State for Trade and Industry v Ashman* [1998] 1 BCLC 676 at 680, [1998] 1 WLR 422 at 426. A court is not entitled to intervene and stay proceedings because it may take the view that the Secretary of State is acting in a manner that it may regard as over-zealous. That

would be to substitute the court's view of what is expedient in the public interest for her view. That is no part of the court's role.

The basis upon which the court can interfere, by granting a stay of proceedings, is to protect its own process from abuse. The existence of the jurisdiction is not open to doubt. It was affirmed by Lord Diplock in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536, when he spoke of—

> 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedure rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.'

Hunter's case was a case in which the abuse lay in the attempt to mount a collateral attack in civil proceedings on a final decision reached in a criminal court of competent jurisdiction. It is accepted that, as the judge found, the present case does not involve a collateral attack on the findings of the SFA tribunals. But, as Lord Diplock ([1981] 3 All ER 727 at 729, [1982] AC 529 at 536) acknowledged in the sentences following that to which I have just referred:

> 'The circumstances in which abuse of process can arise are very varied ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

Stuart-Smith LJ took the same view in *Ashmore v British Coal Corp* [1990] 2 All ER 981 at 987, [1990] 2 QB 338 at 352, when he said:

> '... it is dangerous to try and define fully the circumstances which can be regarded as an abuse of process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend on all the relevant circumstances.'

The application of the principle to cases of double jeopardy—in which the defendant is at risk of being tried twice for offences arising out of the same facts—is well illustrated by two decisions in the Supreme Court of New South Wales: *Cooke v Purcell, Cooke v Whitbread, A-G v Purcell* (1988) 14 NSWLR 51 and *Gill v Walton, Herron v Walton, Gardiner v Walton* (1991) 25 NSWLR 190. The latter case went, on appeal, to the High Court of Australia, sub nom *Walton v Gardiner, Walton v Herron, Walton v Gill* (1993) 112 ALR 289. The judgment of the majority (Mason CJ, Deane and Dawson JJ) contains (at 298) the following statement of the law in Australia:

> 'The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exists to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.'

The overriding consideration, as it seems to me, is the need to preserve public confidence in the administration of justice. The court is entitled—indeed bound—to stay the proceedings where to allow them to continue would threaten its own integrity. In the words of Lord Diplock, proceedings should be stayed

where to allow them to continue would bring the administration of justice into disrepute among right thinking people.

Right-thinking people will not rush to a conclusion that—in refusing to stay the disqualification proceedings—the court is allowing its process to be used as an instrument of oppression, injustice or unfairness—in short, that the process of the court is being abused—without taking care to understand the nature of the SFA proceedings and of the present disqualification proceedings and the interrelation between them. It is necessary, as the judge appreciated, to examine whether the issues upon which the court will need to adjudicate in the present proceedings are the same, or substantially the same, as those which have already been investigated and adjudicated upon in the SFA proceedings.

The Securities and Futures Association is a 'self-regulating organisation' for the purposes of the Financial Services Act 1986. Members of the SFA are authorised persons within Ch III of Pt I of that Act. As such, they can carry on investment business in the United Kingdom without committing an offence under s 4 of that Act. Mr Baker became a registered person under the rules of the SFA in 1988. It was necessary for him to do so because the firm for which he was working was itself a member of the SFA and so bound by the SFA rules. Rule 2-24 requires that a firm which appoints a person to the position of senior executive officer, compliance officer, finance officer, registered director, partner, manager, representative, trader or yellow jacket (that is to say a person working on the floor of London International Financial Futures and Options Exchange) must ensure that that person is a registered person. In practice, therefore, a person in the position of Mr Baker must be and remain a registered person under the rules of the SFA if he is to obtain employment within an organisation which carries on investment business. As such, he, himself, became subject to the SFA rules; and, in particular, to the 'principles', issued by the Securities and Investments Board on behalf of the Secretary of State under s 47A of the Financial Services Act 1986, which are intended to form a universal statement of the standards expected in the conduct of investment business: see r 2-24(3). An applicant for registration must satisfy the 'fit and proper person' test set out in appendix 3 to the SFA rules.

Chapter 7 of the SFA rules contains provisions for enforcement. In the present case, following the publication on 18 July 1995 by the Board of Banking Supervision of its report into the circumstances of the collapse of Barings, the SFA gave notice to Mr Baker that it intended to carry out an investigation into his involvement in that collapse. It suspended his registration. On 14 March 1996 the SFA gave notice to Mr Baker of its decision to institute disciplinary proceedings against him. The grounds stated were these:

> '1. During the period between 1 January 1994 and 24 February 1995 Mr Baker failed to act with due skill, care and diligence in breach of principle 2 of the SIB's Statements of Principle in that he failed properly to understand and monitor the proprietary trading activity undertaken by Baring (Futures) Singapore Pte Ltd or to ensure that this was done, which is an act of misconduct; 2. During the period between 1 January 1994 and 24 February 1995 Mr Baker failed to organise and control the internal affairs of the Financial Products Group in breach of principle 9 of the SIB's Statements of Principle in that he failed to ensure that there be adequate arrangements for the proper supervision of staff and that there be well defined compliance procedures, which is an act of misconduct; 3. Further,

or in the alternative, by SFA as a director

Barings Futures (Singapc which Barings carried Exchange (SIMEX). It v who was based in Singap or certain of its activitie Financial Products Grou as set out in its not 14 March 1996, were, ir nature of the switching l explanations given to hi capital implications of t monitor the trading Mr Leeson; and that he were reduced promptl 25 January 1995.

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or in the alternative, Mr Baker has ceased to be fit and proper to be registered by SFA as a director.'

Barings Futures (Singapore) Pte Ltd (BFS) was the company in Singapore through which Barings carried on trading on the Singapore International Monetary Exchange (SIMEX). It was managed on a day-to-day basis by Mr Nick Leeson, who was based in Singapore. It was an operating subsidiary of BSL. Its activities, or certain of its activities, fell under the supervision of Mr Baker as head of the Financial Products Group. The complaints made against Mr Baker by the SFA, as set out in its notice of institution of disciplinary proceedings dated 14 March 1996, were, in substance, that he failed properly to understand the nature of the switching business carried on in Singapore but simply accepted the explanations given to him by Mr Leeson; that he failed properly to consider the capital implications of the funding of the business; that he failed properly to monitor the trading activity—relying only on information provided by Mr Leeson; and that he failed to ensure that the positions taken by Mr Leeson were reduced promptly when he, Mr Baker, was instructed to do so on 25 January 1995.

The disciplinary tribunal addressed those three grounds of complaint, or 'charges' as they were described in the decision which it delivered on 18 December 1996. The tribunal recorded in para 1.1 of that decision that the SFA had made it plain throughout the proceedings before it, that it was no part of the SFA's case that the alleged acts or omissions of Mr Baker had in anyway contributed to the collapse of Barings. The tribunal dismissed the charges under grounds 2 and 3. In relation to ground 3 the tribunal said:

> '9.8.4. In our judgment, none of the evidence we heard went any distance towards establishing, even on the barest balance of probabilities, let alone according to the higher end of the flexible standard of proof that we have adopted for the reasons set out above, that Mr Baker is by virtue of our findings, in any way not a fit and proper person to be registered by SFA as a director.'

The tribunal was not satisfied, under ground 1, that the SFA had established that Mr Baker had failed properly to understand the proprietary trading (or switching) activity undertaken by BFS. But the tribunal was satisfied that Mr Baker had failed properly to monitor that activity. Mr Baker appealed against that finding to a disciplinary appeal tribunal under the chairmanship of Lord Bridge of Harwich. The appeal tribunal gave its decision on 11 June 1997. It drew attention to the inconsistency between the statement in the decision below that it was not part of the SFA's case that the alleged acts or omissions of Mr Baker had in any way caused or contributed to the collapse of Barings—to which I have already referred and which was repeated in the first sentence of 9.1—and the observation that it was a central part of the SFA's case that had Mr Baker properly understood and monitored and managed the switching business conducted by BFS, which was the business for which Mr Baker had formally accepted responsibility in his defence of 7 May 1996, the unauthorised activities of Mr Leeson could have been uncovered at an earlier stage. The appeal tribunal held that the tribunal below had misdirected itself in treating any potential link between the switching business and Mr Leeson's unauthorised trading, which a timely investigation by Mr Baker could have uncovered, as a relevant factor on which the SFA relied. The appeal tribunal reached the conclusion that that misdirection, coupled with

the absence of any direct evidence as to the steps which a competent person in the position of Mr Baker would have taken in monitoring the switching business beyond those which Mr Baker had taken, vitiated the findings in the decision below, that Mr Baker fell short of the standards of a reasonably prudent manager in failing adequately to monitor BFS's trading activities and to take action in response to the extraordinarily large revenues which those activities had appeared to generate.

Mr Baker became a director of BB & Co on 27 April 1992. It is not alleged that he was a director of BSL, BSLL or BFS. The conduct in issue in the SFA proceedings was Mr Baker's conduct as head of the Financial Products Group, an amalgam of the derivatives businesses of BSL and the financial products operations of BB & Co. His conduct as a director of BB & Co, owing duties as such to BB & Co under the Companies Act 1985 and under the general law, was not in issue in the SFA proceedings. The charges against him in those proceedings were that he failed to act with the due care and skill of a prudent manager—that is to say, that he had fallen below the standards observed by ordinarily skilled and competent members of his profession. In effect, that he was guilty of professional negligence. That this was the basis on which the issues were approached both by the tribunal and the appeal tribunal appears from the analysis in the judgment of the tribunal; an analysis expressly approved by the appeal tribunal. The appeal tribunal put the point in these terms:,

> 'The "profession" practised by Mr Baker was, it seems clear, one requiring a high degree of specialisation and an exceptional expertise. How then was it to be shown that he fell short of the standard required of a reasonably competent member of that profession and that in the situation which confronted him in January 1995, any competent member of the profession would have taken steps to monitor Leeson's conduct of the switching business beyond those which Mr Baker had taken and which the tribunal appeared to have accepted as adequate "throughout 1994".'

It is because the inquiry was into the professional competence of Mr Baker as a manager that the question whether or not his alleged failure adequately to monitor Mr Leeson's activities contributed to the collapse of Barings was, indeed, irrelevant to the issues which the tribunal had to consider.

By contrast, Mr Baker's conduct as a director of BB & Co is central to the disqualification proceedings. Section 6 of the Disqualification Act requires the court to make a disqualification order if, but only if, it is satisfied that his conduct *as a director* of the company which has become insolvent makes him unfit to be concerned in the management of a company. Section 9 of that Act requires the court, when considering whether a person's conduct as a director of any particular company makes him unfit to be concerned in the management of a company, to have regard, *as respects his conduct as a director of that company*, to the matters mentioned in Sch 1 to the Act. Those matters include, in Sch 1, Pt II, para 6: 'The extent of the director's responsibility for the causes of the company becoming insolvent.' The disqualification proceedings, therefore, will necessarily involve an investigation into the very matter which was held not to be relevant in the SFA proceedings—namely what responsibility did Mr Baker have as a director of BB & Co, for the insolvency of BB & Co. That may well require consideration of what Mr Baker did, or did not, understand or do about Mr Leeson's activities in Singapore; but the consideration will take place in a different context. The relevant question will be whether Mr Baker's acts or

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omissions fell so far short of the competence required of a director of BB & Co that the court ought to reach the conclusion that he is unfit to be concerned in the management of a company—that is to say, any company. That is not at all the same question as that which the tribunal had to consider—namely whether Mr Baker was a fit and proper person to remain on the SFA register.

The judge appreciated the distinction. He pointed out that the test of 'fit and proper person' under the SFA rules is materially different from that which the court is required to apply under the Disqualification Act. He appreciated that the underlying purpose of disqualification under the Act is materially different from deregistration under the SFA rules. He said (p 331, ante):

> 'I am unable to see how the underlying purpose of the Disqualification Act could be fully achieved, or the Secretary of State's public duty under that Act properly fulfilled, if her ability to apply for a disqualification order where it appears to her expedient in the public interest to do so is liable to be (in effect) foreclosed by an earlier decision of a disciplinary tribunal in proceedings over which he had no control and in which he did not participate.'

I agree with that view. The question for us on this application is whether to give leave to appeal against the judge's decision to refuse a stay of the disqualification proceedings against Mr Baker. To put the case for Mr Baker at its highest, an appeal could not succeed unless this court were persuaded that to allow the disqualification proceedings to proceed would risk bringing the administration of justice into disrepute among right thinking people having a proper understanding of the different nature of the regulatory provisions which affect him; the one under the SFA rules and the other under the Disqualification Act. I am not satisfied that that test could be met.

Accordingly, an appeal would serve no useful purpose and this application should be refused.

WALLER LJ. I agree that this application for leave to appeal must be refused. It was common ground before the judge and it was common ground before us that the court has jurisdiction both under RSC Ord 18, r 19 and its inherent jurisdiction to stay proceedings that are an abuse of its process. It is furthermore common ground that the limits of that jurisdiction are not clearly defined; that they go beyond circumstances in which the doctrines of res judicata or issue estoppel apply is clear. The jurisdiction indeed exists if proceedings are being used for some improper or collateral purpose. However, it is not a jurisdiction that will be exercised lightly, and it is not for the court to interfere in the decisions of parties to litigate and bring their proceedings to court unless there is an abuse, that is to say some factor which makes the continuation of the proceedings 'manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people': see Lord Diplock in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 in the passage quoted by the judge (p 318, ante) in his judgment and already quoted by Chadwick LJ.

The central plank on which Mr Hollander, on behalf of Mr Baker, rests his submissions in this case is the principle of double jeopardy by reason of the proceedings instituted by the SFA, backed by the assertion that the continuation of the disqualification proceedings would subject Mr Baker to unacceptable injustice, oppression and unfairness.

I agree with the judge that it is not an answer to Mr Hollander's submission simply to say that the SFA disciplinary tribunal or, indeed, the appeal tribunal is not a court of competent jurisdiction, therefore the question of double jeopardy does not apply. But I also agree with the judge that Mr Hollander cannot succeed simply because he can show that to a great extent the same facts will be explored in the disqualification proceedings as were explored in the SFA tribunals.

My reasons for believing the judge was clearly right can be summarised as follows.

(1) As explained by Chadwick LJ and the judge, the question to be answered in the different proceedings is in fact materially different. The SFA is concerned with whether the conduct is such as to render a director unfit to be registered in accordance with the SFA rules. A finding that he was or a finding that he was not cannot necessarily answer the question which arises under disqualification proceedings which is whether he is fit to be a director of *any* company.

(2) It cannot be right that the decision of the Secretary of State taken pursuant to her public duty, to bring or pursue proceedings under the Company Directors Disqualification Act 1986 (the Disqualification Act), can be foreclosed by proceedings brought quite independently under the SFA disciplinary procedures. I am not persuaded that it is arguable that because of the statutory context in which the SFA acts somehow the SFA is an emanation of the state so as to lead to the conclusion that in reality it is the same party who brought the disciplinary proceedings before the SFA as brings the disqualification proceedings now sought to be stayed.

(3) If it could be argued that the Secretary of State had encouraged or controlled the SFA disciplinary proceedings, so as to bring them on prior to bringing the disqualification proceedings and so as to take advantage in some way of those proceedings, that might produce an entirely different situation. There is simply nothing to suggest that that was so. It is asserted that the Secretary of State is now seeking to use the judgment and other documents resulting from the SFA proceedings, but the use does appear exceedingly limited, and cannot, in my view, be said to support any abuse of the court's process in the light of the independence of the original SFA proceedings.

(4) I am doubtful whether, but for the complexity and length of both sets of proceedings, an application on the grounds of double jeopardy would really have been contemplated. For example, if one envisages a one hour application before the SFA and a one-hour application under the Disqualification Act, having regard to the very different aspects with which the two sets of proceedings are concerned, an application to prevent the Secretary of State exercising her discretion in favour of bringing the disqualification proceedings would be almost unthinkable. Unfortunately the complexity and length of both sets of proceedings is dictated by the subject matter. One must, of course, feel sympathy for any person who is involved in such proceedings.

What I would say, however, is that even now, if in the disqualification proceedings there were any sign of them being conducted in a way which was disproportionate in the sense of being more complex and more lengthy than the seriousness of the charges warranted, the court would still have the power to prevent its procedures being abused.

As I previously said, in my view an appeal by Mr Baker from the judge's ruling would be unarguable and, in those circumstances, this application should be dismissed.

SWINTON THOMAS LJ. I have no doubt that in appropriate circumstances the court has power under its inherent jurisdiction to stay proceedings brought by the Secretary of State for Trade and Industry to disqualify a director under the provisions of the Company Directors Disqualification Act 1986 on the ground of abuse of process. However, where proceedings are properly constituted that power will be exercised only in exceptional circumstances: see *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529. Mr Hollander submits that such circumstances exist in the present case.

In *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 at 150, [1994] 1 AC 42 at 62, an extradition case brought initially before a stipendiary magistrate, Lord Griffiths said:

> '... 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 in refusing to act upon it.'

The same principle applies to proceedings under the 1986 Act. Lord Griffiths stressed that it was, however, a power to be sparingly exercised. However, having said that, if the court, having balanced all the factors, in particular the concept of fairness and the public interest, concludes that the continuation of the proceedings amounts to an abuse of process, they will not hesitate to grant a stay. It must be stressed that proceedings under the 1986 Act are brought in the interests of, and for the protection of, the public and that is one of the reasons why the power to stay must be sparingly used.

Of the many authorities cited to us by Mr Hollander, I have found in *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies, Re Atlantic Computers plc, Secretary of State for Trade and Industry v Ashman* [1998] 1 BCLC 676, [1998] 1 WLR 422 the most helpful. Mr Hollander submits that *Re Blackspur Group plc* is a different case to the instant case. That is true, but it does not detract from the general principles set out in that case and it is of importance that Lord Woolf MR set out a heading, 'General observations on the 1986 Act' (see [1998] 1 BCLC 676 at 680, [1998] 1 WLR 422 at 426).

Lord Woolf MR said ([1998] 1 BCLC 676 at 678, [1998] 1 WLR 442 at 424):

> 'The issue is whether, in the face of undertakings offered to the court by Mr Vernon Davies, a respondent to two sets of proceedings under the Company Directors Disqualification Act 1986 (the 1986 Act), the Secretary of State for Trade and Industry (the Secretary of State) may properly continue the proceedings initiated with a view to obtaining disqualification orders against him. The refusal of the Secretary of State to discontinue the proceedings on those undertakings and her decision to press on with the proceedings have inspired two sets of applications. Both were dismissed by Rattee J on 22 November 1996. His judgment is reported at [1997] 2 BCLC 96, [1997] 1 WLR 710. The first set of applications seeks stays of the proceedings on the ground that it would be oppressive to Mr Davies, prejudicial to the interests of the public and a misuse of the procedure of the court for the Secretary of State to pursue them. The second is for leave to

issue applications for judicial review of the decision to continue the proceedings and to refuse consent to stays on the basis of the undertakings offered.'

Under the heading: 'General observations on the 1986 Act', Lord Woolf MR said ([1998] 1 BCLC 676 at 680, [1998] 1 WLR 442 at 426):

'The instant issue should be viewed in the context of general considerations appearing in the regulatory scheme of the 1986 Act and in judicial decisions interpreting and applying it. (1) The purpose of the 1986 Act is the protection of the public, by means of prohibitory remedial action, by anticipated deterrent effect on further misconduct and by encouragement of higher standards of honesty and diligence in corporate management, from those who are unfit to be concerned in the management of a company. (2) Parliament has designated the Secretary of State as the proper public officer to discharge the function of making applications to the court for disqualification orders. There is a wide discretion to do so in cases where it appears, in the prescribed circumstances, that "it is expedient in the public interest that a disqualification order should be made". In any particular case it may be decided that the public interest is best served by making and continuing an application to trial; or by not making an application at all; or by not continuing a pending application to trial; or by not contesting at trial points raised by way of defence or mitigation. All these litigation decisions are made by the Secretary of State according to what is considered by her to be "expedient in the public interest". They are not made by the court or by other parties to the proceedings. (3) Once proceedings have been brought to trial, it is for the court, not for the Secretary of State or for any other party, to decide whether a disqualification order should or should not be made. A court can only make a disqualification order if it is "satisfied" on the prescribed statutory matters. As the court must be "satisfied" of those matters, it is not appropriate for the court to act, or even for the court to be asked to act, as a rubber stamp on a proposed consent order, without regard to its factual basis ... (4) Applications under the 1986 Act are not ordinary private law proceedings, even when heard and determined by a civil court. They are made, and can only be properly made, in cases where it is considered "expedient in the public interest" to seek a disqualification order in the specified statutory form which, when made, has serious penal consequences. The unique form of the order and the special procedure for obtaining it are prescribed by the 1986 Act. Significantly, the 1986 Act does not expressly equip the court with a discretion to deploy the armoury of common law and equitable remedies to restrain future misconduct (injunction or undertaking in lieu of injunction), to punish for disregard of restraints imposed by court order (contempt powers of imprisonment or fine), to compensate for past loss unlawfully inflicted (damages) or to restore benefits unjustly acquired (restitution).'

Then Lord Woolf MR concluded his judgment by saying ([1998] 1 BCLC 676 at 688, [1998] 1 WLR 442 at 433–434):

'In these circumstances the Secretary of State is entitled to take the position that it appears to her expedient in the public interest to prosecute these proceedings. It is impossible to say, on an objective assessment of all the relevant factors, that it is unfair, oppressive or a misuse of the process of the

court for her to do so. She is entitled to rely on the statutory machinery, which provides for the making of a disqualification order on a basis that requires a factual foundation based on evidence, either contested or conceded by the respondent in court.'

We must apply those general principles to the instant case. In agreement with Jonathan Parker J, I have no doubt that Mr Baker and his family have suffered much hardship as a result of having to contest proceedings brought both by the SFA and by the Secretary of State. There is no doubt that proceedings such as these do bring very great hardship in their wake to the respondents to them. In a case where the allegation against the director or directors is not one of dishonesty but is one which may be described compendiously as negligence as a director, I trust that the department and those who advise the Secretary of State think long and hard before they decide to institute proceedings or, as the case may be, to continue them. We, of course, were not a party to the decision making and there is no evidence before us which would suggest that that did not happen in this case.

In his very able submissions Mr Hollander relied primarily, albeit not exclusively, on the fact that proceedings were taken initially by the SFA and that Mr Baker was eventually acquitted of all the charges laid against him. Mr Hollander concedes that as a matter of principle the Secretary of State is entitled to bring disqualification proceedings following an acquittal in proceedings brought by the SFA. He concedes that the proceedings are properly constituted. He does not submit that there has been lengthy and undue delay in bringing the proceedings, and he does not submit that Mr Baker can no longer have a fair hearing. As I have said, he submits that if the court weighs all the circumstances of this case in the balance, the continuation of these proceedings is so oppressive as to justify a stay.

It is true that the underlying facts of the charges brought by the SFA and the Secretary of State are the same. However, as Chadwick LJ has set out very fully in his judgment, the status, the issues and the consequences of the two sets of proceedings have very important differing features.

I agree with the judgments that have been given by Chadwick and Waller LJJ. For the reasons given I also would refuse leave to appeal.

Application for leave to appeal dismissed.

Kate O'Hanlon Barrister.

the absence of any direct evidence as to the steps which a competent person in the position of Mr Baker would have taken in monitoring the switching business beyond those which Mr Baker had taken, vitiated the findings in the decision below, that Mr Baker fell short of the standards of a reasonably prudent manager in failing adequately to monitor BFS's trading activities and to take action in response to the extraordinarily large revenues which those activities had appeared to generate.

Mr Baker became a director of BB & Co on 27 April 1992. It is not alleged that he was a director of BSL, BSLL or BFS. The conduct in issue in the SFA proceedings was Mr Baker's conduct as head of the Financial Products Group, an amalgam of the derivatives businesses of BSL and the financial products operations of BB & Co. His conduct as a director of BB & Co, owing duties as such to BB & Co under the Companies Act 1985 and under the general law, was not in issue in the SFA proceedings. The charges against him in those proceedings were that he failed to act with the due care and skill of a prudent manager—that is to say, that he had fallen below the standards observed by ordinarily skilled and competent members of his profession. In effect, that he was guilty of professional negligence. That this was the basis on which the issues were approached both by the tribunal and the appeal tribunal appears from the analysis in the judgment of the tribunal; an analysis expressly approved by the appeal tribunal. The appeal tribunal put the point in these terms:

> 'The "profession" practised by Mr Baker was, it seems clear, one requiring a high degree of specialisation and an exceptional expertise. How then was it to be shown that he fell short of the standard required of a reasonably competent member of that profession and that in the situation which confronted him in January 1995, any competent member of the profession would have taken steps to monitor Leeson's conduct of the switching business beyond those which Mr Baker had taken and which the tribunal appeared to have accepted as adequate "throughout 1994".'

It is because the inquiry was into the professional competence of Mr Baker as a manager that the question whether or not his alleged failure adequately to monitor Mr Leeson's activities contributed to the collapse of Barings was, indeed, irrelevant to the issues which the tribunal had to consider.

By contrast, Mr Baker's conduct as a director of BB & Co is central to the disqualification proceedings. Section 6 of the Disqualification Act requires the court to make a disqualification order if, but only if, it is satisfied that his conduct *as a director* of the company which has become insolvent makes him unfit to be concerned in the management of a company. Section 9 of that Act requires the court, when considering whether a person's conduct as a director of any particular company makes him unfit to be concerned in the management of a company, to have regard, *as respects his conduct as a director of that company*, to the matters mentioned in Sch 1 to the Act. Those matters include, in Sch 1, Pt II, para 6: 'The extent of the director's responsibility for the causes of the company becoming insolvent.' The disqualification proceedings, therefore, will necessarily involve an investigation into the very matter which was held not to be relevant in the SFA proceedings—namely what responsibility did Mr Baker have as a director of BB & Co, for the insolvency of BB & Co. That may well require consideration of what Mr Baker did, or did not, understand or do about Mr Leeson's activities in Singapore; but the consideration will take place in a different context. The relevant question will be whether Mr Baker's acts or

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The judge appreciated the distinction. He pointed out that the test of 'fit and proper person' under the SFA rules is materially different from that which the court is required to apply under the Disqualification Act. He appreciated that the underlying purpose of disqualification under the Act is materially different from deregistration under the SFA rules. He said (p 331, ante):

> 'I am unable to see how the underlying purpose of the Disqualification Act could be fully achieved, or the Secretary of State's public duty under that Act properly fulfilled, if her ability to apply for a disqualification order where it appears to her expedient in the public interest to do so is liable to be (in effect) foreclosed by an earlier decision of a disciplinary tribunal in proceedings over which he had no control and in which he did not participate.'

I agree with that view. The question for us on this application is whether to give leave to appeal against the judge's decision to refuse a stay of the disqualification proceedings against Mr Baker. To put the case for Mr Baker at its highest, an appeal could not succeed unless this court were persuaded that to allow the disqualification proceedings to proceed would risk bringing the administration of justice into disrepute among right thinking people having a proper understanding of the different nature of the regulatory provisions which affect him; the one under the SFA rules and the other under the Disqualification Act. I am not satisfied that that test could be met.

Accordingly, an appeal would serve no useful purpose and this application should be refused.

WALLER LJ. I agree that this application for leave to appeal must be refused. It was common ground before the judge and it was common ground before us that the court has jurisdiction both under RSC Ord 18, r 19 and its inherent jurisdiction to stay proceedings that are an abuse of its process. It is furthermore common ground that the limits of that jurisdiction are not clearly defined; that they go beyond circumstances in which the doctrines of res judicata or issue estoppel apply is clear. The jurisdiction indeed exists if proceedings are being used for some improper or collateral purpose. However, it is not a jurisdiction that will be exercised lightly, and it is not for the court to interfere in the decisions of parties to litigate and bring their proceedings to court unless there is an abuse, that is to say some factor which makes the continuation of the proceedings 'manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people': see Lord Diplock in *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 in the passage quoted by the judge (p 318, ante) in his judgment and already quoted by Chadwick LJ.

The central plank on which Mr Hollander, on behalf of Mr Baker, rests his submissions in this case is the principle of double jeopardy by reason of the proceedings instituted by the SFA, backed by the assertion that the continuation of the disqualification proceedings would subject Mr Baker to unacceptable injustice, oppression and unfairness.

I agree with the judge that it is not an answer to Mr Hollander's submission simply to say that the SFA disciplinary tribunal or, indeed, the appeal tribunal is not a court of competent jurisdiction, therefore the question of double jeopardy does not apply. But I also agree with the judge that Mr Hollander cannot succeed simply because he can show that to a great extent the same facts will be explored in the disqualification proceedings as were explored in the SFA tribunals.

My reasons for believing the judge was clearly right can be summarised as follows.

(1) As explained by Chadwick LJ and the judge, the question to be answered in the different proceedings is in fact materially different. The SFA is concerned with whether the conduct is such as to render a director unfit to be registered in accordance with the SFA rules. A finding that he was or a finding that he was not cannot necessarily answer the question which arises under disqualification proceedings which is whether he is fit to be a director of *any* company.

(2) It cannot be right that the decision of the Secretary of State taken pursuant to her public duty, to bring or pursue proceedings under the Company Directors Disqualification Act 1986 (the Disqualification Act), can be foreclosed by proceedings brought quite independently under the SFA disciplinary procedures. I am not persuaded that it is arguable that because of the statutory context in which the SFA acts somehow the SFA is an emanation of the state so as to lead to the conclusion that in reality it is the same party who brought the disciplinary proceedings before the SFA as brings the disqualification proceedings now sought to be stayed.

(3) If it could be argued that the Secretary of State had encouraged or controlled the SFA disciplinary proceedings, so as to bring them on prior to bringing the disqualification proceedings and so as to take advantage in some way of those proceedings, that might produce an entirely different situation. There is simply nothing to suggest that that was so. It is asserted that the Secretary of State is now seeking to use the judgment and other documents resulting from the SFA proceedings, but the use does appear exceedingly limited, and cannot, in my view, be said to support any abuse of the court's process in the light of the independence of the original SFA proceedings.

(4) I am doubtful whether, but for the complexity and length of both sets of proceedings, an application on the grounds of double jeopardy would really have been contemplated. For example, if one envisages a one hour application before the SFA and a one-hour application under the Disqualification Act, having regard to the very different aspects with which the two sets of proceedings are concerned, an application to prevent the Secretary of State exercising her discretion in favour of bringing the disqualification proceedings would be almost unthinkable. Unfortunately the complexity and length of both sets of proceedings is dictated by the subject matter. One must, of course, feel sympathy for any person who is involved in such proceedings.

What I would say, however, is that even now, if in the disqualification proceedings there were any sign of them being conducted in a way which was disproportionate in the sense of being more complex and more lengthy than the seriousness of the charges warranted, the court would still have the power to prevent its procedures being abused.

As I previously said, in my view an appeal by Mr Baker from the judge's ruling would be unarguable and, in those circumstances, this application should be dismissed.

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SWINTON THOMAS LJ. I have no doubt that in appropriate circumstances the court has power under its inherent jurisdiction to stay proceedings brought by the Secretary of State for Trade and Industry to disqualify a director under the provisions of the Company Directors Disqualification Act 1986 on the ground of abuse of process. However, where proceedings are properly constituted that power will be exercised only in exceptional circumstances: see *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529. Mr Hollander submits that such circumstances exist in the present case.

In *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 at 150, [1994] 1 AC 42 at 62, an extradition case brought initially before a stipendiary magistrate, Lord Griffiths said:

> '... 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 in refusing to act upon it.'

The same principle applies to proceedings under the 1986 Act. Lord Griffiths stressed that it was, however, a power to be sparingly exercised. However, having said that, if the court, having balanced all the factors, in particular the concept of fairness and the public interest, concludes that the continuation of the proceedings amounts to an abuse of process, they will not hesitate to grant a stay. It must be stressed that proceedings under the 1986 Act are brought in the interests of, and for the protection of, the public and that is one of the reasons why the power to stay must be sparingly used.

Of the many authorities cited to us by Mr Hollander, I have found in *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies, Re Atlantic Computers plc, Secretary of State for Trade and Industry v Ashman* [1998] 1 BCLC 676, [1998] 1 WLR 422 the most helpful. Mr Hollander submits that *Re Blackspur Group plc* is a different case to the instant case. That is true, but it does not detract from the general principles set out in that case and it is of importance that Lord Woolf MR set out a heading, 'General observations on the 1986 Act' (see [1998] 1 BCLC 676 at 680, [1998] 1 WLR 422 at 426).

Lord Woolf MR said ([1998] 1 BCLC 676 at 678, [1998] 1 WLR 442 at 424):

> 'The issue is whether, in the face of undertakings offered to the court by Mr Vernon Davies, a respondent to two sets of proceedings under the Company Directors Disqualification Act 1986 (the 1986 Act), the Secretary of State for Trade and Industry (the Secretary of State) may properly continue the proceedings initiated with a view to obtaining disqualification orders against him. The refusal of the Secretary of State to discontinue the proceedings on those undertakings and her decision to press on with the proceedings have inspired two sets of applications. Both were dismissed by Rattee J on 22 November 1996. His judgment is reported at [1997] 2 BCLC 96, [1997] 1 WLR 710. The first set of applications seeks stays of the proceedings on the ground that it would be oppressive to Mr Davies, prejudicial to the interests of the public and a misuse of the procedure of the court for the Secretary of State to pursue them. The second is for leave to

IAN ANTHONY BECKFORD

COURT OF APPEAL (Lord Justice Neill, Mr Justice Alliott and Mr Justice Rix): November 21, December 21, 1994

TRIAL

Abuse of process

Causing death when under influence of drink or drugs - Car colliding with concrete block - Car destroyed due to oversight by police before defendant charged - Conflict between experts as to cause of collision - Whether destruction of car affected fairness of trial - Power of court to stay proceedings - Each case to be considered on own facts.

The appellant crashed his car into a concrete block at the end of a barrier between a slip road and a dual carriageway and killed his front seat passenger. Following the accident, but before he was charged, the car was destroyed, the police having failed to make arrangements for its retention by the garage where they had taken it. The appellant was charged with causing death by careless driving when under the influence of drink or drugs contrary to section 3A of the Road Traffic Act 1988. At his trial an application to stay the proceedings on the ground of abuse of process was rejected by the trial judge. The appellant did not give evidence. The prosecution case was that the appellant, after an evening's drinking, had probably fallen asleep at the wheel of his car when driving home, had mounted the kerb between the slip road and the main road and hit the concrete block. The appellant's case was that there was no, or insufficient, evidence that he had been drinking and that the probable explanation of the accident was that put forward by a defence expert, that the steering-wheel had locked when he was negotiating the fly over bend. The appellant was convicted and appealed.

Held, dismissing the appeal, that the court had power to stay proceedings in cases where it concluded that the defendant could not receive a fair trial or where it would be unfair for the defendant to be tried. Each case had to be considered on its own facts. In the instant case, the absence of the car did not affect the fairness of the trial. The judge had dealt at length with the evidence of the defence expert and the jury had had the opportunity of evaluating his theory. There had been no evidence of problems of steering the car in the past, no marks on the road that the brakes had been applied, and the prosecution witnesses were of the opinion that the position of the car did not accord with the defence hypothesis of a steering-wheel lock. Thus, there were no grounds for setting aside the jury's verdict as unsafe or unsatisfactory.

Dicta of Sir Roger Ormrod in *Derby Crown Court, ex p. Brooks* (1985) 80

Cr.App.R. 164, 168, and of Neill L.J. in *Bow Street Metropolitan Stipendiary Magistrate, ex p. Director of Public Prosecutions* (1992) 95 Cr.App.R. 9, 16applied. *Gajree*, unreported, September 20, 1994. C.A., considered.

Per curiam: It is to be hoped that procedures have been put in place to ensure that cars are not scrapped before express permission has been given by the police and that permission will never be given where serious criminal charges are to be brought which may involve the possibility of some mechanical defect in the car.

[For abuse of process, see *Archbold* (1995) 4-41 to 48.]

Appeal against conviction.

On June 21, 1994, at the Central Criminal Court (Judge Pearlman) the appellant was convicted by a majority of 11 to one of causing death by careless driving when under the influence of drink or drugs, contrary to section 3A of the Road Traffic Act 1988. He was sentenced to two years' imprisonment and disqualified from driving for seven years. The facts and grounds of appeal appear in the judgment.

The appeal was argued on November 21, 1994, when the following additional case was cited: *Attorney-General's Reference (No. 1 of 1990)* (1992) 95 Cr.App.R. 196, [1992] Q.B. 630, C.A.

Ross Taylor (assigned by the Registrar of Criminal Appeals) for the appellant.
Malcolm Fortune for the Crown.

Cur. adv. vult.

December 21. **NEILL L.J.** read the judgment of the court: On June 21, 1994 in the Central Criminal Court the appellant, Ian Beckford, was convicted of causing death by careless driving when under the influence of drink or drugs. Sentence was then adjourned. On July 12, 1994 the appellant was sentenced to two years' imprisonment and was disqualified from driving for a period of seven years. He now appeals against conviction by leave of the single judge.

The facts

At about 5 a.m. on November 13, 1992 the appellant was driving a Mini Metro car (BLB 964Y) when the car collided with the square concrete block at the end of the crash wall and barrier on the south side of the eastern approach to the Bow fly-over. The Bow fly-over is a dual carriageway in east London with two traffic lanes in each direction. The concrete block is adjacent to the side refuge which separates the slip road and the main carriageway on the south eastern side of the fly-over. Dionne Thompson, who was a passenger in the front seat of the car, was killed in the collision. The owner of the car was Mr Theo Campbell. He had bought it in September 1992 and in October he had left it with Mr Malcolm Small to carry out repairs. On the evening of November 12th Mr Small and the

appellant went in the car to two clubs. They were accompanied by two young women, Miss Thompson and Miss Sharon Bubb. On leaving the second club Mr Small walked home and the car was left with the appellant. The appellant was driving the car home with Miss Thompson in the front passenger seat and with Miss Bubb and another man, Mr Cecil Campbell, in the back when the collision occurred.

An ambulance was called to the scene of the crash and the occupants of the car were taken to hospital. There the appellant received treatment for a large cut which he had sustained and which required 37 stitches. Both the ambulance men who attended the scene said that the appellant was suffering from shock. According to the doctor who examined him at the hospital he said that he had had "a few pints of alcohol".

The police officers who first attended the scene in response to an emergency call were P.C. Kyte and P.C. James. We shall have to refer to their evidence in more detail later. At this stage it is sufficient to note:

(a) That after speaking to the appellant and noticing the smell of intoxicating liquor on his breath P.C. Kyte arrested the appellant as being unfit to drive through drink or drugs.
(b) That P.C. James looked at the steering mechanism and thought that there was some damage to the steering lock. He was heard to remark "the ignition barrel's been done".

A little later, P.C. Kendrick arrived at the scene. He examined the car and the road surface. He found no braking marks on the road, however, which might have indicated that the steering-wheel had locked, nor did he find any marks which might have indicated that the car had mounted the curb or any other signs of anything which might have contributed to the collision. He did not check the steering lock. Following his examination he gave instructions for the removal of the vehicle to the garage company which was usually instructed by the police. The vehicle was later removed to a warehouse occupied by the garage company.

On November 19, 1992 the vehicle was inspected by Dr Lambourne of the Metropolitan Police Laboratory. Dr Lambourne was a specialist in the investigation of road accidents and had worked at the Police Laboratory for 20 years. From his examination he reached the following conclusions:

(a) That the impact had occurred directly to the front and to the near side of the vehicle, that is, directly in front of the passenger in the front seat.
(b) That the impact speed had been between 35 m.p.h. and 45 m.p.h.
(c) That, before the impact, the car had been travelling in the nearside lane, that is, in the lane at the beginning of the slip road leading down from the fly-over.
(d) That there was damage to the front offside wheel which indicated that before the impact the vehicle had struck the kerb between the slip

road and the main road over the fly-over; this damage supported his conclusion that the vehicle approached the barrier from the slip road rather than from the main road.

On the following day, November 20th, the car was inspected by P.C. Croucher, who was an advanced accident investigator. At the time of his examination he did not have the car key in his possession because the key had been retained at the police station. He did notice, however, that the ignition switch appeared to have been forced and that where the key entered the ignition switch the switch had been mangled. Nevertheless he found that the internal mechanism of the ignition barrel was intact, though he did not take it apart. He had not been told beforehand of the comment by P.C. James on November 13th that the "ignition barrel had been done". He also found that owing to the extensive damage to the vehicle it was impossible to remove the steering-wheel which had locked solid.

The appellant was not charged until May 10, 1993 when summonses were issued against him. By that time, however, the garage had made arrangements for the disposal of the car and it had been scrapped. It was discovered later that it was scrapped on December 17, 1992. It is clear that the police had not given any authority for the car to be destroyed but, on the other hand, they had given no instructions for it to be preserved. It was the practice of the garage company to dispose of vehicles unless they were asked to keep them.

Mr Beckford was committed for trial on September 17, 1993.

The trial

The case for the prosecution at the trial was that Mr Beckford, having spent an evening with his friends and having, during that evening, consumed a quantity of alcohol had probably fallen asleep when driving home and that it was in these circumstances that the car had mounted the kerb between the slip road and the main road and had collided with the concrete block at the end of the barrier. The case for the appellant on the other hand was that there was no or no sufficient evidence that he was unfit to drive because of drink and that the most probable explanation was that the vehicle had crashed because the steering lock had locked in a straight ahead position. It was also the appellant's case that just before the impact the car had been on the main road and not on the slip road, and that because of the locking of the steering-wheel the appellant had been unable to steer the vehicle round the bend at the beginning of the fly-over. The appellant did not give evidence at the trial, however, and the suggestion that the steering had locked was based in the main on the evidence of Mr Ronald Harrison, a consultant automobile engineer and motor claims assessor of many years experience, who was called on behalf of the defence.

At the outset of the trial, counsel for the appellant submitted that the proceedings should be stayed as an abuse of the process of the court or

alternatively that all the prosecution evidence should be excluded under section 78 of the Police and Criminal Evidence Act 1984 (the 1984 Act). It was submitted that if the car had not been scrapped it might have provided vital evidence for the defence, and that accordingly it was unfair for the prosecution to be allowed to proceed with the case when the defence had had no opportunity to examine the car or to discover whether there was a defect in it. The judge rejected the submission, taking the view that Mr Beckford would not suffer serious prejudice if the trial continued and that it was for the jury to decide the issue.

The trial then proceeded. When P.C. Kyte came to give evidence, however, counsel for Mr Beckford made a further submission. He referred to a number of P.C. Kyte's questions to Mr Beckford, including the following:

"Q. Have you been drinking?
A. Yes.

Q. How much have you had to drink?
A. A few pints.

Q. How many?
A. Three."

Counsel submitted that these questions had been asked in breach of paragraph 10(1) of the Code of Practice and that they should be excluded under section 76 or section 78 of the 1984 Act. The judge rejected this submission. He expressed his conclusion as follows:

"I do not find that there were grounds to suspect that an offence had been committed until the defendant said that he had had three drinks, three pints; and it is from the answers really that he should have cautioned him about the drink."

Later in the trial, at the conclusion of the evidence for the Crown, it was submitted that there was no case to answer. It was said that there was insufficient evidence that the appellant was unfit to drive through drink and insufficient evidence that he was driving without due care and attention. This submission too was rejected by the judge.

As has already been mentioned the appellant himself did not give evidence at the trial. Mr Harrison, however, gave evidence as to the conclusions which he had reached having looked at the statements from the witnesses and having examined the photographs of the scene which had been taken by the police. Mr Harrison of course had not been able to examine the vehicle which had been destroyed long before he was instructed. He had, however, produced a detailed report dated January 9, 1994 and a further report dated April 24, 1994. We can summarise the main features of Mr Harrison's evidence as follows:

(1) He had been a traffic investigator for many years and had also

previously served as a police officer and as a coroner's officer in the accident investigation department.

(2) In the course of his career he had had the following experience of steering-wheel locking:

(a) In 1973 or 1974 he had attended an accident in Portsmouth when a Mini coupe had failed to make a left hand bend. He found on examination that the steering wheel was locked in the dead ahead position. He had removed the steering column and the steering lock and found that a wedge in the steering had become partially engaged.

(b) On another occasion he examined an Austin Metro which had failed its MOT test because of bad tyres. He found that the steering-wheel had locked. On removing the steering lock he found that the pin or wedge in the lock was not returning to its central position.

(c) He had had similar experiences with an Audi and a minibus.

(3) On March 20, 1994 he went to the scene of the collision. Having visited the scene and having inspected photographs he expressed the opinion that the vehicle had approached the point of impact from the main road leading on to the fly-over, and not from the slip road.

(4) He said that he attributed the cause of the accident to a mechanical failure. In his opinion the general surface of the road as well as the manhole cover in the second lane of the main road could have caused the steering-wheel to lock.

In the course of their evidence some of the prosecution witnesses were cross-examined about the possibility of a car's steering becoming locked while it was being driven. P.C. Kendrick agreed in cross-examination that if the pin in the steering lock came out the steering would become locked. P.C. Croucher said that he had never come across a case of a steering-wheel becoming locked while a vehicle was in motion and that he did not think that that was possible because the pin in the steering-wheel lock only came out when the key was removed. He said that such locking was "an unlikely thing to happen."

Dr Lambourne too was asked in cross-examination about the possibility of the steering wheel becoming locked. He said that in his 21 years experience he had not come across any case where the steering-wheel had locked when the vehicle was in motion. He further said that he doubted whether a damaged ignition lock would affect the steering column lock.

At the conclusion of the trial, which lasted from Tuesday, June 14, 1994 to Tuesday, June 21, 1994, the appellant was convicted by the unanimous verdict of the jury. On July 12th he was sentenced to two years' imprisonment.

The appeal

In this court, counsel for the appellant advanced three grounds of appeal. Before turning to the main ground it will be convenient to deal shortly with the other grounds.

It was submitted that the judge should have excluded the evidence given by P.C. Kyte that the appellant had admitted at the scene that he had had "about three pints". It was submitted that the questioning at this stage was a clear breach of the Code of Practice and that the evidence should have been excluded.

We have already referred to the judge's ruling on this matter. As P.C. Kyte explained in his evidence the fact that alcohol can be detected on the breath might mean that only a small amount has been consumed. We consider that the judge was entitled to conclude that it was not until the appellant had admitted that he had drunk about three pints that the police officer was required to administer a caution. We would therefore reject this ground of appeal.

It was further submitted that the judge was wrong to fail to accede to the submission that there was no case to answer. It was said that there was insufficient evidence of unfitness to drive. We have no doubt at all that the judge was correct in coming to the conclusion that there was a case for the jury to consider.

We come therefore to the principal ground of appeal which merits very careful consideration. It was submitted that the judge was wrong in law in failing to stay the proceedings at the beginning of the trial on the ground of abuse of process, or alternatively to exclude the whole of the prosecution evidence in accordance with section 78 of the 1984 Act. This submission would appear to incorporate the further argument that in the circumstances the conviction was unsafe and unsatisfactory. We propose to consider this ground of appeal under the general heading, "Whether the proceedings should have been stayed".

Whether the proceedings should have been stayed

It is not in dispute that in certain circumstances the court has power to stay a criminal prosecution. The question for consideration is whether such circumstances exist in the present case.

The constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions. In the words of Lord Devlin in *Connelly v. D.P.P.* (1964) 48 Cr.App.R. 183; [1964] A.C. 1254, the courts have "an inescapable duty to secure fair treatment for those who come or are brought before them."

The jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the authorities:

(a) Cases where the court concludes that the defendant cannot receive a fair trial;
(b) Cases where the court concludes that it would be unfair for the defendant to be tried.

In some cases of course the two categories may overlap.

A useful statement of the law, which covers part of the ground, is to be found in the judgment of Sir Roger Ormrod in *Derby Crown Court, ex p. Brooks* (1985) 80 Cr.App.R. 164, 168, 169, where he 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 both to the defendant and the prosecution . . . ."

It is now clear, however, that the power to ensure that there should be a fair trial according to law does not exhaust the jurisdiction. Thus in *R. v. Horseferry Road Magistrates Court, ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] A.C. 42, the House of Lords held that the court had jurisdiction to inquire into the circumstances under which a person appearing before the court had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, to stay the prosecution as an abuse of process. As Lord Griffiths made clear in his speech at p. 125 and p. 61H there was no suggestion that the appellant in that case could not have a fair trial, nor could it have been suggested that it would have been unfair to try him if he had been returned to the country through the proper extradition procedures. Lord Griffiths continued:

> "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 . . . I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

This concept of fairness runs as a thread throughout the cases. Thus it was held by the Divisional Court in *Croydon Justices, ex p. Dean* (1994) 98 Cr.App.R. 76, that the prosecution of a person who had received a promise or representation from the police that he would not be prosecuted was capable of amounting to an abuse or misuse of process. So too in *Chu*

Piu-wing v. Attorney-General [1984] H.K.L.R. 411 where the Court of Appeal in Hong Kong allowed an appeal against conviction for contempt of court for refusing to obey a subpoena on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence.

In order to do justice to the arguments for the appellant in the present case it is necessary to consider the question of fairness generally and to examine (a) the possibility of a fair trial both at the stage when counsel made his submission on the opening day and also with hindsight to see whether the conviction was unsafe or unsatisfactory, and also (b) whether it was fair to bring the appellant to trial when through no fault of Mr Beckford himself the car had been destroyed before he was charged and long before any expert instructed on his behalf could have examined it. At the same time it is necessary to remember that though it is alleged that the police were careless or even grossly negligent in allowing the car to be destroyed there is no suggestion of bad faith against the prosecuting authorities. It is also necessary to bear in mind that the court must not only protect the fairness of its process but also ensure that those who are properly before the court and who can receive a fair trial should be tried according to law.

As I ventured to point out in *Bow Street Metropolitan Stipendiary Magistrate, ex p. D.P.P.* (1992) 95 Cr.App.R. 9, 16, though the underlying principles are clear, the law is still in a stage of development. The circumstances of each case require separate consideration.

In the course of the argument in the present case we were referred to the decision of the Court of Appeal, Criminal Division, in *Gajree* unreported, September 20, 1994. In that case the appellant, who had been convicted of rape, had not been arrested until about four years after the alleged offence had taken place. The Court of Appeal quashed the conviction as unsafe and unsatisfactory because the appellant had been deprived of evidence which might otherwise have been available to him. In particular the Court of Appeal was impressed by the fact that because of the delay the appellant was unable to have the carpet examined on which, it was alleged, there had been seminal stains, and also had not been able to produce plans or photographs of the layout of the shop where the incident was alleged to have taken place because the premises had been seriously damaged by fire. It is further to be noted that in *Gajree* there had been very substantial delay before the prosecution was instituted and that, as appears from the transcript, there was "absolutely no corroboration" of the complainant's evidence.

It was submitted on behalf of the appellant that his case was comparable with that of the appellant in *Gajree.* In support of this submission reliance was placed on the fact that the evidence of police officers established that there was some damage to the barrel into which the ignition key was inserted. The extent of this damage, however, was never fully examined before the car was destroyed. As a result of the negligent omission by the

police to ensure the preservation of the car, the appellant had been deprived of the opportunity of having the car examined by Mr Harrison, and thus of any evidence of the results of that examination.

As we said earlier each case has to be considered on its own facts. In the present case there was no evidence that either the appellant or anyone else had ever experienced any difficulty with steering the car. There were no marks on the road to indicate that the wheels had locked or even that the brakes had been applied. Moreover, Mr Harrison's hypothesis was based on his belief that before the impact the car had been in the traffic lane leading onto the fly-over and had then veered to the left. The prosecution witnesses, on the other hand, were of the opinion that before the impact the car had been on the inside lane which led to the slip road. Moreover, it is of importance that none of the prosecution witnesses who were asked about the matter had had any experience of a steering lock becoming locked while a vehicle was in motion.

It is to be hoped that procedures have been put in place to ensure that cars are not scrapped before express permission has been given by the police and that permission will never be given where serious criminal charges are to be brought which may involve the possibility of some mechanical defect in a car. On the facts of the present case, however, we do not consider that the absence of the car affected the fairness of the trial. The judge dealt at length and with care with the evidence of Mr Harrison. The jury had the opportunity to evaluate that evidence including Mr Harrison's theory that the vehicle had come from the second lane. In the course of his summing-up (21E) the judge reminded the jury of Dr Lambourne's answer to a question, which had come from the jury, as to whether the vehicle could have come from the right. Dr Lambourne's answer was:

> "I think it is very unlikely that the vehicle came from the right because the damage would have been to the other side. Perhaps there is a very small chance, but it is most unlikely."

We have come to the conclusion that the judge was correct in ruling that the prosecution should proceed. We have also come to the conclusion that there are no sufficient grounds for setting the verdict aside as being unsafe or unsatisfactory. For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: Crown Prosecution Service, Stratford, London.

NICHOLAS ROBERT NEIL MULLEN

COURT OF APPEAL (The Vice President (Lord Justice Rose), Mr Justice Colman and Mr Justice Maurice Kay): January 13, February 4, 1999

ABUSE OF PROCESS

Unlawful deportation

Appellant's presence within jurisdiction secured by unlawful means—Trial on charge of conspiracy to cause explosions—Whether open to Court of Appeal to find conviction unsafe because of prosecution's abuse of process prior to trial.

British authorities initiated and procured the appellant's deportation from Zimbabwe to England, in disregard of available extradition procedures. He was charged with conspiracy to cause explosions likely to endanger life or to cause serious injury to property. At trial the defence were unaware of material relating to the involvement of the British authorities in the appellant's deportation which should have been disclosed to them. The appellant was convicted. He appealed on the ground that no trial should have taken place because of the prosecution's abuse of process of the court prior to trial.

Held, allowing the appeal, that the meaning of "unsafe" in section 2 of the Criminal Appeal Act 1968 (as amended by section 2 of the Criminal Appeal Act 1995) was broad enough to permit the quashing of a conviction on the sole ground that it was unsafe because of abuse of process prior to trial. The statutory language was sufficiently ambiguous to permit reference to *Hansard*, from which it was apparent that the amended form of section 2 was intended to restate the existing practice of the Court of Appeal, which had been to hold that abuse of process could be a ground for quashing a conviction. In the instant case, British authorities had initiated and procured the appellant's deportation from Zimbabwe by unlawful means for the purposes of putting him on trial. By so doing, they had encouraged unlawful conduct in Zimbabwe and had acted in breach of public international law. In deciding whether there had been an abuse of process which, if the prosecution were allowed to succeed, would amount to an affront to the public conscience, the matter had to be approached on the basis that but for the unlawful manner of his deportation the appellant would not have been in the United Kingdom to be prosecuted when he was and there was a real prospect that he would never have been brought to this country at all. If the circumstances of the deportation had come to light at the time of trial, as they would have done if the prosecution had made proper voluntary disclosure, they would have justified the proceedings being stayed. In exercising the discretion, certainty of guilt could not

displace the essential feature of this type of abuse of process, namely the degradation of the lawful administration of justice; the court had to take into account the gravity of the offence, as against the failure to adhere to the rule of law on the part of those responsible for criminal prosecutions. In the circumstances, the discretionary balance came down decisively against the prosecution of this offence. For a conviction to be safe it must be lawful, and where it resulted from a trial which should never have taken place it could not be regarded as safe.

R. v. Horseferry Road Magistrates' Court, ex p. Bennett (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42, HL; *Latif* [1996] 2 Cr.App.R. 92, [1996] 1 W.L.R. 104, CA, followed. *R. v. Martin (Alan)* [1998] 1 Cr.App.R. 347, [1998] A.C. 917, HL, *R. v. Bloomfield* [1997] 1 Cr.App.R. 135, CA, *R. v. Chalkley and Jeffries* [1998] 2 Cr.App.R. 79, CA, *R. v. MacDonald*, May 1, 1998, unreported, CA, considered.

[For abuse of process—executive misconduct, see *Archbold* 1999 para. 4-56.]

Appeal against conviction.

On June 8, 1990, in the Central Criminal Court (Hidden J.) the appellant was convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property and was sentenced to 30 years' imprisonment. His initial application for leave to appeal against sentence was refused in March 1991. On January 29, 1998, he was granted an extension of time and leave to appeal against conviction. The facts and grounds of appeal appear in the judgment of the Court.

The appeal was argued on January 13, 1999, when the following additional cases were cited or referred to in the skeleton arguments: *Campbell (No. 2)* [1997] Crim.L.R. 227, CA; *Guildford Magistrates' Court, ex p. Healy* [1983] 1 W.L.R. 108, DC; *Horseferry Road Magistrates' Court, ex p. Bennett (No. 2)* (1994) 99 Cr.App.R. 123, [1994] 1 All E.R. 289, DC; *Nisbet* (1971) 55 Cr.App.R. 490, [1972] 1 Q.B. 37, CA; *Ramsden* [1972] Crim.L.R. 547, CA; *Roberts* (unreported), March 19, 1998; *Saunders (Ernest)* (unreported), September 29, 1989, CA; *Ward* (1993) 96 Cr.App.R. 1, [1993] 1 W.L.R. 619, CA; *Ware v. Fox* [1967] 1 All ER. 100, [1967] 1 W.L.R. 379, DC.

Colin Mackay Q.C. and *Campaspe Lloyd-Jacob* for the appellant.
Nigel Sweeney for the Crown.

Cur. adv. vult.

February 4. The following judgment was handed down.

THE VICE PRESIDENT (ROSE L.J.): On June 8, 1990, at the Central Criminal Court, the appellant was convicted following a trial before Mr Justice Hidden of conspiracy to cause explosions likely to endanger life or cause serious injury to property. He was sentenced to 30 years' imprisonment.

Initially he applied for leave to appeal only against sentence and, following refusal by the single judge, the full court refused leave in March 1991. Seven years after the trial, a differently constituted division of the full court granted his application for an extension of time and leave to appeal against conviction following refusal by the single judge. The grounds argued before this Court, in support of his appeal, relate solely to the circumstances of his deportation from Zimbabwe to England prior to his trial. No challenge is sought to be made to the conduct of the trial itself and the appeal has proceeded on the basis that, if it was fair to try him, the appellant was properly convicted.

It is unnecessary to refer to the facts of the case save in the briefest outline. Following a shooting incident in Battersea, in the early hours of December 21, 1988, the police searched a flat at 8, Staplehurst Court, Battersea. They found over 100lb. of Semtex, timing and power units for detonating various types of bomb, a number of ready made car bombs, blasting incendiary devices, mortar bomb equipment, firearms and ammunition. The prosecution alleged that the appellant was responsible for renting those and several other premises used by the bomb makers and for supplying them with false birth certificates and driving licences. He also obtained a number of cars for them and arranged banking facilities at two building societies. He wrote an inventory of bomb making equipment which was found at Staplehurst Court. Traces of Semtex were found in two of the cars which he had bought.

The defence was that the appellant had arranged the premises, banking facilities and false documentation for two men whom he believed would use them in a credit card fraud. He was unaware of IRA involvement until December 14, 1988 when, having been informed by them of that involvement, he sought to withdraw from the scheme. He claimed that they had fired a gun at him and made threats in relation to his girlfriend and child. He had written the inventory under duress at their dictation.

On December 20, 1988 the appellant, his girlfriend and their daughter flew to Zimbabwe. In circumstances which we shall consider in more detail later he was brought back to the United Kingdom from Zimbabwe on February 7, 1989 by a Zimbabwean immigration officer. At Gatwick Airport English police boarded the plane, arrested the appellant and took him for interview. When interviewed, in the presence of his solicitor, the appellant admitted some matters and explained others but did not say much and many of his explanations were qualified. In evidence before the jury he denied that he had ever been a member of the IRA or any other terrorist organisation and said that he had not knowingly helped the IRA. He had English and Irish passports and a lengthy criminal record. He described meeting a man called Martin in May 1988 who had been running a successful credit card fraud in Ireland. The appellant agreed to rent a house for him to facilitate a similar enterprise in England. He described renting a number of properties, opening building society accounts and acquiring cars. He gave an account, in support of his claim, that until

December 14, 1988 he was not aware of IRA involvement and claimed duress, both in relation to the list of terrorist equipment which he had written and otherwise. He flew to Zimbabwe on December 20, on a ticket bought, for December 21, the previous month. He did not, in interview, tell the police about the events which he claimed had occurred on December 14.

Before coming to the rival submissions in relation to this appeal, it is convenient to rehearse the relevant parts of material which has been disclosed to the defence for the purposes of this appeal in the form of a Summary for Disclosure, following a PII hearing before this Court. It is conceded by Mr Sweeney, on behalf of the Crown, that, in the light of the House of Lords decision in *R. v. Mills* [1998] 1 Cr.App.R. 43 [1998] A.C. 382, HL, as the common law now stands and must therefore be taken to have been in 1990, this material ought voluntarily to have been disclosed by the prosecution, to the defence, at the time of trial.

The Summary for Disclosure ordered shows that on December 29, 1988 the London police contacted the Zimbabwe Central Intelligence Organisation (CIO), and on January 6, 1989 there was a meeting between the police and the secret intelligence service (SIS) in London to see if the appellant could, secretly, be summarily deported from Harare to London. On January 10 there was ample evidence to suggest that he had acted as a facilitator for an active service unit; and, on January 19, an SIS officer was "asked to discover whether, and if, exactly how Mullen could be returned from Zimbabwe into police custody and to discover whether he could be expelled direct to the U.K. . . . and what steps were needed to expel him"; the aim was "foolproof return of Mullen to London". On January 20, the CIO indicated they "did not want to get involved in extradition which was likely to get bogged down. However the SIS officer was informed that it should be possible to obtain approval for Mullen's deportation direct to the U.K. but it was not certain at present that the evidence was sufficient". On January 20, the SIS in London indicated that every SIS step would require the utmost care "with a constant eye on any subsequent legal proceedings in London". The CIO were provided by an SIS officer with a draft paper recommending deportation for illegally using false identities in Zimbabwe, misrepresenting his occupation, illegally trafficking in precious stones and using Zimbabwe as a safe haven for activities in support of international terrorism. The appellant was described as a violent man, with a knowledge of firearms and explosives. At a meeting in London, the police indicated that "it could be detrimental to any future legal proceedings in England if it appeared that his return was by means other than official channels". Any move by the Zimbabwean authorities to exclude Mullen must be based solely on his activities in Zimbabwe. Any action taken must at all costs be capable of withstanding close judicial scrutiny in England. On January 23, a second draft, adding a fifth ground for deportation, namely that Mullen was conducting business in Zimbabwe, contrary to the conditions attached to his temporary

employment permit, was prepared by the SIS and delivered to the CIO. By the same date it had been agreed that extradition would be likely to fail for political reasons. The Zimbabwean authorities' "normal procedure in a deportation case was for the person to be deported to the country that he had originally departed from and such cases were normally acted upon before the subject had time to secure the services of a lawyer. If the process after Mullen's arrest became protracted for any reason and he obtained a lawyer there would be a risk that Zimbabwean authorities would be pressured into deporting him elsewhere". On the same day, the SIS in London indicated that "we do not want to appear to be the demanders" at a meeting the following day which was to take place between the Deputy Director General of the CIO (the DDG) and an SIS officer.

At that meeting, on January 24, after indicating that the pursuit of the IRA and its active supporters was a matter of the highest priority for the U.K. government, the SIS officer told the DDG that, if at all possible, they wished to avoid "becoming involved in complicated extradition proceedings". The DDG indicated his agreement that the United Kingdom should be going for deportation. On January 27, at a meeting in London between the SIS and the police, it was agreed that the best way forward was for any deportation to be based upon Mullen's declaration that he had had no previous convictions when applying for a permanent residence. It was believed that this alone would be "adequate for Mullen to be seized in Zimbabwe (with timing stage-managed shortly before a direct flight to London) and deported to the U.K. in short order". On January 30, the SIS agreed that Mullen's criminal record "ought to clinch the case for deporting him".

On February 1, at a meeting in London attended by officials from the police, the SIS, the security service, the Foreign & Commonwealth Office and the Home Office, eight matters were minuted: the police were not in a position to apply for extradition; Mullen's own activities had brought him to the notice of the Zimbabwe authorities; the Zimbabwe authorities had asked the British police for details of his criminal record as a result of his residency application; the implication of his Irish citizenship needed to be considered carefully; the Government had to be ready to respond with indisputable evidence that any deportation had been entirely at the instigation of Zimbabwe for breach of local laws; if Zimbabwe decided to deport there would be considerable advantage in not telling Mullen until shortly before he was put on a flight "in order to minimise the risk of him trying to appeal against deportation"; it would be important to ensure that the High Commissioner and all Zimbabwe departments were aware that the U.K. Government was not involved in any way; Mullen should be put on a plane quickly and the line for media and parliamentary enquiries should be that "the deportation proceedings were not in response to any request from the U.K. government and that there should be no action which might be construed as evidence of collusion between the two governments".

On February 2, the SIS agreed that the cardinal principle "must be that no official request has at any time been made to the authorities of Zimbabwe by the authorities of the U.K. This is crucial". Reference was specifically made to "the *Mackeson* case" and "considerable anxiety was expressed . . . that witnesses might subsequently be found in Zimbabwe who would be prepared to tell it like it is." There was agreement on a line said to be "sustainable, true and non-prejudicial to the legal case which may follow" which, among other things, falsely claimed that the Zimbabwean authorities had routinely verified Mullen's personal particulars and in so doing consulted the U.K. police as to whether he had a criminal record. The view was expressed that "the ideal would be for Mullen to be arrested shortly before the departure of a direct flight and put aboard it. A stage manager's skills would be essential here. . . . If Mullen claimed rights as an Irishman not to be sent to the U.K. a suggested line is that the CIO had uncovered evidence locally of false documents and the use of false identities and cannot take any claim by Mullen at its face value. His Irish passport may or may not be genuine." On the same day the decision was taken not to comply with the normal practice of informing the Irish embassy in Lusaka about Irish citizens in trouble in Zimbabwe. The SIS officer in Zimbabwe recorded that his objective was to "lean on" the DDG of the CIO "as hard as I deemed prudent in order to achieve the right decision over Mullen". The officer made a personal appeal to the DDG to help secure deportation to the U.K. The SIS officer in Zimbabwe sought guidance as to whether he should arrange for Mullen's deportation to be reported on FCO channels "as this would provide an answer in subsequent court proceedings as to how the police in the U.K. were alerted in advance of Mr Mullen's arrival".

On February 6, the DDG of the CIO issued instructions that "no indication whatsoever be given to Mullen of CIO's knowledge of his IRA activities . . . and no hint or suggestion must be imparted to avoid future arguments being used by him in court". He further instructed "that he be allowed no access whatsoever to his lawyers". When he was arrested on February 6, the appellant said that the Zimbabwean officials were acting on behalf of the British security services and that he was being picked up not for what he had done in Zimbabwe but because he was a member of an Irish Socialist organisation. On February 8, the DDG said he had taken the decision to deport Mullen himself without consulting ministers in advance.

In making immigration declarations to the Zimbabwean authorities in November 1988, the appellant falsely said he had not been convicted of any crime in any country; falsely gave his occupation as journalist and gave as his permanent home address an address in London from which he had moved some weeks earlier. Similar false declarations were made in his application for a residence permit and he obtained temporary employment on the basis of a false reference he wrote on his own behalf.

The relevant parts of the Zimbabwean legislation current at the time can

be readily identified. Section 14(1)(f) of the Immigration Act 1979 classifies as a prohibited person any person convicted of any offence specified in Part 1 of the First Schedule to the Act (which it is common ground applied to the appellant) and under (j) any person entering or remaining in contravention of the provisions of the Act, which, it is common ground, would have applied to the appellant in the light of his false statements. Section 8(1) empowers an immigration officer to arrest a person suspected on reasonable grounds of having entered in contravention of the Act and confers on an immigration officer power to remove a prohibited person. Section 8(3)(a) requires written notice to the appellant that he was a prohibited person. By section 8(4) the power of removal did not extend to the holder of a temporary permit until it was cancelled; the appellant had a temporary permit which was cancelled on February 6, 1989. Section 16 confers on the Minister a power to exempt persons from the category of being a prohibited person. By section 21, the appellant had three days in which to appeal to a magistrate against a notice made under section 8(3)(a) that he was a prohibited person and by section 23 a right to make representations to the Minister within 24 hours of a section 8(3)(a) notice being served on him.

On behalf of the appellant, Mr Mackay Q.C. who did not appear at trial, submitted, first, that the disclosure now made demonstrates that the English prosecuting authorities, knowing that extradition was available, instigated and, in collusion with the Zimbabwean authorities, procured the appellant's deportation in circumstances in which he was denied access to a lawyer, contrary to Zimbabwean law and internationally recognised human rights. He should have had three days' grace. He could have appealed against deportation relying on the Zimbabwean authorities (*e.g. Mackeson v. Minister of Information* [1979] Rhodesian L.R. 481 and *Rondon v. Minister of Affairs* [1990] Zimbabwe L.R. 327) where powers under section 14 were exercised for an ulterior motive, and he could have applied to the Minister under section 16 to exempt him from the category of prohibited person on the basis that his convictions were old and he wanted to go to Ireland where he was a citizen. The facts of the present case are very similar to those in *Bow Street Magistrates Court, ex p. Mackeson* (1982) Cr.App.R. 24 where the Divisional Court quashed committal proceedings for abuse of process. Mr Mackay accepted that the burden of proving abuse of process is on the appellant and that knowledge on the part of the English authorities that local or international law was broken must be shown. He relied on *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42, HL. At pages 125 and 62G Lord Griffiths said:

> "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."

At pages 130 and 67G Lord Bridge said:

"When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. . . . Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted."

At pages 137 and 76C Lord Lowry said:

". . . 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."

At pages 137 and 76G Lord Lowry said:

"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."

In *R. v. Latif* [1996] 2 Cr.App.R. 92 [1996] 1 W.L.R. 104, HL, at pages 101 and 112H Lord Steyn said:

"The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42. *Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as

to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

Mr Mackay next submitted that, although a decision was taken by the defence at trial not to invite the trial judge to rule on abuse of process, this is not fatal to the point being canvassed in this Court, particularly in the light of the disclosure which has now taken place and ought to have been made before trial. Not only was that information withheld but *Plymouth Justices, ex p. Driver* (1986) 82 Cr.App.R. 85, [1986] 1 Q.B. 95, DC, which was subsequently disapproved in *Bennett*, provided an obstacle to the success of a submission to the trial judge. This Court, he submitted, is in just as good a position as the trial judge would have been to assess the material now disclosed and carry out the balancing exercise which Lord Steyn identifies in *Latif.*

Finally, Mr Mackay submitted that, if abuse of process is proved, the conviction is unsafe within the meaning of section 2(1) (a) of the Criminal Appeal Act 1968 as amended.

In its original form, section 2 of the 1968 Act provided for an appeal against conviction to be allowed if the verdict of the jury was unsafe or unsatisfactory, or a wrong decision had been made on any question of law, or there was a material irregularity in the course of the trial with the proviso that the appeal might be dismissed if no miscarriage of justice has actually occurred. By section 2(1) of the Criminal Appeal Act 1995 there was substituted a provision that the Court of Appeal:

"(a) shall allow an appeal against conviction if they think that the conviction is unsafe and
(b) shall dismiss such an appeal in any other case."

In *Att.-Gen.'s Reference (No. 1 of 1990)* (1992) 95 Cr.App.R. 296, [1992] Q.B. 630, CA, this Court disagreed with a trial judge's order for a stay where there had been prejudicial but non-culpable delay and, at pages 303 and 644, Lord Lane C.J., giving the judgment of the Court, having emphasised the exceptional nature of the jurisdiction to stay proceedings on the ground of delay, said:

"In the event of an unsuccessful application to the Crown Court on such grounds, the appropriate procedure will be for the trial to proceed in accordance with the ruling of the trial judge and, if necessary, the point should be argued as part of any appeal to the Court of Appeal (Criminal Division)".

In *Heston-Francois* (1984) 78 Cr.App.R. 209, [1984] Q.B. 278, CA, at pages 216 and 287, Watkins L.J., giving the judgment of the Court, said:

"Where there has been oppressive conduct savouring of abuse of process it seems clear that the Court of Appeal (Criminal Division) may quash a conviction on the ground that it is 'unsatisfactory' or 'unsafe': (section 2(1)(a) of the Criminal Appeal Act 1968)."

Such a course was taken in *Mahdi* [1993] Crim.L.R. 793, decided prior to the amendment of the Criminal Appeal Act and where the judgment of the Court was given by Lord Taylor C.J. and in *Bloomfield* [1997] 1 Cr.App.R. 135, CA, following amendment to the 1968 Act and without the Court addressing the question of whether "unsafe" permits the quashing of a conviction for abuse of process when no challenge is made to the conduct of the trial or to the correctness of the jury's verdict. Mr MacKay referred to *Chalkley & Jeffries* [1998] 2 Cr.App.R. 79, [1998] Q.B. 848, CA, and *R. v. Martin (Alan)* [1998] 1 Cr.App.R. 347, [1998] A.C. 917, HL, which both contain *dicta* which appear to be contrary to his submission and to which we will return later.

On behalf of the Crown, Mr Sweeney presented careful arguments of impeccable propriety. He accepted, as we have already indicated, that there was, in the light of present-day standards, a duty on the prosecution voluntarily to have disclosed, at the time of trial, the material disclosed in connection with this appeal. But, he submitted, that non-disclosure does not avail the appellant in the absence of an explanation as to why he chose not to take the abuse issue before the trial judge. This Court, he submitted, should be slow to exercise a discretion which the trial judge was not asked to exercise. Mr Sweeney stressed that the conspiracy of which the appellant was convicted began in May 1988, when he started renting addresses in false names and acquiring the other means to facilitate the activities of an active service unit. Thereafter, the appellant made short trips to Zimbabwe where he committed a variety of other offences apart from failing to disclose his convictions; he had taken computers there and intended to take photocopiers to sell on the black market so that, with the proceeds, he could purchase gems which could be smuggled from Zimbabwe into the United Kingdom. He said, in interview, that he regarded himself as both English and Irish and, in evidence, that he intended to return to England eventually. The whole basis on which he had presented himself to the Zimbabwean immigration authorities was false, and he used false documents to hire motor vehicles in Zimbabwe. In consequence there were numerous breaches of the Zimbabwean legislation going well beyond his mere failure to declare his previous convictions. The chance of success in any application to the Minister or any appeal against deportation was minimal if not non-existent. The Zimbabwe Supreme Court had ruled in the *Mackeson* case that the authorities can deport to a country of origin notwithstanding that the deportee is wanted with a view to prosecution there. There were here five grounds for deportation before the failure to disclose convictions came to the fore. Although Mr Sweeney conceded

that, on the balance of probability, there was a prima facie case of aiding and abetting a conspiracy to cause explosions, this, he said, is not necessarily the same as a case for extradition, because the Attorney-General's consent to prosecute would not be forthcoming unless there was a realistic prospect of conviction. Accordingly, Mr Sweeney did not concede that those seeking not to extradite were acting in bad faith. He conceded that extradition was legally available as a concept and that further investigation might have provided such evidence as to enable an application for extradition to be made. He further conceded that, on the disclosed material, the U.K. authorities had initiated the deportation process and that the appellant had been denied access to a lawyer and the legal processes in Zimbabwe and the opportunity to petition the Minister to exercise his discretion under section 16. He referred to *Bennett* and *Swindon Magistrates, ex p. Nagle* (unreported) December 2, 1997 and the judgments of Lord Bingham at pages 14-21 and Hooper J. at page 23 as requiring participation and positive collusion on the part of the prosecuting authorities before abuse can be established. He accepted that a court determining abuse of process must carry out the balancing exercise identified by Lord Steyn in *Latif* at pages 101 and 112H-113. Abuse of process depends on the facts—see *per* Lord Lloyd in *Martin* at pages 352B and 926C. He sought to distinguish *ex p. Mackeson, Hartley* [1978] 2 N.Z.L.R. 199, *Bennett* and *Ebrahim* (1991) 95 I.L.R. 417 on the basis that they were all cases of detention at whim and return at whim, whereas, in the present case, there were good grounds for detaining the appellant in Zimbabwe and for returning him to England whence he had come. He accepted that the English authorities, in the present case, sought to avoid their involvement with the Zimbabwean authorities becoming known; but they also took great care to ensure that only Zimbabwean matters were taken into account by the Zimbabwean authorities who were acting at their own pace in investigating matters which would have been shown to be correct if the investigation had been completed. The English authorities had been informed from the outset that it was the normal Zimbabwean practice to deport to the country from which the deportee had come and to do so without permitting recourse to legal advice. There was nothing to indicate that the English authorities knew that the Zimbabwean authorities were acting in breach of their normal practice, or encouraged them to do so.

As to the meaning of "unsafe", Mr Sweeney adopted what he described as a non-partisan stance. He submitted that the word can refer either to guilt or innocence of the crime convicted, or it can refer to a miscarriage of justice in the round, including such abuse of process as would have prevented proceedings. He took the Court in detail to the article by Professor Sir John Smith Q.C. in [1995] Crim.L.R. 920 which in *Graham* [1997] 1 Cr.App.R. 302 at page 308, Lord Bingham C.J. referred to as "a penetrating analysis". For present purposes, Sir John's views expressed in that article can be summarised in this way: the amendment was intended to be a codifying provision and as no obvious answer can be given to the

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scope of unsafe, *Bank of England v. Vagliano* [1891] A.C. 107 at page 144 permits the Court to look at the previous state of the law; the parliamentary debates provide clear evidence of what the new provision is intended to do, namely to re-state existing practice; it is unlikely that the Crown would argue for a narrow meaning; the section has no substantive effect and the ultimate question of whether there has been a miscarriage of justice is the same as whether the conviction is unsafe. "The effect of the amendment is simply to concentrate the mind on the real issue in every appeal from the outset". In *Jones (Steven)* [1997] 1 Cr.App.R. 86, CA, at page 94D Lord Bingham said:

> "It seems plain on the language of the statute and on authority that the court is obliged to exercise its own judgment in deciding whether, in the light of the new evidence, the conviction is unsafe."

In *Graham* [1997] 1 Cr.App.R. 302, CA, at page 309C Lord Bingham said:

> "Our sole obligation is to consider whether a conviction is unsafe. We would deprecate resort to undue technicality."

In *Simpson* [1998] Crim.L.R. 481, Garland J. giving the reserved judgment of a division of this Court over which the Lord Chief Justice presided said at page 19E of the Court of Appeal transcript dated February 5, 1998:

> ". . . we would wish to leave open for argument the proposition that in a case where a fair trial was possible but it was, nevertheless, unfair that the Defendant should have been tried, a verdict of 'guilty' could properly be regarded as safe."

In the light of these authorities, Mr Sweeney invited the Court to adopt a broad interpretation of the word "unsafe". He accepted that the practice of the Court prior to the amendment of the 1968 Act was that exemplified in *Att.-Gen.'s Reference (No. 1 of 1990)* and *Heston-Francois.* Accordingly, he invited the Court to say that, in a case where such abuse of process occurs that a trial should not have taken place, "unsafe" should be construed as permitting this Court to quash the conviction. His final submission was that, even if this court finds abuse of process as a matter of fact in the present case, and even if it accepts a wide construction for "unsafe", it does not follow that the present conviction is unsafe because, as we understand his submission, there is no miscarriage of justice as the abuse point was not taken before the trial judge.

We turn first to consideration of the facts and the balancing exercise identified by Lord Steyn in *Latif.* Having regard to the fact that the appellant, as he now concedes, was properly convicted, this Court must approach the exercise of its discretion on a rather different basis from that which would have been appropriate if an application had been made to the trial judge. In particular, there is before this Court no question of consideration of the strength of the evidence of the defendant's guilt of the offence charged. However, as appears from the passage already cited from

the speech of Lord Lowry in *ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42, at pages 137 and 76G, certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice.

As a primary consideration, it is necessary for the Court to take into account the gravity of the offence in question. In the present case, the substance of the offence was the facilitating of a bombing campaign in the United Kingdom, which, but for the discovery by the police of the Battersea explosives and armaments cache, might well have caused loss of life and injury to members of the public and, more probably, substantial damage to property in this country. The sentence of 30 years' imprisonment reflects the gravity of the offence. Although it was not at the very top of the range of seriousness of criminal activity, it was undeniably at a very high level in that range.

Secondly, although the appellant had lent his assistance to an active IRA unit, there is no evidence to suggest that, unless he were at once apprehended and brought back to this country, he would pose, whether in Zimbabwe or elsewhere, an immediate and continuing security threat to life and property here. Once the Battersea operation had been thwarted, as it had been some six weeks before his deportation, his activities in Zimbabwe do not appear to have presented an imminent security threat.

Thirdly, it is necessary to consider the nature of the conduct of those involved in the deportation on behalf of the British Government.

As appears from the Summary for Disclosure:

(i) although by January 10, 1990 the police considered that there was ample evidence that the appellant had acted as a facilitator, and could therefore appropriately be the subject of an application to Zimbabwe for extradition, the SIS's mandate was to explore the prospects for and subsequently to procure deportation;

(ii) the SIS took active steps to persuade the CIO that there existed grounds for deportation and provided evidence, including, crucially, evidence of previous convictions, as well as draft documents recommending grounds for deportation;

(iii) the steps taken by the SIS were directed to evading the effect of and the principles expressed by the Divisional Court in *Bow Street Magistrates' Court, ex p. Mackeson* (1982) 75 Cr.App.R. 24;

(iv) the SIS was aware from the CIO that, both on the grounds of the appellant's lies in his applications for entry into Zimbabwe and for a temporary employment permit and of his previous convictions, the Zimbabwean authorities had strong grounds for his deportation;

(v) however, the SIS was also determined to ensure, if possible, that, if his deportation were ordered, he should not be able to challenge it in the courts of Zimbabwe or to make representations

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to the Minister that his deportation should not be to Britain from where he had entered Zimbabwe but should be to Ireland of which he was a national: if he had the opportunity to challenge the order or make representations, there was clearly a substantial risk that, if he were deported at all, it might be to Ireland;

(vi) to accomplish this purpose the SIS recognised the need for stage-management of the timing of his detention by reference to an immediately available flight to London;

(vii) the SIS specifically considered and suggested to the CIO how to deal with any last-minute claim by the appellant to be deported to Ireland;

(viii) in order to achieve an order for deportation the local SIS officer was very persuasive with the DDG;

(ix) it is to be inferred that the SIS was made aware of the instructions issued by the CIO on February 6, that the appellant be allowed no access whatsoever to his lawyers.

This Court is firmly of the view that it must have been appreciated by the SIS, and probably by the police in Britain, that the vital element in the operation—the insulation of the appellant from any legal advice following his detention—was in breach of specific provisions of the law of Zimbabwe, or, at the least, was contrary to the appellant's entitlement as a matter of human rights.

In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the appellant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.

Finally, the events leading to the deportation as now revealed in the Summary for Disclosure were concealed from the appellant until last year.

In all these circumstances, can it now be said that the conduct of the British authorities in causing the appellant to be deported in the manner in which he was, and in prosecuting him to conviction was—to use the words of Lord Steyn in *Latif* [1996] 2 Cr.App.R. 92, [1996] 1 W.L.R. 104, at pages 101 and 113—"so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed"?

This Court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the IRA and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the appellant in the manner which has been described, represents, in the view of this Court, a blatant and extremely

serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy, to which, as appears from *Bennett* and *Latif*, very considerable weight must be attached.

Mr Sweeney has submitted on behalf of the Crown that, even if the appellant had been given the opportunity prior to deportation of consulting a lawyer and even if his deportation had been delayed for the period of three days required by section 21 of the Immigration Act 1979 to enable him to appeal to a magistrate or for 24 hours so as to enable him to make representations to a Minister, as permitted under section 23 of that Act, he had acted so flagrantly in breach of Zimbabwean immigration law and his record of previous convictions was so poor, that, in the end, he would almost certainly still have been deported to Britain. Accordingly, this Court's discretion should not be exercised in favour of declaring the trial and conviction to have been unlawful.

We cannot accept that substantial weight should be given to this consideration. First, the stark fact remains that the appellant was denied any opportunity to challenge deportation under the Act by judicial review or to make representations to the Minister. Secondly, even if there were good grounds for his deportation as a prohibited person, a request by him would almost certainly have been made to be deported to Ireland or to some other jurisdiction. Whereas it was certainly within the powers of the Zimbabwean authorities to ignore such request, whether they would have done so must remain a matter of speculation. This Court cannot say that deportation to Britain would have been inevitable if he had been dealt with in a lawful manner.

In these circumstances, the discretion has to be exercised on the basis that, but for the unlawful manner of his deportation, he would not have been in this country to be prosecuted when he was, and there was a real prospect that he would never have been brought to this country at all.

Additionally, the need to encourage the voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence is a further matter of public policy to which it is also necessary to attach great weight. Omission to make such disclosure clearly is a matter to be taken into account, on the exercise of this Court's discretion following a conviction.

In these circumstances, we have no doubt that the discretionary balance comes down decisively against the prosecution of this offence. This trial was preceded by an abuse of process which, had it come to light at the time, as it would have done had the prosecution made proper voluntary disclosure, would properly have justified the proceedings then being stayed.

In as much as that discretionary exercise now falls to be carried out by this Court, we conclude that, by reason of this abuse of process, the prosecution and therefore the conviction of the appellant were unlawful.

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In arriving at this conclusion we strongly emphasise that nothing in this judgment should be taken to suggest that there may not be cases, such as *Latif*, in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant's presence within the jurisdiction. In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged.

The next question is as to the impact on this appeal of the failure to argue abuse of process before the trial judge.

Generally speaking, all matters affecting a trial should be canvassed with the trial judge. This is particularly so in relation to matters within his or her discretion. If no ruling is sought on a matter within the trial judge's discretion, this will usually be fatal to any subsequent attempt to rely on that matter by way of appeal to this Court.

In the present case, the appellant apparently expressed to those representing him at trial, his concerns as to the circumstances in which he had been deported to England. But, before us, it is conceded on his behalf that a deliberate decision was made by the defence that no ruling on abuse would be sought from the trial judge. The reasons for that decision are unknown to this Court and no useful purpose would be served by speculating on them.

What is clear, however, is, first, that the law at the time of trial was not as favourable to the defence as it has since become by virtue of *Bennett* and, secondly and more importantly, that at trial the defence were unaware of the documentary material disclosed before this Court as to the involvement of the English prosecuting authorities in the appellant's deportation.

Furthermore, although abuse of process, unlike jurisdiction, is a matter calling for the exercise of discretion, it seems to us that *Bennett*-type abuse, where it would be offensive to justice and propriety to try the defendant at all, is different both from the type of abuse which renders a fair trial impossible and from all other cases where an exercise of judicial discretion is called for. It arises not from the relationship between the prosecution and the defendant, but from the relationship between the prosecution and the Court. It arises from the Court's need to exercise control over executive involvement in the whole prosecution process, not limited to the trial itself. (See *Connelly v. Director of Public Prosecutions* (1964) 48 Cr.App.R. 183, [1964] A.C. 1254, HL: *per* Lord Morris at pages 206 and 1301:

> "A court must . . . suppress any abuses of its process and . . . defeat any attempted thwarting of its process";

and *per* Lord Devlin at pages 268 and 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."

See also the passages in *Bennett* already cited from the speeches of Lord Griffiths at pages 125 and 62G, Lord Bridge at pages 130 and 67G and Lord Lowry at pages 137 and 76C.)

Having regard to these considerations, namely the combined effect of lack of disclosure at trial and the special nature of *Bennett*-type abuse, we do not consider that failure to seek the trial judge's ruling on abuse is fatal to this appeal. We do not, however, wish anything which we have said to be construed as encouraging applications for leave to appeal to be made long after trial, solely on the basis that there has been a change in the law. For the reasons set out in the judgment of Lord Bingham of Cornhill C.J. in *Hawkins (Paul)* [1997] 1 Cr.App.R. 234, CA, at pages 238G-240F this Court continues to be very reluctant to extend time in such cases.

We turn to the meaning of the amendment to the Criminal Appeal Act 1968, by the Criminal Appeal Act 1995.

This Court's jurisdiction is statutory and depends for present purposes on the meaning properly to be attributed to the word "unsafe". In particular, is it apt to confer jurisdiction to quash a conviction when no complaint is made about the conduct of the trial and the sole ground of appeal is that no trial should have taken place, because of the prosecution's abuse of the process of the court prior to trial?

In *Chalkley & Jeffries* [1998] 2 Cr.App.R. 79, [1998] Q.B. 848, at pages 88 and 859 Auld L.J., giving the judgment of the Court, referred to the amended test as being much simpler than the old test in the 1968 Act prior to amendment. At pages 99 and 869E he expressly agreed with a passage in the third supplement to *Archbold, Criminal Pleading Evidence and Practice* (1997) page 857, para. 7-45 which contains the following:

"Neither the misconduct of the prosecution nor the fact that there has been a failure to observe some general notion of fair play are in themselves reasons for quashing a conviction . . . 'unsafe' . . . is clearly intended to refer to the correctness of the conviction (*i.e.* a conviction is unsafe if there is a possibility that the defendant was convicted of an offence of which he was in fact innocent)."

At first blush, this passage in the Court's judgment might be understood as precluding this Court from regarding the present conviction as unsafe. But it is to be noted that *Bennett* was not referred to and, in *MacDonald*, May 1, 1998 (unreported), Auld L.J. giving the judgment of a differently constituted division of this Court said this at page 11:

"Before parting with the matter we express some reservation about the jurisdiction of the Court to quash a conviction where there has been an abuse of process of the *ex p. Bennett* kind, that is, where a fair trial was possible and in the event resulted in a safe conviction, but where, on a proper view of the matter, the prosecution should have

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been stayed as an affront to justice. The question does not arise for our determination in the light of our conclusion that a fair trial was possible and took place, that it was not unfair to try the appellants and that safe convictions resulted. And the matter was only touched on briefly in argument. However, if our view had been that it was an abuse of the *ex p. Bennett* kind, we do not know where we could have found the power to quash what we regard as a safe conviction. The Court's jurisdiction is entirely statutory, and the single criterion for interference with a conviction is now—since the recent amendment of section 2 of the Criminal Appeal Act 1968—its unsafety. The Court seems to have assumed such jurisdiction in *Bloomfield* [1997] 1 Cr.App.R. 125 and *Hyatt* [1997] 3 *Archbold News* 2, but as the editors of *Archbold News* comment in their Issue 02 of 1998, it is far from obvious as to why this should be so. See the observation of Lord Lloyd in *R. v. Martin (Alan)* [1998] 1 Cr.App.R. 347, [1998] A.C. 917, HL, at pages 355 and 928 and the judgment of this Court in *Chalkley & Jeffries* [1998] 2 Cr.App.R. 79, [1998] Q.B. 848, CA, at pages 99B-100C and 869A-870B. It may be that a conviction in a trial which should never have taken place is to be regarded as unsafe for that reason. It may be that, despite the statutory basis of the Court's jurisdiction, it has also some inherent or ancillary jurisdictional basis for intervening to mark abuse of process by quashing a conviction when it considers that the court below should have stayed the proceeding. Or it may be that the recent amendment to the 1968 Act has removed the supervisory role of this Court over abuse of criminal process where the affront to justice, however outrageous, has not so prejudiced the defendant in his trial as to render his conviction unsafe. All that is for decision by another court in an appropriate case."

In the light of these observations *Chalkley* cannot, in our judgment, properly be regarded as having concluded the matter. On the contrary, it is apparent from what he said in the passage cited in *MacDonald* that Auld L.J. regarded the point as still open. A similar view was expressed in *Simpson*, by Garland J. at page 19E in the passage cited earlier.

However, in *Martin*, (which was referred to in *MacDonald* but not in *Simpson*), Lord Lloyd at pages 355 and 928H said:

"even if the Courts-Martial Appeal Court had been satisfied that there was an abuse of process, it would still have been necessary for the court to dismiss the appeal unless persuaded that the conviction was unsafe. For the Courts-Martial Appeal Court is a creature of statute and has no power to allow appeals save in accordance with section 12(1) of the Courts-Martial Appeals Act 1968 as substituted by section 29(1) and paragraph 5 of Schedule 2 to the Criminal Appeal Act 1995."

(These provisions are identical to those amending section 2 of the 1968 Act in relation to this Court.)

Lord Browne-Wilkinson and Lord Slynn both agreed with Lord Lloyd's reasons for dismissing the appeal. Lord Hope at pages 357 and 930G said:

> "I do not think it can be doubted that the Appeal Court—in this particular case the Courts-Martial Appeal Court—have power to declare a conviction to be unsafe and to quash the conviction if they find that the course of proceedings leading to what would otherwise have been a fair trial has been such as to threaten either basic human rights or the rule of law."

It seems plain that these conflicting observations by Lord Lloyd and Lord Hope were *obiter* and formed no part of the reasoning which led to the decision in *Martin.* Furthermore, it does not appear that their Lordships were invited to consider what was said in Parliament when the 1968 Act was amended or what the pre-amendment practice of this Court was, as exemplified by *Heston-Francois* (1984) 78 Cr.App.R. 209, [1984] Q.B. 278 and *Att.-Gen.'s Reference (No. 1. of 1990)* (1992) 95 Cr.App.R. 296, [1992] Q.B. 630, at pages 303 and 644. It is also pertinent that Sir John Smith's article in [1995] Crim.L.R. 920 was not before the House of Lords in *Martin.*

In our judgment the conflicting views expressed in *Martin* in themselves afford a sufficient demonstration of the ambiguity of "unsafe" to permit this Court, in accordance with *Pepper v. Hart* [1993] A.C. 593, to have recourse to *Hansard.* Furthermore, if the construction of Lord Lloyd is correct, it will, with respect, lead to absurdity, which provides a further reason for recourse to *Hansard*: in relation to a minor offence triable by justices, abuse arguments can lead to redress by judicial review in the Divisional Court, but, in relation to a serious offence tried at the Crown Court, abuse arguments could not lead to appellate success.

Accordingly, we turn to *Hansard,* the relevant passages from which are conveniently set out at page 924 in Sir John Smith's article [1995] Crim.L.R. 920. It is unnecessary to rehearse what was said on Second Reading and in Standing Committee. But it is apparent that the amended form of section 2 was intended by the Home Secretary, by Lord Taylor of Gosforth, Chief Justice and, crucially, by Parliament, to restate the existing practice of the Court of Appeal; although there is nothing to suggest that express consideration was then given by anyone to whether unsafe was apt to embrace abuse of the *Bennett* or any other type. It is common ground that *Heston-Francois* and *Att.-Gen.'s Reference (No. 1 of 1990)* show the pre-amendment practice of this Court, namely that abuse can be a ground for quashing a conviction.

Furthermore, in our judgment, for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the *Oxford Dictionary* gives the legal meaning of "unsafe" as "likely to constitute a miscarriage of justice".

Sir John Smith's article to which we have referred does not deal with unsafe in relation to abuse, though his commentary on *Simpson* [1998] Crim.L.R. 482 raises directly pertinent questions. But, for the reasons

which we have given, we agree with his 1995 conclusion that "unsafe" bears a broad meaning and one which is apt to embrace abuse of process of the *Bennett* or any other kind.

It follows that, in the highly unusual circumstances of this case, notwithstanding that there is no criticism of the trial judge or jury, and no challenge to the propriety of the outcome of the trial itself, this appeal must be allowed and the appellant's conviction quashed.

Appeal allowed.
Conviction quashed.

Solicitors: Christian Fisher & Co.; Crown Prosecution Service, H.Q.

N.R.M.H.

[HOUSE OF LORDS]

REGINA v. HORSEFERRY ROAD MAGISTRATES' COURT, *Ex parte* BENNETT

1993 March 3, 4, 8, 9; June 24

Lord Griffiths, Lord Bridge of Harwich, Lord Oliver of Aylmerton, Lord Lowry and Lord Slynn of Hadley

Justices - Committal proceedings - Jurisdiction - Defendant removed from South Africa to England - Collusion alleged between police forces - Arrest in London lawful - Whether court having jurisdiction to inquire into circumstances of defendant's presence within jurisdiction - Whether court empowered to refuse trial where abuse of process shown - Whether jurisdiction vested in justices

The defendant, a citizen of New Zealand who was alleged to have committed criminal offences in England, was traced to South Africa by the English police and forcibly returned to England. There was no extradition treaty between the two countries, and although special arrangements could be made for extradition in a particular case under section 15 of the Extradition Act 1989 no such proceedings were taken. The defendant claimed that he had been kidnapped from the Republic of South Africa as a result of collusion between the South African and British police and returned to England, where he was arrested and brought before a magistrates' court to be committed to the Crown Court for trial. The defendant sought an adjournment to enable him to challenge the court's jurisdiction. The application was refused and he was committed for trial. He sought judicial review of the magistrates' court's decision. The Divisional Court of the Queen's Bench Division, refusing the application, held that the English court had no power to inquire into the circumstances under which a person appearing before it had been brought within the jurisdiction.

On appeal by the defendant:-

Held, allowing the appeal (1) (Lord Oliver of Aylmerton dissenting), that where a defendant in a criminal matter had been brought back to the United Kingdom in disregard of available extradition process and in breach of international law and the laws of the state where the defendant had been found, the courts in the United Kingdom should take cognisance of those circumstances and refuse to try the defendant; and that, accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, it might stay the prosecution as an abuse of process and order the release of the defendant (post, pp. 61H-62B, F-G, 64E-F, 67F-68B, C-D, 73F-G, 74F-H, 84B-D).

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C. and *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95, D.C. considered.

(2) That the jurisdiction exercised by magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to protect the court's process from abuse was

confined to matters directly affecting the fairness of the trial of the particular accused with whom they were dealing and did not extend to the wider supervisory jurisdiction for upholding the rule of law; that the wider responsibility was vested in the High Court and where a question arose as to the deliberate abuse of the extradition procedures the magistrates should adjourn the matter so that an application could be made to the Divisional Court, which was the proper forum for deciding the matter; and that, accordingly, the case would be remitted to the Divisional Court for further consideration (post, pp. 64B-D, F, 68C-D, 73E-F, 78C-E, 84B-D).

Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108, D.C. applied.

Decision of the Divisional Court of the Queen's Bench Division [1993] 2 All E.R. 474; 97 Cr.App.R. 29 reversed.

The following cases are referred to in their Lordships' opinions:

Ashton, In re [1993] A.C. 9; [1993] 2 W.L.R. 846; [1993] 2 All E.R. 663, H.L.(E.)

Atkinson v. United States of America Government [1971] A.C. 197; [1969] 3 W.L.R. 1074; [1969] 3 All E.R. 1317, H.L.(E.)

ChuPiu-wing v. Attorney-General [1984] H.K.L.R. 411

Connelly v. Director of Public Prosecutions [1964] A.C. 1254; [1964] 2 W.L.R. 1145; [1964] 2 All E.R. 401; 48 Cr.App.R. 183, H.L.(E.)

Frisbie v. Collins (1952) 342 U.S. 519

Grassby v. The Queen (1989) 168 C.L.R. 1

Ker v. Illinois (1886) 119 U.S. 436

Lam Chi-ming v. The Queen [1991] 2 A.C. 212; [1991] 2 W.L.R. 1082; [1991] 3 All E.R. 172; 93 Cr.App.R. 358, P.C.

McC. (A Minor), In re [1985] A.C. 528; [1984] 3 W.L.R. 1227; [1984] 3 All E.R. 908; 81 Cr.App.R. 54, H.L.(N.I.)

Mills v. Cooper [1967] 2 Q.B. 459; [1967] 2 W.L.R. 1343; [1967] 2 All E.R. 100, D.C.

Moevao v. Department of Labour [1980] 1 N.Z.L.R. 464

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C.

Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak [1982] Q.B. 398; [1981] 3 W.L.R. 60; [1981] 2 All E.R. 129; 72 Cr.App.R. 250, D.C.

Reg. v. Croydon Justices, Ex parte Dean [1993] Q.B. 769; [1993] 3 W.L.R. 198; [1993] 3 All E.R. 129, D.C.

Reg. v. Derby Crown Court, Ex parte Brooks (1984) 80 Cr.App.R. 164, D.C.

Reg. v. Governor of Pentonville Prison, Ex parte Sinclair [1991] 2 A.C. 64; [1991] 2 W.L.R. 1028; [1991] 2 All E.R. 366; 93 Cr.App.R. 329, H.L.(E.)

Reg. v. Grays Justices, Ex parte Low [1990] 1 Q.B. 54; [1989] 2 W.L.R. 948; [1988] 3 All E.R. 834; 88 Cr.App.R. 291, D.C.

Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108, D.C.

Reg. v. Hartley [1978] 2 N.Z.L.R. 199

Reg. v. Horsham Justices, Ex parte Reeves (Note) (1980) 75 Cr.App.R. 236, D.C.

Reg. v. Humphrys [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497; 63 Cr.App.R. 95, H.L.(E.)

Reg. v. Oxford City Justices, Ex parte Smith (1982) 75 Cr.App.R. 200, D.C.

Reg. v. Plymouth Justices, Ex parte Driver [1986] Q.B. 95; [1985] 3 W.L.R. 689; [1985] 2 All E.R. 681; 82 Cr.App.R. 85, D.C.
Reg. v. Sang [1980] A.C. 402; [1979] 2 W.L.R. 439; [1979] 2 All E.R. 46; 68 Cr.App.R. 240, C.A.; [1980] A.C. 402; [1979] 3 W.L.R. 263; [1979] 2 All E.R. 1222; 69 Cr.App.R. 282, H.L.(E.)
Reg. v. Telford Justices, Ex parte Badhan [1991] 2 Q.B. 78; [1991] 2 W.L.R. 866; [1991] 2 All E.R. 854; 93 Cr.App.R. 171, D.C.
Reg. v. West London Stipendiary Magistrate, Ex parte Anderson (1984) 80 Cr.App.R. 143, D.C.
Rex v. Lee Kun [1916] 1 K.B. 337, C.C.A.
Rex v. Nat Bell Liquors Ltd. [1922] 2 A.C. 128, P.C.
Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 K.B. 338; [1952] 1 All E.R. 122, C.A.
Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373
Rex v. Walton (1905) 10 Can.Cr.Cas. 269
Rex v. Whiteside (1904) 8 Can.Cr.Cas. 478
Rex (Martin) v. Mahony [1910] 2 I.R. 695
Rourke v. The Queen (1977) 76 D.L.R. (3d) 193
S. v. Ebrahim, 1991 (2) S.A. 553
Scott (Susannah), Ex parte (1829) 9 B. & C. 446
Sinclair v. H.M. Advocate (1890) 17 R.(J.) 38
United States v. Alvarez-Machain (1992) 119 L.Ed.2d 441
United States v. Sobell (1957) 244 F.2d 520
United States v. Toscanino (1974) 500 F.2d 267

The following additional cases were cited in argument:

Attorney-General v. Cass (1822) 11 Price 345
Attorney-General v. Dorkings (1822) 11 Price 156
Attorney-General v. Golder (1823) 12 Price 335
Barbuit's Case in Chancery (1737) Cas.T.Talb. 281
Barlow v. Hall (1794) 2 Anst. 461
Barton v. Commonwealth of Australia (1974) 131 C.L.R. 477
Birch v. Prodger (1804) 1 Bos. & Pul.N.R. 135
Brown v. Lizars (1905) 2 C.L.R. 837
Card v. Salmon [1953] 1 Q.B. 392; [1953] 2 W.L.R. 301; [1953] 1 All E.R. 324, D.C.
Derbyshire County Council v. Times Newspapers Ltd. [1992] Q.B. 770; [1992] 3 W.L.R. 28; [1992] 3 All E.R. 65, C.A.
Flatman v. Light [1946] 2 All E.R. 368, D.C.
Gelen v. Hall (1857) 5 W.R. 757
Groenvelt v. Burwell (1699) Ld.Raym. 454
Hall v. Roche (1799) 8 Durn. & E. 187
Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, H.L.(E.)
Krans, Ex parte (1823) 1 B. & C. 258
Loveridge v. Plaistow (1792) 2 H.Bl. 29
Lyford v. Tyrrel (1793) 1 Anst. 85
McDonald v. The Queen (1983) 77 Cr.App.R. 196, P.C.
Mapp v. Ohio (1961) 367 U.S. 643
Miranda v. Arizona (1966) 384 U.S. 436
O'Toole v. Scott [1965] A.C. 939; [1965] 2 W.L.R. 1160; [1965] 2 All E.R. 240, P.C.
Parisot, In re (1889) 5 T.L.R. 344, D.C.
Reg. v. Alladice (1988) 87 Cr.App.R. 380, C.A.

Reg. v. Aubrey-Fletcher, Ex parte Ross-Munro [1968] 1 Q.B. 620; [1968] 2 W.L.R. 23; [1968] 1 All E.R. 99, D.C.
Reg. v. Betesh (1975) 30 C.C.C. (2d) 233
Reg. v. Birmingham Justices, Ex parte Lamb [1983] 1 W.L.R. 339; [1983] 3 All E.R. 23, D.C.
Reg. v. Bow Street Stipendiary Magistrate, Ex parte Director of Public Prosecutions (1989) 91 Cr.App.R. 283, D.C.
Reg. v. Brentford Justices, Ex parte Wong [1981] Q.B. 445; [1981] 2 W.L.R. 203; [1981] 1 All E.R. 884; 73 Cr.App.R. 67, D.C.
Reg. v. Canale [1990] 2 All E.R. 187; (1989) 91 Cr.App.R. 1, C.A.
Reg. v. Canterbury and St. Augustine Justices, Ex parte Turner (1983) 147 J.P. 193, D.C.
Reg. v. Carden (1879) 5 Q.B.D. 1, D.C.
Reg. v. Clerk to Medway Justices, Ex parte Department of Health and Social Services [1986] Crim.L.R. 686, D.C.
Reg. v. Crneck, Bradley and Shelley (1980) 116 D.L.R. (3d) 675
Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243; [1962] 3 W.L.R. 1154; [1962] 3 All E.R. 641, C.A.
Reg. v. Governor of Pentonville Prison, Ex parte Alves [1993] A.C. 284; [1992] 3 W.L.R. 844; [1992] 4 All E.R. 787, H.L.(E.)
Reg. v. Governor of Pentonville Prison, Ex parte Osman (No. 3) [1990] 1 W.L.R. 878; [1990] 1 All E.R. 999; 91 Cr.App.R. 409, D.C.
Reg. v. Grays Justices, Ex parte Graham [1982] Q.B. 1239; [1982] 3 W.L.R. 596; [1982] 3 All E.R. 653; 75 Cr.App.R. 229, D.C.
Reg. v. Manchester City Stipendiary Magistrate, Ex parte Snelson [1977] 1 W.L.R. 911; [1978] 2 All E.R. 62; 66 Cr.App.R. 44, D.C.
Reg. v. Oxford City Justices, Ex parte Berry [1988] Q.B. 507; [1987] 3 W.L.R. 643; [1987] 1 All E.R. 1244; 85 Cr.App.R. 89, D.C.
Reg. v. Sattler (1858) Dears. & Bell 539
Reg. v. Walsh (1989) 91 Cr.App.R. 161, C.A.
Rex v. Corrigan [1931] 1 K.B. 527, C.C.A.
Rex v. Davies [1906] 1 K.B. 32
Rex v. Garrett; Ex parte Sharf (1917) 86 L.J.K.B. 894, C.A.
Rex v. Governor of Brixton Prison, Ex parte Servini [1914] 1 K.B. 77, D.C.
Rex v. Marks (1802) 3 East 157
Rochin v. California (1952) 342 U.S. 165
Sampson, In re [1987] 1 W.L.R. 194; [1987] 1 All E.R. 609; 84 Cr.App.R. 376, H.L.(E.)
Silverman v. United States (1961) 365 U.S. 505
Simms v. Moore [1970] 2 Q.B. 327; [1970] 2 W.L.R. 1099; [1970] 3 All E.R. 1; 54 Cr.App.R. 347, D.C.
Smalley, In re [1985] A.C. 622; [1985] 2 W.L.R. 538; [1985] 1 All E.R. 769; 80 Cr.App.R. 205, H.L.(E.)
Trendtex Trading Corporation v. Central Bank of Nigeria [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.
Triquet v. Bath (1764) 3 Burr. 1478
United States ex rel. Lujan v. Gengler (1975) 510 F.2d 62
United States v. Rauscher (1886) 119 U.S. 407
United States v. Russell (1973) 411 U.S. 423
Wemyss v. Hopkins (1875) 39 J.P. 549, D.C.
Wong Sun v. United States (1963) 371 U.S. 471

Appeal from the Divisional Court of the Queen's Bench Division.

This was an appeal by the defendant, Paul James Bennett, by leave of the Appeal Committee of the House of Lords (Lord Keith of Kinkel,

Lord Goff of Chieveley and Lord Mustill) given on 3 December 1992, from an order dated 31 July 1992 of the Divisional Court of the Queen's Bench Division (Woolf L.J. and Pill J.) dismissing his motion for judicial review of decisions of the Horseferry Road Magistrates' Court of 22 May 1991 refusing him an adjournment, to enable him to challenge the jurisdiction of the court to hear committal proceedings, and committing him for trial at Southwark Crown Court.

The Divisional Court certified, in accordance with section 1(2) of the Administration of Justice Act 1960, that a point of law of general public importance was involved, namely:

> "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

The facts are stated in the opinion of Lord Griffiths.

Alan Newman Q.C. and *Brian Jubb* for the defendant appellant. The High Court has an inherent jurisdiction in both civil and criminal matters to make and enforce rules of practice so as to ensure that its process is used fairly and conveniently by both sides: see *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1301, 1347. The earlier cases, such as *Ex parte Susannah Scott* (1829) 9 B. & C. 446; *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38 and *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373, which appear to ignore or deny the existence of such a jurisdiction, should be treated with caution. In *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 Q.B. 78 the existence of a similar jurisdiction in examining justices was recognised and reinforced. The only exception occurs where they are sitting as examining justices in extradition proceedings: *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64.

In *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95 it was said obiter that the court has no power to inquire into the circumstances in which a person was found within the jurisdiction in order to decide whether he should be tried. That conclusion is inconsistent with *Reg. v. Governor of Brixton Prison, Ex parte Soblen* [1963] 2 Q.B. 243; *Connelly v. Director of Public Prosecutions* and *Ex parte Badhan* [1991] 2 Q.B. 78. On the other hand, in *Reg. v. Bow Street Magistrates, Ex parte Mackeson* (1981) 75 Cr.App.R. 24 in the exercise of the court's discretion the applicant was granted prohibition against the magistrates' court and discharged because he had been forcibly brought back. That case was followed in *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108. [Reference was also made to *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199 and *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464.] The reasoning of the latter authorities should be preferred.

Court procedures which prevent the prosecution from proceeding in cases involving the illegal abduction of the defendant embody fundamental legal principles which maintain and promote human rights, good relations between states and the sound administration of justice: see *S. v. Ebrahim,*

1991 (2) S.A. 553; *United States v. Toscanino* (1974) 500 F.2d 267; *Reg. v. Humphrys* [1977] A.C. 1 and *United States v. Alvarez-Machain* (1992) 119 L.Ed.2d 441.

The Court of Appeal recognised, in view of observations in *Reg. v. Sang* [1980] A.C. 402, 422-423, a discretion in the court ("a residual discretion") to exclude evidence of little probative value but of highly prejudicial effect, since it is the duty of the court to safeguard a defendant against the risk of wrongful conviction.

This discretion qualifies the absolute rule that relevant evidence is admissible however obtained: see also section 78 of the Police and Criminal Evidence Act 1984.

Colin Nicholls Q.C. and *Robert Fischel* for the respondent. The court has jurisdiction to try any person found within the jurisdiction for any offence committed within the jurisdiction: *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373. The court has no power to inquire into the circumstances in which a person is found within the jurisdiction for the purpose of refusing to try him: *Ex parte Susannah Scott* (1829) 9 B. & C. 446 applying *Rex v. Marks* (1802) 3 East 157 and *Ex parte Krans* (1823) 1 B. & C. 258; *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38 and *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373 considered and approved in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95. *Reg. v. Bow Street Magistrates, Ex parte Mackeson* (1981) 75 Cr.App.R. 24 and *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108 were per incuriam and *Reg. v. Plymouth Justices, Ex parte Driver* was correctly decided. The decisions in *Ex parte Mackeson* and *Ex parte Healy* were based on a misunderstanding of the judgments of Lord Goddard C.J. in *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373, of Woodhouse J. in *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199 and *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95.

The basis of the rule in *Ex parte Susannah Scott*, 9 B. & C. 446 is the public interest that persons held in unlawful custody for criminal offences should be answerable in a court of justice. English courts cannot be judges of the wrongdoing of foreign authorities who are governed by their own laws: *Reg. v. Sattler* (1858) Dears. & Bell 539; *In re Parisot* (1889) 5 T.L.R. 344. The rule is otherwise in civil matters where a litigant is not permitted to take advantage of his own wrongdoing: *Lyford v. Tyrrel* (1729) 1 Anst. 85; *Loveridge v. Plaistow* (1972) 2 H.Bl. 29; *Hall v. Roche* (1799) 8 Durn. & E. 187; *Barlow v. Hall* (1794) 2 Anst. 461; *Birch v. Prodger* (1804) Bos. & Pul.N.R. 135; *Attorney-General v. Dorkings* (1822) 11 Price 156; *Attorney-General v. Cass* (1822) 11 Price 345 and *Attorney-General v. Golder* (1823) 12 Price 335.

The only exception to the rule in *Ex parte Scott* is where a person has been returned to the United Kingdom in accordance with the provisions of an extradition treaty. Section 19 of the Extradition Act 1870 (33 & 34 Vict. c. 52) and section 6(4) of the Extradition Act 1989 prohibit his trial for an offence which is not disclosed by the facts in respect of which his

return was ordered: *Rex v. Corrigan* [1931] 1 K.B. 527 and *Reg. v. Aubrey Fletcher, Ex parte Ross-Munro* [1968] 1 Q.B. 620.

The arrest of a fugitive criminal by the officers of one state in the territory of another is prima facie a breach of international law. But if the state of asylum acquiesces in the arrest there is no such breach: see *Oppenheim, A Manual of International Law*, 9th ed. (1992), pp. 385-390, para. 119 and *Rex v. Garrett; Ex parte Sharf* (1917) 86 L.J.K.B. 894. Where there is a breach of foreign law the foreign state may vindicate its own law by diplomatic means and the complainant may prosecute his own wrong there: *Ex parte Driver*. Both the request for return and surrender of a fugitive are acts of the prerogative power and cannot be impugned as improper: *Brown v. Lizars* (1905) 2 C.L.R. 837 and *Barton v. Commonwealth of Australia* (1974) 131 C.L.R. 477. An irregularity abroad which occasions no impropriety here cannot amount to an abuse of process so as to entitle the court to refuse to try the fugitive or prohibit his trial. The power to stop a prosecution as an abuse of the process of the court arises only where the prosecution has abused or manipulated the process of the court so as to deprive the defendant of his right to a fair trial: *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164.

The role of the judge is confined to the forensic process. He controls neither the police nor the prosecution authority. He is only concerned with the conduct of the trial, save where there is abuse of the process of the court. He has no other or residual discretion to exclude evidence where the prosecution is allegedly involved in the impropriety: *Reg. v. Sang* [1980] A.C. 402 and *Rourke v. The Queen* (1977) 76 D.L.R. (3d) 193. The decisions in *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254; *Reg. v. Humphrys* [1977] A.C. 1 and *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 Q.B. 78 are not authority for the proposition that a court can or should prevent a prosecution because of the means whereby a person's presence within the jurisdiction has been obtained. [Reference was made to *Rex v. Governor of Brixton Prison, Ex parte Servini* [1914] 1 K.B. 77; *Atkinson v. United States of America Government* [1971] A.C. 197; *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529 and *Reg. v. Governor of Pentonville Prison, Ex parte Osman (No. 3)* [1990] 1 W.L.R. 878.] *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769 was not concerned with abuse of the process of the court. If it was, it was wrongly decided.

The constitutional right to due process was not regarded in the United States of America as preventing the courts from trying a defendant who has been kidnapped in a foreign country and forcibly brought into the United States: *Ker v. Illinois* (1886) 119 U.S. 436; *Frisbie v. Collins* (1952) 342 U.S. 519; *United States ex rel. Lujan v. Gengler* (1975) 510 F.2d 62 and *United States v. Alvarez-Machain*, 119 L.Ed.2d 441. The Canadian courts take a similar view: see *Rex v. Whiteside* (1904) 8 Can.Cr.Cas. 478 and *Rex v. Walton* (1905) 10 Can.Cr.Cas. 269. In the United States, the Circuit Court of Appeal stayed a prosecution on due process grounds where a fugitive had been brutally kidnapped by federal officers where extradition process was available: *United States v. Toscanino*, 500 F.2d 267. That was not because of the circumstances of

the return but because the prosecutor was not allowed to continue: *McDonald v. The Queen* (1983) 77 Cr.App.R. 196. That case was concerned with the exclusion of evidence. [Reference was made to *United States v. Russell* (1973) 411 U.S. 423; *Mapp v. Ohio* (1961) 367 U.S. 643; *Miranda v. Arizona* (1966) 384 U.S. 436; *Wong Sun v. United States* (1963) 371 U.S. 471; *Silverman v. United States* (1961) 365 U.S. 505 and *Rochin v. California* (1952) 342 U.S. 165.]

Newman Q.C. in reply. A person who has been brought within the jurisdiction as a result of extradition proceedings cannot lawfully be tried for any other offence than that for which his return was demanded by the requesting country: *United States v. Rauscher* (1886) 119 U.S. 407.

The rules of international law are incorporated into English law automatically and are considered to be part of English law unless they are inconsistent with an Act of Parliament: *Barbuit's Case in Chancery* (1737) Cas.T.Talb. 281; *Triquet v. Bath* (1764) 3 Burr. 1478 and *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529.

Section 58 of the Police and Criminal Evidence Act 1984 and the Codes of Practice made under section 66 of the Act are intended to achieve fairness not only for a defendant but also for the Crown and its officers. No distinction is to be drawn between police officers and the Crown Prosecution Service: *Reg. v. Walsh* (1989) 91 Cr.App.R. 161; *Reg. v. Alladice* (1988) 87 Cr.App.R. 380; *Reg. v. Canale* [1990] 2 All E.R. 187 and *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769.

A defendant is entitled to a stay of proceedings if he is being prosecuted after a promise has been made to him that no prosecution will be brought against him: *Reg. v. Betesh* (1975) 30 C.C.C. (2d) 233; *Reg. v. Crneck, Bradley and Shelley* (1980) 116 D.L.R. (3d) 675 and *Chu Piu-wing v. Attorney-General* [1984] H.K.L.R. 411.

[LORD GRIFFITHS. Their Lordships invite counsel to address them on the appropriate court to exercise the abuse of process jurisdiction.]

Colin Nicholls Q.C. and *Robert Fischell* for the respondent. Examining justices have no power to consider whether or not proceedings are an abuse of process. Their function is to determine whether there is sufficient evidence to justify committal of the defendant for trial: sections 6(1) and 9 of the Magistrates' Courts Act 1980; *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64; *Atkinson v. United States of America Government* [1971] A.C. 197; *Reg. v. Governor of Pentonville Prison, Ex parte Alves* [1993] A.C. 284; *Reg. v. Carden* (1879) 5 Q.B.D. 1; *Card v. Salmon* [1953] 1 Q.B. 392 and *Reg. v. Birmingham Justices, Ex parte Lamb* [1983] 1 W.L.R. 339. The examining justices' function is the same in domestic and extradition proceedings. The power of the court to act within its jurisdiction to safeguard the defendant against oppression has been recognised only in regard to trial on indictment and the control of abuse once proceedings are instituted: *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254, 1305 and *Reg. v. Humphrys* [1977] A.C. 1. In the latter case it was doubted whether the power extended to courts of inferior jurisdiction: [1977] A.C. 1, 26, 46 and 53. In *Ex parte Sinclair* [1991] 2 A.C. 64 and *Ex parte Alves* [1993] A.C. 284, the question was thought to be still open. The decisions in *Reg. v. Derby Crown Court, Ex parte Brooks*, 80 Cr.App.R.

164; *Reg. v. Bow Street Stipendiary Magistrate, Ex parte Director of Public Prosecutions* (1989) 91 Cr.App.R. 283 and *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 Q.B. 78 that examining justices have power to prevent abuse of process are inconsistent with *Atkinson v. United States of America Government* [1971] A.C. 197. In *Ex parte Badhan* the order of the court was one of prohibition and so the question as to whether the court had jurisdiction was avoided. In most of the cases where the Divisional Court has considered the jurisdiction of magistrates in respect of abuse of process the proceedings have similarly been by way of prohibition: *Reg. v. Manchester City Stipendiary Magistrate, Ex parte Snelson* [1977] 1 W.L.R. 911; *Reg. v. Brentford Justices, Ex parte Wong* [1981] Q.B. 445; *Reg. v. Horsham Justices, Ex parte Reeves (Note)* (1980) 75 Cr.App.R. 236 and *Reg. v. Grays Justices, Ex parte Graham* [1982] Q.B. 1239. [Reference was also made to *Mills v. Cooper* [1967] 2 Q.B. 459; *Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak* [1982] Q.B. 398 and *Reg. v. West London Stipendiary Magistrate, Ex parte Anderson* (1984) 80 Cr.App.R. 143.]

As a matter of policy, it is undesirable and unnecessary for examining magistrates to have the power to consider questions of abuse of process: see *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108. Applications for a stay of proceedings which may result in a refusal to exercise jurisdiction should, like applications for habeas corpus, be reserved for the original jurisdiction of the High Court. Abuse of process is akin to contempt: *Hawkins' Pleas of the Crown*, 7th ed. (1795), vol. 3, Bk. 2, ss. 41, 42. Inferior courts, which are not courts of record, have no inherent power to commit for contempt and, thus, no jurisdiction to consider abuse of process. They must rely on the protection of the Divisional Court: *Rex v. Davies* [1906] 1 K.B. 32.

There is a doubt about magistrates' courts being courts of record: see *Groenvelt v. Burwell* (1699) Ld.Raym. 454; *Gelen v. Hall* (1857) 5 W.R. 757; *Wemyss v. Hopkins* (1875) 39 J.P. 549 and *Flatman v. Light* [1946] 2 All E.R. 368. Sections 63 and 97(4) of the Magistrates' Courts Act 1980 and section 12 of the Contempt of Court Act 1981 grant justices specific powers to deal with contempt. That suggests that magistrates' courts are not courts of record. They have a limited power to regulate their proceedings: *O'Toole v. Scott* [1965] A.C. 939 and *Simms v. Moore* [1970] 2 Q.B. 327.

Alan Newman Q.C. and *Brian Jubb* for the defendant. In *Reg.v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64, 75-78, the question whether justices sitting as examining justices have jurisdiction in relation to abuse of process was left open. They have no such power in extradition cases.

Section 1 of the Act of 1980 empowers justices to issue a summons. Under section 1(2) they are given power to take certain matters into account but the list is not exhaustive. The question of abuse of process in laying the information is dealt with after the summons has been issued and in open court rather than on an ex parte application before the issue of the summons: *Reg. v. Clerk to Medway Justices, Ex parte Department of Health and Social Services* [1986] Crim.L.R. 686. Under section 76(2) of the Police and Criminal Evidence Act 1984 the justices are required

to consider the admissibility of a confession statement if that issue is raised in committal proceedings: *Reg. v. Oxford City Justices, Ex parte Berry* [1988] Q.B. 507. Thus, it is desirable that abuse of process jurisdiction should be vested in the justices. If justices cannot have such jurisdiction, then, equally the Divisional Court exercises a supervisory jurisdiction and in the absence of the justices' jurisdiction there will be nothing to supervise. All courts, including the magistrates' courts, have power to prevent abuse of process: *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529. [Reference was also made to *In re Smalley* [1985] A.C. 622; *In re Sampson* [1987] 1 W.L.R. 194; *Reg. v. Canterbury and St. Augustine Justices, Ex parte Turner*, 147 J.P. 193 and *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770.]

Nicholls Q.C. replied.

Their Lordships took time for consideration.

24 June. LORD GRIFFITHS. My Lords, the appellant is a New Zealand citizen who is wanted for criminal offences which it is alleged he committed in connection with the purchase of a helicopter in this country in 1989. The essence of the case against him is that he raised the finance to purchase the helicopter by a series of false pretences and has defaulted on the repayments.

The English police eventually traced the appellant and the helicopter to South Africa. The police, after consulting with the Crown Prosecution Service, decided not to request the return of the appellant through the extradition process. The affidavit of Detective Sergeant Martin Davies of the Metropolitan Police of New Scotland Yard deposes as follows:

> "I originally considered seeking the extradition of the applicant from South Africa. I conferred with the Crown Prosecution Service, and it was decided that this course of action should not be pursued. There are no formal extradition provisions in force between the United Kingdom and the Republic of South Africa and any extradition would have to be by way of special extradition arrangements under section 15 of the Extradition Act 1989. No proceedings for the applicant's extradition were ever initiated."

It is the appellant's case that, having taken the decision not to employ the extradition process, the English police colluded with the South African police to have the appellant arrested in South Africa and forcibly returned to this country against his will. The appellant deposes that he was arrested by two South African detectives on 28 January 1991 at Lanseria in South Africa, who fixed a civil restraint order on the helicopter on behalf of the United Kingdom finance company and told the appellant that he was wanted by Scotland Yard and he was being taken to England. Thereafter he was held in police custody until he was placed on an aeroplane in Johannesburg ostensibly to be deported to New Zealand via Taipei. At Taipei when he attempted to disembark he was restrained by two men who identified themselves as South African police and said that they had orders to return him to South Africa and then to the United Kingdom and

hand him over to Scotland Yard. He was returned to South Africa and held in custody until he was placed, handcuffed to the seat, on a flight from Johannesburg on 21 February arriving at Heathrow on the morning of 22 February when he was immediately arrested by three police officers including Detective Sergeant Davies. He further deposes that he was placed on this flight in defiance of an order of the Supreme Court of South Africa obtained by a lawyer on his behalf on the afternoon of 21 February.

The English police through Sergeant Davies deny that they were in any way involved with the South African police in returning the appellant to this country. They say that they had been informed that there were a number of warrants for the appellant's arrest in existence in Australia and New Zealand and that they requested the South African police to deport the appellant to either Australia or New Zealand and it was only on 20 February that the English police were informed by the South African police that the appellant was to be repatriated to New Zealand by being placed on a flight to Heathrow from whence he would then fly on to New Zealand. Sergeant Davies does, however, depose in a second affidavit as follows:

> "1. Further to my affidavit sworn in the above-mentioned proceedings on 29 November 1991, my earliest communications with the South African authorities following the applicant's arrest were with the South African police with a view to his repatriation to New Zealand or deportation to Australia and his subsequent extradition from one of those countries to England. I discussed with the South African police the question as to whether the applicant would be returned via the United Kingdom and I was informed by them that he might be returned via London. I sought advice from the Crown Prosecution Service and from the Special Branch of the Metropolitan Police as to what the position would be if he were so returned. I informed the South African police by telephone that if the applicant were returned via London he would be arrested on arrival. Subsequently I was informed by the South African police that the applicant could not be repatriated to New Zealand via Heathrow . . . "4. I now recollect that it was on 20 February and not on 21 February as I stated in my previous affidavit, that the South African police informed me on the telephone that the applicant was to be returned to New Zealand via Heathrow. On the same day I consulted the Crown Prosecution Service and it was decided that the English police would arrest the applicant on his arrival at Heathrow."

It is not for your Lordships to pass judgment on where truth lies at this stage of the proceedings but for the purpose of testing the submission of the respondent that a court has no jurisdiction to inquire into such matters it must be assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he is alleged to have committed in 1989. I shall also assume that the

Crown Prosecution Service were consulted and approved of the behaviour of the police.

On 22 May 1991 the appellant was brought before a stipendiary magistrate for the purpose of committal proceedings. Counsel for the appellant requested an adjournment to permit him to challenge the jurisdiction of the magistrates' court. The application was refused and the appellant was committed for trial to the Southwark Crown Court on five offences of dishonesty. The appellant obtained leave to bring proceedings for judicial review to challenge the decision of the magistrate. On 22 July 1992 the Divisional Court ruled that as a preliminary issue the court would consider whether there was jurisdiction vested in the Divisional Court to inquire into the circumstances by which the appellant had come to be within the jurisdiction of the courts of England and Wales.

On 31 July 1992 the Divisional Court held that even if the evidence showed collusion between the Metropolitan Police and the South African police in kidnapping the appellant and securing his enforced illegal removal from the Republic of South Africa there was no jurisdiction vested in the court to inquire into the circumstances by which the appellant came to be within the jurisdiction and accordingly dismissed the application for judicial review. The Divisional Court has certified the following question of law:

> "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

The Divisional Court in this case was faced with conflicting decisions of the Divisional Court in earlier cases. In *Reg. v. Bow Street Magistrates, Ex parte Mackeson* (1981) 75 Cr.App.R. 24 the facts were as follows. The applicant was a British citizen who had left this country at the end of 1977 and in 1979 was working as a schoolteacher in Zimbabwe-Rhodesia. In May 1979 he was wanted by the Metropolitan Police for offences of fraud that he was alleged to have committed before he left this country. The Metropolitan Police were aware that no extradition was lawfully possible at that time because the Zimbabwe-Rhodesia Government was in rebellion against the Crown. The Metropolitan Police therefore told the authorities in Zimbabwe-Rhodesia that the applicant was wanted in England in connection with fraud charges with the result that he was arrested and a deportation order made against him. The applicant brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside which succeeded at first instance but the decision was set aside on appeal. No attempt was made to use the extradition process to secure the return of the applicant when Zimbabwe-Rhodesia returned to direct rule under the Crown in December 1979. On 17 April 1980 the applicant was placed upon a plane by the police in Zimbabwe-Rhodesia and arrested on his arrival at Gatwick by the Metropolitan Police on 17 April 1980. No evidence was offered in respect of the fraud charges but further charges were alleged against him

under the Theft Acts. The applicant applied for an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates' court on those charges.

On these facts Lord Lane C.J. giving the judgment of the Divisional Court held, on the authority of *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373, that the court had jurisdiction to try the applicant. He said, at p. 32:

> "Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the court. That aspect of the matter is simple."

On the question of whether the court could or would exercise a discretion in favour of the applicant to order his release from custody Lord Lane C.J. relied upon a passage in the judgment of Woodhouse J. in *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, a decision of the Court of Appeal of New Zealand. In that case the New Zealand police had obtained the return of a man named Bennett from Australia to New Zealand where he was wanted on a charge of murder, merely by telephoning to the Australian police and asking them to arrest Bennett and put him on an aeroplane back to New Zealand, which they had done. Lord Lane C.J. cited the following extract from the judgment of Woodhouse J. [1978] 2 N.Z.L.R. 199, 216-217:

> "There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith C.J. referred to extradition as a 'great prerogative power, supposed to be an incident of sovereignty' and then rejected any suggestion that 'it could be put in motion by any constable who thought he knew the law of a foreign country,

and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished:' *Brown v. Lizars* (1905) 2 C.L.R. 837, 852. The reasons are obvious.

"We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the judge would probably have been justified in exercising his discretion under section 347(3) or under the inherent jurisdiction to direct that the accused be discharged."

Lord Lane C.J. followed that passage and exercised the court's discretion to order prohibition against the magistrates' court and to discharge the applicant.

Ex parte Mackeson, 75 Cr.App.R. 24 was followed by the Divisional Court in *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108.

In *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95 a differently constituted Divisional Court after hearing argument containing more elaborate citation of authority declined to follow *Ex parte Mackeson* and held that the court had no power to inquire into the circumstance in which a person was found within the jurisdiction for the purpose of refusing to try him.

The Divisional Court regarded the law as settled by a trilogy of cases. *Ex parte Susannah Scott* (1829) 9 B. & C. 446, *Sinclair v. H.M. Advocate* (1890) 17 R.(J.) 38 and *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373. These cases undoubtedly show that at the time they were decided the judges were not prepared to inquire into the circumstances in which a person came within the jurisdiction. In *Ex parte Susannah Scott* Lord Tenterden C.J. granted a warrant for the apprehension of Scott so that she might appear and plead to a bill of indictment charging her with perjury. Ruthven, the police officer to whom the warrant was directed, arrested Scott in Brussels. She applied to the British Ambassador for assistance but he refused to interfere and Ruthven brought her to Ostend and then to England. A rule nisi was obtained for a habeas corpus to bring up Scott in order that she might be discharged. In giving judgment Lord Tenterden C.J. said, 9 B. & C. 446, 448:

"The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them."

In *Sinclair v. H.M. Advocate*, 17 R.(J.) 38 the sheriff substitute of Lanarkshire granted a warrant to a Glasgow sheriff officer to arrest Sinclair for breach of trust and embezzlement and to receive him into custody from the government of Spain. The accused was brought before the sheriff substitute on this warrant and committed to prison to await his trial. He brought a bill of suspension and liberation in which he alleged that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant; that he had been put by them on board an English ship in the *Tagus*, and there had been taken into custody by a Glasgow detective officer without the production of a warrant; but during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours; that the complainer had demanded to be allowed to land there but had been prevented by the officer; that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, but he was brought direct to Scotland, and there committed to prison, and no warrant was ever produced or exhibited to him. It was held that these allegations did not set forth any facts to affect the validity of the commitment by the sheriff substitute, which proceeded upon a proper warrant.

In the course of his judgment the Lord Justice-Clerk said, at pp. 40-42:

> "There are three stages of procedure in this case - first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings.
>
> "In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mount of the Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement. If there was any irregularity in the granting or execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong.
>
> "It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said,

we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here. . . .

"No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign government, and irregularly dealt with by a subordinate officer."

Lord M'Laren stated his view in the following terms, at pp. 43-44:

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody. . . .

"I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction.

"In a case of substantial infringement of right this court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention."

In *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373 a deserter from the R.A.S.C. was arrested in Belgium by British officers accompanied by two Belgian police officers. He was brought to this country where he was charged with desertion and detained in Colchester barracks. He applied for a writ of habeas corpus which was issued and on the return of the writ he submitted that his arrest was illegal because the British authorities had

no power to arrest him in Belgium and his arrest was contrary to Belgian law. Dealing with this submission Lord Goddard C.J. said, at p. 376:

> "The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the state of A or the state of B where I was actually arrested.' He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge of one without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest."

Lord Goddard C.J. then reviewed the decisions in *Ex parte Susannah Scott*, 9 B. & C. 446, and *Sinclair v. H.M. Advocate*, 17 R.(J.) 38, and after citing the passage in the speech of Lord M'Laren which I have already cited Lord Goddard C.J. continued, at pp. 377-378:

> "That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court."

There were also cited to the Divisional Court a number of authorities from the United States which showed that United States courts have not regarded the constitutional right to "due process" as preventing a court in the United States from trying an accused who has been kidnapped in a foreign country and forcibly abducted into the United States: see *Ker v. Illinois* (1886) 119 U.S. 436 and *United States of America v. Sobell* (1957) 244 F.2d 520.

Relying on this line of authority the Divisional Court declined to follow *Ex parte Mackeson*, 75 Cr.App.R. 24, and held that it had no power to inquire into the circumstances in which the applicant was brought within the jurisdiction.

In the present case the Divisional Court approved the decision in *Ex parte Driver* [1986] Q.B. 95 and in giving the leading judgment of the court Woolf L.J. said:

> "However, quite apart from authority, I am bound to say it seems to me that the approach of Stephen Brown L.J. [in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95], in general, must be correct. The power which the court is exercising, and the power which the court was purporting to exercise, in *Ex parte Mackeson* is one which

> is based upon the inherent power of the court to protect itself against the abuse of its own process. If the matters which are being relied upon have nothing to do with that process but only explain how a person comes to be within the jurisdiction so that that process can commence, it seems to me difficult to see how the process of the *court* (and I emphasise the word 'court') can be abused by the fact that a person may or may not have been brought to this country improperly."

However, in a later passage Woolf L.J. drew a distinction between improper behaviour by the police and the prosecution itself, he said:

> "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 respondent to uphold the decision of the Divisional Court and the nub of their 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 *Reg. v. Sang* [1980] A.C. 402 and those passages in the speeches of Lord Diplock, at pp. 436-437, and Lord Scarman, at pp. 454-455, which 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 respondent has 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 *United States v. Alvarez-Machain* (1992) 119 L.Ed.2d 441 reasserting the Ker-Frisbie Rule. 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 U.S. 436, 444.

The respondent also cited two Canadian cases decided at the turn of the century, *Rex v. Whiteside* (1904) 8 Can.Cr.Cas. 478 and *Rex v. Walton* (1905) 10 Can.Cr.Cas. 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 drawn to the New Zealand decision in *Moevao v.*

Department of Labour [1980] 1 N.Z.L.R. 464, in which Richmond P. expressed reservations about the correctness of his view that the prosecution in *Reg. v. Hartley* [1978] 2 N.Z.L.R. 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 *Reg. v. Hartley*, the powerful dissent of the minority in *United States v. Alvarez-Machain* and the decision of the South African Court of Appeal in *S. v. Ebrahim*, 1991 (2) S.A. 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 *Reg. v. Sang* [1980] A.C. 402 the appellant points to section 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 *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80 Cr.App.R. 164, 168-169, Sir Roger Ormrod said:

"The power to stop a prosecution arises only when it is an abuse of a 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. Attorney-General* [1984] H.K.L.R. 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 pp. 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 *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769, the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to section 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. Director of Public Prosecutions* [1964] A.C. 1254, 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 respondent that the 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 *Reg. v. Governor of Pentonville Prison,*

Ex parte Sinclair [1991] 2 A.C. 64 and *Atkinson v. United States of America Government* [1971] A.C. 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 *Reg. v. Humphrys* [1977] A.C. 1, 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v. Cooper* [1967] 2 Q.B. 459, Lord Parker C.J. 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, at p. 467:

> "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 L.J. expressed his agreement with this view, at p. 470F. In *Reg. v. Canterbury and St. Augustine Justices, Ex parte Klisiak* [1982] Q.B. 398, 411f, Lord Lane C.J. was prepared to assume such a jurisdiction. In *Reg. v. West London Stipendiary Magistrate, Ex parte Anderson* (1984) 80 Cr.App.R. 143, Robert Goff L.J., reviewing the position at that date said, at p. 149:

> "There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see *Director of Public Prosecutions v. Humphrys* (1976) 63 Cr.App.R. 95, 144; [1977] A.C. 1, 19, *per* Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular *Brentford Justices, Ex parte Wong* (1981) 73 Cr.App.R. 67; [1981] Q.B. 445; *Watford Justices, Ex parte Outrim* (1982) [1983] R.T.R. 26; *Grays Justices, Ex parte Graham* (1982) 75 Cr.App.R. 229; [1982] 3 All E.R. 653. The power has, however, been described by the Lord Chief Justice as being 'very strictly confined:' see *Oxford City Justices, Ex parte Smith* (1982) 75 Cr.App.R. 200, 204."

The power has recently and most comprehensively been considered and affirmed by the Divisional Court by *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 Q.B. 78, 81.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient

judicial warning (see, for example, Lord Lane C.J. in *Reg. v. Oxford City Justices, Ex parte Smith* (1982) 75 Cr.App.R. 200 and Ackner L.J. in *Reg. v. Horsham Justices, Ex parte Reeves (Note)* (1980) 75 Cr.App.R. 236) it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates' court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined 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. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.

I would answer the certified question as follows. The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.

Accordingly I would allow this appeal and remit the case to the Divisional Court for further consideration.

LORD BRIDGE OF HARWICH. My Lords, this appeal raises an important question of principle. When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing? This is to state the issue very starkly, perhaps some may think tendentiously. But because this appeal has to be determined on the basis of assumed facts, your Lordships, as it seems to me, cannot avoid grappling with the issue in this stark form.

In this country and in Scotland the mainstream of authority, as the careful review in the speech of my noble and learned friend, Lord Griffiths, shows, appears to give a negative answer to the question posed, holding that the courts have no power to examine the circumstances in which a prisoner was brought within the jurisdiction. I fully recognise the cogency of the arguments which can be adduced in support of this view, sustained as they are by the public interest in the prosecution and punishment of crime. But none of the previous authorities is binding on your Lordships' House and, if there is another important principle of law which ought to influence the answer to the question posed, then your Lordships are at liberty, indeed under a duty, to examine it and, if it transpires that this is an area where two valid principles of law come into conflict, it must, in my opinion, be for your Lordships to decide as a matter of principle which of the two conflicting principles of law ought to prevail.

When we look to see how other jurisdictions have answered a question analogous to that before the House in terms of their own legal systems, the most striking example of an affirmative answer is the decision of the South African Court of Appeal in *S. v. Ebrahim*, 1991 (2) S.A. 553 allowing an appeal against his conviction for treason by a member of the African National Congress on the sole ground that he had been abducted from Swaziland, outside the jurisdiction of the South African court, by persons acting as agents of the South African state. This decision, as the summary in the headnote shows, resulted from the application of

> "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."

In the United States, the authorities reveal a conflict of judicial opinion. The doctrine established by Supreme Court decisions in 1886, *Ker v. Illinois*, 119 U.S. 436, and in 1952, *Frisbie v. Collins*, 342 U.S. 519, accords substantially in its effect with the doctrine of the early English authorities. But more recently this doctrine has been powerfully challenged. In *United States v. Toscanino* (1974) 500 F.2d 267, 268 the defendant, an Italian citizen, who had been convicted in the New York District Court of a drug conspiracy, alleged that the court had "acquired jurisdiction over him unlawfully through the conduct of American agents who had kidnapped him in Uruguay . . . tortured him and abducted him to the United States for the purpose of prosecuting him" there. The lower court having held that these allegations were immaterial to the

exercise of its jurisdiction to try him, provided he was physically present at the time of trial, he appealed to the United States Court of Appeals Second Circuit. The effect of the court's decision is sufficiently summarised in the headnote. The court held:

> "that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice, so that defendant was entitled to a hearing on his allegations. . . . Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."

The most recent decision of the United States Supreme Court in *United States v. Alvarez-Machain*, 119 L.Ed.2d 441 concerned a Mexican citizen indicted for the murder of an agent of the Drug Enforcement Administration (D.E.A.). The District Court had held that other D.E.A. agents had been responsible for the defendant's abduction from Mexico; that this had been in violation of the extradition treaty between Mexico and the United States; and that the accused should be discharged and repatriated to Mexico. This decision was affirmed by the United States Court of Appeals, Ninth Circuit, but reversed by the Supreme Court by a majority of six to three. The opinions related primarily to the question whether the abduction was a breach of the treaty. The majority held that the abduction, although "shocking," involved no breach of the treaty and relied on the earlier decisions in the cases of *Ker*, 119 U.S. 436, and *Frisbie*, 342 U.S. 519, for the view that the abduction was irrelevant to the exercise of the court's criminal jurisdiction. The dissenting opinion of Stevens J., in which Blackmun and O'Connor JJ. joined, held that the abduction was both in breach of the treaty and in violation of general principles of international law and distinguished the earlier authorities as having no application to a case where the abduction in violation of international law was carried out on the authority of the executive branch of the United States Government. The minority opinion was that this was an infringement of the rule of law which it was the court's duty to uphold. After referring to the South African decision in *S. v. Ebrahim*, Stevens J. writes in the final paragraph of his opinion, at pp. 466-467:

> "The Court of Appeal of South Africa - indeed, I suspect most courts throughout the civilised world - will be deeply disturbed by the 'monstrous' decision the court announces today. For every nation that has an interest in preserving the rule of law is affected, directly or indirectly, by a decision of this character."

In the common law jurisdiction closest to our own the opinion expressed by Woodhouse J. in the New Zealand case of *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, in which he describes the issue as "basic to the whole concept of freedom in society," has already been cited by my

noble and learned friend, Lord Griffiths, and I need not repeat it. In the later case of *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, 475-476, Woodhouse J. cited the relevant passage from his own judgment in *Hartley* and added:

> "It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. And in this regard the courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the *Connelly* case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that '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' ([1964] A.C. 1254, 1354 . . .). Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law,' to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general. It is for reasons of this kind that I remain of the opinion that the trial judge would have been entirely justified in the *Hartley* case in stopping the prosecution against the man Bennett."

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal

proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse J. in *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, 476, as an "abuse of the criminal jurisdiction in general" or indeed, in the language of Mansfield J. in *United States v. Toscanino*, 500 F.2d 267, as a "degradation" of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.

For these reasons and for the reasons given in the speech of my noble and learned friend, Lord Griffiths, with which I fully agree, I would allow the appeal.

LORD OLIVER OF AYLMERTON. My Lords, a citizen whose rights have been infringed by unlawful or over-enthusiastic action on the part of an executive functionary has a remedy by way of recourse to the courts in civil proceedings. It may not be an ideal remedy. It may not always be a remedy which is easily available to the person injured. It may not even, certainly in his estimation, be an adequate remedy. But it is the remedy which the law provides to the citizen who chooses to invoke it. The question raised by this appeal is whether, in addition to such remedies as may be available in civil proceedings, the court should assume the duty of overseeing, controlling and punishing an abuse of executive power leading up to properly instituted criminal proceedings not by means of the conventional remedies invoked at the instance of the person claiming to have been injured by such abuse but by restraining the further prosecution of those proceedings. The results of the assumption of such a jurisdiction are threefold; and they are surprising. First, the trial put in train by a charge which has been properly laid will not take place and the person charged (if guilty) will escape a just punishment; secondly, the civil remedies available to that person will remain enforceable; and thirdly, the public interest in the prosecution and punishment of crime will have been defeated not by a necessary process of penalising those responsible for executive abuse but simply for the purpose of manifesting judicial disapproval.

It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court

charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression "a criminal court"), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case. I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.

I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Griffiths, and I gratefully acknowledge and adopt his recitation of the relevant authorities and the conflict of judicial opinion which arises from them. Your Lordships have, in addition, been referred in the course of argument to a number of reports of civil cases of respectable antiquity in which persons originally unlawfully detained have been released from custody in the exercise of the court's undoubted jurisdiction to prevent abuses of its own process. But those were cases in which parties to civil proceedings had sought to take advantage of their own wrong in securing the unlawful detention of another party by serving proceedings for civil arrest upon him whilst unlawfully detained. In the case of a person charged with the commission of a criminal offence following an allegedly irregular initial detention, there was, until *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24, an unbroken line of authority in the United Kingdom dating from the early 19th century for the proposition perhaps most pithily expressed by Lord Goddard C.J. in *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373 that once a person is in lawful custody in this country the court has no power and is not concerned to inquire into the circumstances in which he may have been brought here. *Ex parte Mackeson* and *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108 which impliedly followed it, were to the contrary effect, but in a reserved judgment of the Divisional Court delivered by Stephen Brown L.J. in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95, in which all the relevant authorities were fully reviewed, that court followed the earlier line of authority and rejected the decision in *Ex parte Mackeson* as having been decided per incuriam. *Ex parte Driver* was followed by the Divisional Court in the instant case in rejecting the appellant's claim that the criminal court had jurisdiction to consider and pass judgment upon the circumstances in which he had been brought within the jurisdiction.

The appellant invites this House now to say that the decision in *Ex parte Mackeson* is to be preferred and that a criminal court's

undoubted jurisdiction to prevent abuses of its own process should be extended, if indeed it does not already extend, to embrace a much wider jurisdiction to oversee what is referred to generally as "the administration of justice," in the broadest sense of the term, including the executive acts of law enforcement agencies occurring before the process of the court has been invoked at all and having no bearing whatever upon the fairness of the trial. I have to say that I am firmly of the opinion that, whether such a course be properly described as legislation or merely as pushing forward the frontiers of the common law, the invitation is one which ought to be resisted. For my part, I see neither any inexorable logic calling for such an extension nor any social need for it; and it seems to me to be a course which will be productive of a good deal of inconvenience and uncertainty.

I can, perhaps, best explain my reluctance to embark upon such a course by postulating and seeking to answer two questions.

First, does a criminal court have, or should it have, any *general* duty or any power to investigate and oversee executive abuses on the part of law enforcement officers not affecting either the fairness of the trial process or the bona fides of the charge which it is called upon to try and occurring prior to the institution of the criminal proceedings and to order the discontinuance of such proceedings and the discharge of the accused if it is satisfied that such abuses have taken place? Secondly, if there is no such general jurisdiction and if the executive abuse alleged consists of the repatriation of the accused from a foreign country through acts which are unlawful in the country in which they occurred, is there some special quality in this form of executive abuse which gives rise to or which calls for the creation of such a jurisdiction in this particular case?

So far as the first question is concerned, I know of no authority for the existence of any such general supervisory jurisdiction in a criminal court. It is not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively - for instance, if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not for a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *Reg. v. Croydon Justices, Ex parte Dean* [1993] Q.B. 769, where the court quashed committal proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the bona fides of the prosecution and on the fairness of the process to an accused who has been invited to prejudice his own position on the faith of the undertaking. Where, however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his

apprehension and detention. That is not for a moment to suggest that such abuses, if they occur, are unimportant or are to be lightly accepted; but they are acts for which, if they are unlawful, the accused has the same remedies as those available to any other citizen whose legal rights have been infringed. If they are not only unlawful but are criminal as well, they are themselves remediable by criminal prosecution. That a judge may disapprove of or even be rightly outraged by the manner in which an accused has been apprehended or by his treatment whilst in custody cannot, however, provide a ground for declining to perform the public duty of insuring that, once properly charged, he is tried fairly according to law.

In *Reg. v. Sang* [1980] A.C. 402, 454, Lord Scarman observed:

> "Judges are not responsible for the bringing or abandonment of prosecutions: nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury."

Those words were used in the context of a suggested discretion to prevent a prosecution because of judicial disapproval of the way in which admissible evidence had been obtained, but they are equally applicable to other executive acts which may incur judicial disapprobation. Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. They may take the form of allegations of illegal entry on private premises, of damage to property, of the use of excessive force or even of ill-treatment or violence whilst in custody. So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused, having no bearing upon the fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of executive power entitles the accused to be exonerated. But then at what point and at what degree of outrage is the criminal court to undertake an inquiry and, if satisfied, to take upon itself the responsibility of refusing further to try the case?

If, then, it be right, as I believe that it is, that there neither is nor should be any general discretion in a criminal court to inquire into the conduct of executive officers before and leading up to the institution of criminal proceedings, the second question which I have ventured to postulate arises. Where, with the connivance or at the instigation of executive officers in this country, an accused person who has taken refuge in a foreign country is brought as a result of activity unlawful in that country within the jurisdiction of an English court and is then lawfully detained and charged, is there some special quality attaching to the unlawful and abusive activity abroad which confers or ought to confer on the criminal court a discretion which it would not otherwise possess?

The matter can, perhaps, best be illustrated by a hypothetical example of two terrorists, A and B, who, having detonated a bomb in London, make their way to Dover with a view to escaping abroad. A, as a result of a quarrel with a ticket inspector, is wrongfully detained by the railway police and whilst still in wrongful custody is duly arrested for the terrorist offence and subsequently charged. B, having successfully boarded a Channel ferry, is recognised as he steps ashore in Calais by two off-duty constables returning from holiday who seize him on the quayside and take him back on board keeping him under restraint until the ferry returns to Dover where he is arrested and charged. Now nobody would, I think, suggest for a moment that the trial of A should not proceed, simply because, as a result of a wrongful arrest and detention, he has been prevented from making good his escape, although he has in fact been put in the position of being charged and brought to trial only by reason of an unlawful abuse of executive power. What, then, distinguishes the case of B and confers on the criminal court in his case a discretion to stay his trial and discharge him which the court which does not possess in the case A? I can see only two possible justifications for the suggestion that the court ought, in B's case, to have such a discretion. First, it may be argued that, as a matter of international comity an English court ought to signify its disapproval of the invasion of the protective rights of a foreign state over those who come within its jurisdiction by declining to try a person who has been wrongfully removed from the protection of that state through the instrumentality of persons for whose actions the authorities of this country are responsible. I do not find this argument persuasive. An English criminal court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state is, as it seems to me, a matter which can only properly be pursued on a diplomatic level between the government of the United Kingdom and the government of that state.

Secondly, it may be argued that the unlawful activity of which complaint is made, because it results in the accused being brought within a jurisdiction from which he would otherwise have escaped, is invested with a special character because it infringes some "right" of the accused in English law to be repatriated only through a process of extradition by the state under whose protection he has succeeded in placing himself. Now it is, of course, perfectly true that the Extradition Act 1989 contains, in section 6(4), an inhibition upon extradition from the United Kingdom unless provision is made by the receiving state that the person extradited will not, without the consent of the Secretary of State, be dealt with for (in broad terms) offences other than those in respect of which his extradition has been ordered.

That provision is mirrored in section 18 of the Act which provides that the person extradited to the United Kingdom from a foreign state will not be triable for (again in broad 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 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, Criminal Pleading Evidence & Practice*, 43rd ed. (1993), para. 4-44 calls it "a misuse or improper manipulation of the process of the court." In *Rourke v. The Queen* (1977) 76 D.L.R. (3d) 193 Laskin

C.J.C. said, at p. 205, "The court is entitled to protect its process from abuse" and also referred, at p. 207, to "the danger of generalising the application of the doctrine of abuse of process." In *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464, 476, Woodhouse J. spoke approvingly of "the much wider and more serious abuse of the criminal jurisdiction in general," whereas Richmond P., giving expression to reservations about the view in which he had concurred in *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, referred, at p. 471, to the need to establish "that the process of the court is itself being wrongly made use of." I think that the words used by Woodhouse J. involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by the President. The question still remains what circumstances antecedent to the trial will produce a situation in which the process of the court 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 abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *Reg. v. Grays Justices, Ex parte Low* [1990] 1 Q.B. 54 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *Reg. v. Horsham Justices, Ex parte Reeves (Note)*, 75 Cr.App.R. 236 it was held to be an abuse of process to pursue charges when the magistrates had already found "no case to answer." It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the ground of abuse of process.

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the

prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "pour encourager les autres."

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The court in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24, while quite clear that there was jurisdiction to try the applicant, relied on *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199 for the existence of a discretion to make an order of prohibition. Woodhouse J. in *Hartley* had also recognised the *jurisdiction* to try Bennett, but expressed the court's conclusion that to do so in the circumstances offended against "one of the most important principles of the rule of law." The court's decision in *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95 to the contrary effect was influenced by *Ex parte Susannah Scott*, 9 B. & C. 446, *Sinclair v. H.M. Advocate*, 17 R.(J.) 38 and *Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott* [1949] 1 All E.R. 373. *Scott* and *Sinclair* were decisions on jurisdiction and formed the basis of the decision in *Ex parte 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 C.J. dealt with that argument in the court's judgment by reference to the cases of *Scott* and *Sinclair*. Then, having disposed of an argument based on provisions of the Army Act relating to arrest, the Lord Chief Justice came to "the only point in which there was any substance . . . whether there has been such delay that this court ought to interfere:" p. 379a. 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 p. 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 parte Mackeson* to *Ex parte 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 *Reg. 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 respondent: 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 *Reg. v. Sang* [1980] A.C. 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 respondent also relied on *Reg. 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 C.J. in a different context in *Rex v. Lee Kun* [1916] 1 K.B. 337, 341:

> "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 endorse (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 Kingdom from elsewhere (by whatever method) will nearly always take place in consequence of a request by the executive here.

(2) Why should the court not stay for abuse of process if the accused has been wrongfully arrested in the United Kingdom (which is not alleged to have happened in the instant case)?

A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process.

(3) If at common law the rule in *Reg. v. Sang* applies to let in admissible evidence obtained by wrongful conduct on the part of the executive, why does similar reasoning not prevail where the presence of the accused has been procured by wrongful conduct in which the executive is involved?

Reg. v. Sang exemplifies a common law rule of evidence, as explained by the speeches in that case, which applied to all admissible evidence except confessions and certain evidence produced by confessions (as to which see *Lam Chi-ming v. The Queen* [1991] 2 A.C. 212). The abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context. Secondly, although there is no discretion at common law to exclude

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evidence (except confession evidence) by reason of wrongful conduct, there *is* discretion to stay proceedings as an abuse of process (see *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254) and the alleged facts of the instant case are but one example of the need for that discretion.

It has been suggested that, since the executive conduct complained of invades the rights of other countries and of persons under their protection and detracts from international comity, the remedy lies not with the courts but in the field of diplomacy. I would answer that the court must jealously protect its own process from misuse *by the executive* and that this necessity gives particular point to the observation of Lord Devlin (which my noble and learned friend, Lord Griffiths, has already noted) in *Connelly v. Director of Public Prosecutions*, at p. 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."

I now turn to the question of procedure. The appellant, having been committed for trial, applied for an order of certiorari to quash the order for committal on the ground that the magistrates refused to adjourn the committal proceedings "to enable the point of abuse of process to be argued," presumably in the Divisional Court of the Queen's Bench Division. Although I feel obliged to consider the procedure which was followed in this case and that which must follow from the conclusion of the majority of your Lordships, I preface my remarks by saying that I agree with the answer to the certified question, and also with the order, which my noble and learned friend, Lord Griffiths, has proposed.

In *Ex parte Mackeson*, 75 Cr.App.R. 24 the applicant applied to the Divisional Court before the day fixed for the committal proceedings for an order of certiorari quashing the charges against him and an order prohibiting the magistrates from proceeding with the committal proceedings. The Divisional Court, having held that there was jurisdiction to stay the proceedings as an abuse of process, granted prohibition. In *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108, another case of alleged "disguised extradition," the single lay justice hearing the committal proceedings was invited to decide the abuse of process point and to stay the proceedings. After a five day hearing she decided the point against the accused, who then applied for an order of certiorari. I have difficulty in seeing how the magistrate's decision on a question of fact could have been attacked by certiorari but in any event the Divisional Court rejected the application on the merits. So the committal stood. In his judgment my noble and learned friend, then Griffiths L.J., said, at p. 112:

> "This court considers that it was wrong to invite a single lay justice to consider a matter such as this. Whether or not there has been an abuse of process of the sort raised in these proceedings is a matter far more fitting to be inquired into by the Queen's Bench Divisional Court than by a single justice. If a point such as this is to be taken in future it should be taken in the form in which it was in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, 75 Cr.App.R. 24; that

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is, there should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition. That is not to say that we have any criticism whatsoever of the way in which the justice approached her task in this case. Both the defence and the prosecution asked her to decide the question; she clearly went into it with the greatest care and we are quite unable to find any fault or criticism with any of the conclusions of fact at which she arrived. In the opinion of this court, having been asked to undertake a task which we do not think was appropriate for a single lay justice, she discharged her duties quite admirably."

And, at p. 113:

"Accordingly, I have come to the conclusion that there is no merit or substance in this application and it will be refused. As I say, if this question is to be raised in further cases the proper procedure is to use that in *Reg. v. Bow Street Magistrates, Ex parte Mackeson,* 75 Cr.App.R. 24, so that the Divisional Court may be seised of the matter, and not bring it up before a lay justice on committal proceedings. However, we anticipate that cases of this nature are likely to be very rare."

McCullough J., concurring, said, at pp. 113-114:

"Whether this was an application properly made to the justice or whether it was one that should properly have been made in the first place to the Divisional Court, I am in no doubt that no order of certiorari should go. Despite the admirable way in which this justice dealt with the matter, I share the concern of Griffiths L.J. that a single lay justice should be asked to grapple with questions of this kind. It is better I think that the question should be dealt with as in *Reg. v. Bow Street Magistrates, Ex parte Mackeson,* 75 Cr.App.R. 24 even although such a course may leave one wondering precisely how a justice in such circumstances can be said to have acted in excess of jurisdiction or made an error of law."

In *Ex parte Driver* [1986] Q.B. 95 the applicant sought prohibition in accordance with the *Mackeson* procedure, as recommended in *Healy,* but the order sought was refused on the ground that there was no jurisdiction to stay for the reasons relied on.

The *Driver* doctrine therefore held sway when the present case came before the magistrates with a view to committal. Accordingly, it is understandable that the magistrates rejected the request of the accused to adjourn while he made a *Mackeson* application and instead proceeded to commit him for trial.

My Lords, I am satisfied that, on the facts found in *Mackeson,* 75 Cr.App.R. 24, it was both lawful and appropriate to make an order of prohibition directed to the magistrates' court. While that court had *jurisdiction* to entertain committal proceedings, the High Court decided that to permit the criminal proceedings against the accused to continue would be an abuse of process of the court (of trial); it would therefore

be equally an abuse of process to permit proceedings in the magistrates' court to be conducted (or, once embarked on, continued) with a view to committing the accused to the Crown Court for trial, which would be oppressive to the accused and a waste of the court's time. A parallel is found in the order made in *Reg. v. Telford Justices, Ex parte Badhan* [1991] 2 Q.B. 78, where the Divisional Court prohibited the magistrates from further hearing committal proceedings on the ground that, by reason of the prejudice caused by delay, to proceed against the accused would amount to an abuse of process. In my view the fact that the decision and order are made by the High Court, although the Crown Court is the proposed court of trial, makes no difference. It is the function of the High Court to exercise supervisory jurisdiction over inferior courts, including the magistrates' court. It is, moreover, noteworthy that the function of directing or giving consent to preferment of a "voluntary" bill of indictment can only be performed by a *High Court judge* in England and Wales (or by the direction of the Criminal Division of the Court of Appeal): see Administration of Justice (Miscellaneous Provisions) Act 1933, section 2(2), which has continued in force unamended since the transfer of criminal jurisdiction on indictment to the Crown Court in 1971.

What I have said is not of course intended to detract from the power of the court of trial itself, as the primary forum, to stay proceedings as an abuse of process, but the convenience of staying the proceedings at an earlier stage is obvious, when that can properly be done.

Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear. In any event, notwithstanding dicta to the contrary, I would, on the authority of *Grassby v. The Queen* (1989) 168 C.L.R. 1, a decision of the High Court of Australia, and of cases there cited (to which I shall presently refer), not be easily persuaded that *examining magistrates* have jurisdiction to stay committal proceedings for abuse of process. (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in *Mills v. Cooper* [1967] 2 Q.B. 459.)

My Lords, as I have said, the remedy sought is an order of certiorari. I prefer to consider that remedy according to the conventional, perhaps now old-fashioned, principles enunciated in *Rex (Martin) v. Mahony* [1910] 2 I.R. 695, *Rex v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128 and *Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1952] 1 K.B. 338, without seeking to justify the making of an order in this case by reference to more recent views, including views based on dicta uttered in this House. As I see it, the magistrates here, understandably but erroneously relying on *Ex parte Driver* [1986] Q.B. 95, acted prematurely and therefore without jurisdiction when they proceeded to hear and determine the committal proceedings without first allowing the appellant to make to the Divisional Court an application which (subject to *Ex parte Driver*) was on its face at least worthy of consideration. Having, however innocently, neglected an essential preliminary step (namely the adjournment decreed by *Ex parte Healy* [1983] 1 W.L.R. 108), the magistrates incurred the liability to have their

order of committal quashed. For an example of proceedings in which a condition precedent to jurisdiction was omitted I refer to *In re McC. (A Minor)* [1985] A.C. 528. I would be in favour of remitting the case to the Divisional Court to reconsider it in the light of your Lordships' opinions, since one alternative would be to refuse an order of certiorari because an application to stay the proceedings can perfectly well be made to the court of trial, and the decision (relating to trial on indictment) would not, it seems, be reviewable: *In re Ashton* [1993] 2 W.L.R. 846. The other, and perhaps more convenient, course would be for the Divisional Court now to hear the application for a stay. If that were decided in favour of the appellant, the court could make an order of certiorari and such other order, if any, as might be needed to prevent the proceedings in the magistrates' court from going ahead.

It seems to me that, by analogy with proceedings which are terminated by reason of irregular extradition procedures, the appellant, if he succeeds, would have to be given an opportunity to "escape" but, subject to that, I can see nothing to prevent him from being properly pursued in the future, for example by ad hoc extradition under section 15.

Since the resolution of the point is not essential to your Lordships' decision of the appeal, I shall be brief in my discussion of whether the examining magistrates can stay committal proceedings as an abuse of process.

In *Grassby v. The Queen*, 168 C.L.R. 1, the accused was charged with criminal defamation and the examining magistrate stayed the committal proceedings on the ground of abuse of process. The Crown appealed to the Court of Criminal Appeal of New South Wales, which set aside the stay. The accused sought special leave to appeal from that decision. The High Court granted special leave but dismissed the appeal (which involved another point, namely the refusal of a member of the Court of Criminal Appeal to disqualify himself). Dawson J. delivered the leading judgment, holding that a committing magistrate has no power to stay the proceedings as an abuse of process. All the other members of the court, presided over by Mason C.J., agreed except Deane J. who considered that, if the magistrate concluded (in the words of the Act) that "a jury would not be likely to convict" because the *trial court* was likely to stay the proceedings for abuse of process, he should then discharge the accused. The judge, however, agreed in the result on the facts and his dissent was based only on his interpretation of section 41(6) of the Justices Act 1902.

Dawson J. said, at p. 10, that the magistrate's power to stay for abuse of process "has been denied upon the highest authority in the United Kingdom." He referred to *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254 and continued:

> "See also *Mills v. Cooper* [1967] 2 Q.B. 459, 467, *per* Lord Parker C.J. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (see *Reg. v. Humphrys* [1977] A.C. 1, 26 *per* Viscount Dilhorne, [1977] A.C. 1, 45-46, *per* Lord Salmon; to the contrary *Reg. v. West London Stipendiary Magistrate; Ex parte Anderson* (1984) 80 Cr.App.R. 143, 149), but it is clear that they do not extend to a

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magistrate hearing committal proceedings. In *Atkinson v. Government of the United States of America* [1971] A.C. 197, 231-232 Lord Reid (with whom Lords MacDermott and Guest agreed) said: 'The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires. The appellant argues that this was established, if it had been in doubt, by the decision of this House in *Connelly v. Director of Public Prosecutions* . . . Whatever may be the proper interpretation of the speeches in *Connelly's* case . . . with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial.'"

In *Reg. v. Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 A.C. 64, another extradition case, Lord Ackner in his illuminating speech pointed out, at p. 78e, that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was obiter. Nonetheless a view expressed by such a high authority commands respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power.

Dawson J. observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued, 168 C.L.R. 1, 11:

"The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1 & 2 Philip & Mary c. 13; 2 & 3 Philip & Mary c. 10), they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial. With the establishment of an organised police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in the Indictable Offences Act 1848 (U.K.) (11 & 12 Vict. c. 42), 'Sir John Jervis's Act,' which provided for witnesses appearing before the justices to be examined in the

presence of the accused and to be cross-examined by the accused or his counsel."

After an interesting and valuable historical review the judge said, at pp. 15-16:

"The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In *Reg. v. Forbes; Ex parte Bevan* (1972) 127 C.L.R. 1, 7, Menzies J. pointed out that: '"Inherent jurisdiction" is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction," which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have "inherent jurisdiction".'"

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J. observed, at pp. 17-18:

"The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in section 41 of the Justices Act. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial."

Having referred to section 41 of the Justices Act 1902, the judge then said, at p. 18:

"There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which

would guide the exercise of that power have little relevance to the function which the magistrate is required to perform."

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates *could not* stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial, if the Attorney-General were to prefer a voluntary bill.

For the reasons already mentioned and also for the reasons given by my noble and learned friends I would allow the appeal.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Griffiths, Lord Bridge of Harwich and Lord Oliver of Aylmerton. Despite the powerful reasons adverted to by Lord Oliver of Aylmerton I agree with Lord Griffiths that the question should be answered in the way he proposes. It does not seem to me to be right in principle that, when a person is brought within the jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, that the court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality to refuse to proceed to trial. I would accordingly allow the appeal.

Appeal allowed.
Legal aid taxation.

Solicitors: Hallinan Blackburn Gittings and Nott; Crown Prosecution Service.

A. R.

R. v. CROYDON JUSTICES, ex parte DEAN

QUEEN'S BENCH (DIVISIONAL COURT) (Lord Justice Staughton and Mr. Justice Buckley): February 17, 18, 19, 1993

Trial - Stay of Proceedings - Abuse of Process - Police Without Authority Giving Undertaking Not to Prosecute - No Bad Faith - Defendant Thereafter Committed for Trial by Prosecuting Authority - Whether Abuse of Process - Whether Committal Should be Quashed.

Judicial Review - Magistrates' Court- Committal Proceedings - Committal Hearing Following Police Undertaking Not to Prosecute - Justices Committing Applicant for Trial - Whether Judicial Review Appropriate Remedy.

The applicant, aged 17, and two other men, G and B, were arrested by the police in respect of a murder investigation. The applicant did not take part in the killing but after it had taken place he assisted in destroying the victim's car. When interviewed by the police he made statements containing potentially important evidence against G. The applicant agreed to be a prosecution witness and by the time he had left the police station he had in effect admitted doing acts with intent to impede the apprehension of G and B, but was not then charged. The same evening, G and B were charged with murder. Five days later the applicant again went to the police station where he admitted for the first time that G and B had driven him to the scene of the crime and shown him the victim's body. At the end of the interview he was informed that he was a prosecution witness and had the protection of the police. He later went with the police to the scene of the crime and described how the victim's car had been destroyed. Thereafter, the Crown Prosecution Service decided, after a conference with the police, that the applicant should be charged under section 4(1) of the Criminal Law Act 1967 with assisting in the destruction of the victim's car, knowing that it was evidence, with the intent to impede the apprehension or prosecution of G and B, knowing or believing that they were guilty of murder or some other arrestable offence. Before he was charged, the applicant made further statements to the police identifying articles belonging to G and B which he had seen in the victim's car. He was then charged. At the committal proceedings, the justices rejected a submission that they should not act as examining justices to inquire into the offence on the ground that it would be an abuse of process and also refused to adjourn the proceedings pending an application to the High Court for a stay. The applicant was committed for trial and applied for judicial review of the justices' decision and the committal. On the question whether judicial review proceedings were appropriate, and, if so, had there been an abuse of process.

Held, that (1) although the application in the present case should have been made to the Crown Court at trial, rather than by judicial review, and only in exceptional

cases should the committal proceedings be quashed once the indictment had been signed and the defendant charged, as the applicant had not been arraigned on the section 4(1) charge, on the basis that the Court could decide the case on undisputed facts, together with any other facts that it was bound to accept as true, the Court would quite exceptionally determine the application.

Barnet Magistrates' Court, ex p. Wood [1993] Crim.L.R. 78 and dictum of Lord Lane C.J. in *Attorney-General's Reference (No. 1 of 1990)* (1992) 95 Cr.App.R. 296, 301, [1992] Q.B. 630, 642 considered.

(2) The prosecution of a person who had received a promise, undertaking or representation from the police that he would not be prosecuted was capable of being an abuse of process. On the undisputed evidence in the instant case the applicant was given to understand for a considerable time that he was to be a prosecution witness, from which it almost certainly followed that he was not himself to be prosecuted for any offence in connection with the murder; but that undisputed evidence did not show that he received any express promise, undertaking or offer of immunity; nevertheless, in the quite exceptional circumstances of the case, having regard to the applicant's age at the time, the assistance he gave to the police for over five weeks, it was clearly an abuse of process for him to be prosecuted subsequently. Accordingly, the application would be granted and the committal of the applicant for the section 4(1) offence would be quashed.

Dicta of Lord Diplock in *Hunter* v. *Chief Constable of the West Midlands Police* [1982] A.C. 529, 536 and of McMullin V.-P. in *Chu Piu-wing v. Attorney-General* [1984] H.K.L.R. 411, 417, 418 applied.

[For abuse of process, see *Archbold* (1993) paras. 4-41 to 48. For judicial review of committal proceedings, see *ibid.* para. 10-15.]

Application for judicial review.

The applicant, George Franklyn Phillip Dean, pursuant to leave granted by Brooke J. on October 26, 1992, applied for judicial review by way of an order of certiorari to bring up and quash the decision of Croydon Justices on July 9, 1992, to refuse an application that they do not proceed as examining justices to inquire into the allegation that the applicant had committed the offence of doing acts with intent to impede the apprehension or prosecution of another contrary to section 4(1) of the Criminal Law Act 1967 and their subsequent decision of July 14, 1992, to commit the applicant to the Central Criminal Court for trial.

The facts appear in the judgment of Staughton L.J.

The grounds upon which relief was sought were that the justices had erred in law and in the exercise of their discretion in refusing to stay their inquiry as examining justices into the alleged offence because the prosecution was an abuse of the process of the court in that investigating officers had undertaken to the applicant that proceedings would not be commenced or continued against him in consideration of his assistance to them in their inquiries in relation to another offence.

The application was argued on February 17, 18 and 19, 1993, when the following additional cases were cited: *Abitibi Paper Co. Ltd. and the Queen, Re* (1979) 99 D.L.R. (3d) 333, *Ashton-under-Lyne Justices, ex p. Potts, The Times*, March 29, 1984, *Director of Public Prosecutions v. Humphrys* (1976) 63 Cr.App.R. 95, [1977] A.C. 1, *Heston-Francois* (1984) 78 Cr.App.R. 209, [1984] Q.B. 278, *Hui Chi-ming v. R.* (1992) 94 Cr.App.R. 236, [1992] A.C. 34, *McDonald v. R.* (1983) 77 Cr.App.R. 196, *Metropolitan Bank Ltd. v. Pooley* (1885) 10 App.Cas. 210, *Norwich Crown Court, ex p. Belsham* (1992) 94 Cr.App.R. 382, [1992] 1 W.L.R. 54, *R.* v. *Sang* (1979) 69 Cr.App.R. 282, [1980] A.C. 402 and *Turner (Bryan)* (1975) 61 Cr.App.R. 67.

James Wadsworth, Q.C. and *Robert Good* for the applicant.
Andrew Collins, Q.C. and *Charles Miskin* for the prosecution.

STAUGHTON L.J.: Late in the evening of Friday March 13, 1992, a man called Ronald Eades was stabbed and killed in woodland near Croydon. The principal offenders were, as it subsequently turned out. Kevin Gallagher and Justin Benham. Gallagher was convicted of murder and sentenced to life imprisonment; Benham pleaded guilty to manslaughter and is awaiting sentence.

The present applicant, George Dean, has been committed for trial at the Central Criminal Court on a charge of doing acts with intent to impede the apprehension of another, contrary to section 4(1) of the Criminal Law Act 1967. The particulars are that he assisted in the destruction of a Ford Granada Scorpio car, knowing it was evidence, with intent to impede the apprehension or the prosecution of Gallagher and Benham, and knowing or believing that they were guilty of murder or some other arrestable offence. The prosecution case is that the Scorpio was being driven on the night of the killing by Eades, who was a chauffeur; Gallagher and Benham subsequently drove it away, and left Gallagher's Fiat Panda near the scene of the crime. Later the applicant assisted them to remove the Panda, and to destroy the Scorpio by setting it on fire.

At the committal proceedings before the Croydon justices in July 1992, counsel for the applicant submitted that there was an abuse of process of the court because the applicant had received an undertaking from the police that he would not be prosecuted in connection with the killing; alternatively counsel applied for an adjournment so that he could make an application to the Divisional Court for a stay of the proceedings. Both applications were refused by the justices. The applicant then sought leave to apply for judicial review of the decision of the Croydon justices to inquire into the alleged offence under section 4(1), and also for an order quashing his committal to the Crown Court for that offence. He had in addition been committed, with Gallagher and Benham, on a charge of robbing William Holland on a separate occasion, that is to say on March 1, 1992. No remedy is sought in respect of that committal. The applicant and Benham have both pleaded guilty to that offence and await sentence. Leave to apply for judicial review was granted by Brooke J. on October 26. A subsequent application by the Director of Public Prosecutions to set aside that leave was dismissed.

Undisputed evidence

The following is an outline of the course of the police investigation, so far as it concerned the applicant, who was aged 17 at the time. For the present I omit from this account anything that is disputed.

On Tuesday March 17, 1992, four days after the killing, Gallagher, Benham and the applicant were each arrested on suspicion of murdering Ronald Eades. The applicant's parents and a representative of his solicitors attended at the police station. On Wednesday March 18, from 1.20 a.m. to 1.49 a.m. and from 1.56 a.m. to 2.25 a.m., there was a tape recorded interview of the applicant under caution in the presence of his solicitor's representative. In the first part of the interview the applicant said very little of significance, but in the second part he was somewhat more forthcoming, and admitted taking part in the destruction of the Scorpio. Later in the day the applicant was again interviewed under caution, from 1.19 p.m. to 2.03 p.m., from 2.21 p.m. to 3.06 p.m., from 3.15 p.m. to 3.45 p.m., and from 4.29 p.m. to 4.51 p.m., in the presence of a representative of his solicitor. Some of what he said was untrue. That was put to him on more than one occasion, and he acknowledged that he had not told the truth. He still did not tell the whole truth; what he did say was

potentially importance evidence against Gallagher, but was of less significance as to the part played by Benham. The applicant was then released from arrest and made a witness statement, which again contained important evidence against Gallagher. It concluded: "I am willing to assist police in whatever way I can with regard to this matter." In the custody record at the police station there are these concluding remarks:

"As a result of inquiries into a murder in Shirley Hills (ZN section) this prisoner was arrested as a possible accomplice. He has been interviewed by ZN officers regarding this and has subsequently been eliminated as a suspect and has provided a statement to act as a prosecution witness . . . No further action was taken regarding the murder inquiry and he was bailed until 15/4/92 at 3 p.m. Form 60 served."

By the time that he left the police station, the applicant had in effect admitted the offence with which he is now charged. He was nevertheless not charged but released. Gallagher and Benham were charged with murder that evening. Five days later, on Monday March 23, the applicant again went to the police station with his solicitor's representative, and there were three further periods of interview. He was told at the start that he was not under arrest and was free to leave at any stage. There are a number of important features in the interview that day. First, the officers told him on a number of occasions that they did not think that he was telling the truth, but was telling lies, or at any rate not the whole truth. Secondly, he certainly told a lie in one important respect. He was asked:

"Q. You were aware that there was this thing of rolling homosexuals up at Shirley Hills, did you play a part in that?

A. Yeah, I've gone up there before . . .

Q. Did you think it was a game, profit making?

A. No, it wasn't, it was more like boredom just sitting around and he used to drive up there once in a while, we'd never actually done anything when I was there, we'd just drive up there, get out walk around and get in the car and end up driving off."

He now admits, by his plea of guilty to robbery of Holland on March 1, 1992, that he had taken some part in the sort of conduct which he there denied.

Thirdly, there were a number of passages in which the police officers spoke of his role as a witness:

"Q. . . . what we are after from you is detail, we want to know what parts you did, we can't make any promises to you, understand that, what we can say is that if your part in this offence is such that it doesn't make you an accessory to it and you understand what I mean, you're nodding your head, you know what an accessory is?

A. Not to the full, no.

Q. I mean what we're saying is that if you played a part in the murder of the man or the disposal of his body, or the movement of cars, or other things, we need to know about that now, it's no good us finding out later, it dispels your credibility. We're trying to treat you as a credible witness, we need to do that now rather than later, hear what I'm saying and understand it, we're not saying you're telling lies, we're saying you're not telling the whole truth. . . .

Q. . . . we're not saying you're a liar, we're saying you're not telling the truth. We want you to realise how important it is for your own benefit, because we hope that you are going to assist the prosecution, do you understand that?

A. Yeah.

Q. I don't know whether you understand the complexities of the law, a little bit?
A. Yeah.
Q. You should have nothing to fear, we are here representing the victim and the victim's family . . .
Q. . . . we want you to help us, you're going to be a prosecution witness at this stage; we believe. If you have done anything which you think is out of order, let us decide."

At the end of the interview, D.C. Appleby explains to the applicant that he is a prosecution witness and has the protection of the police.

On the following day, Tuesday March 24, the applicant prepared a statement with his solicitor, which formed the basis of a further witness statement which he made to the police that day. In it he admitted for the first time that on the night of the murder Gallagher and Benham had driven him to the scene of the crime and shown him the body. He then drove Gallagher's Panda away from where it was nearby. On Wednesday April 1, at the invitation of the police, the applicant went to the scene of the crime with his solicitor's representative and a video film was made. He said:

"I was introduced to Detective Superintendent Bassett whom I understood was the senior officer in overall charge of the murder inquiry. I am introduced on the video in his presence by D.C. Peacock as a prosecution witness. It was not under caution or arrest. I answered all the questions that were put to me and showed them everything I could including what I had been told and shown and where I had driven Kevin Gallagher's own car from in the nearby car park. I was personally thanked by D.S. Bassett whom I helped and he spoke to me about my being a witness."

That is not denied in the affidavit of D.S. Bassett. On Thursday April 9, two police officers arrived at the applicant's house and asked him to go with them and show them the route to where the Scorpio was set on fire, which he did. On the same day he made a third witness statement, about the route and the destruction of the car. On Tuesday April 14, Mrs. Hyde of the Crown Prosecution Service had a conference with the police, and decided that the applicant should be charged with robbery of Holland, with Benham and Gallagher, on March 1, and should also be charged with the offence with which we are now concerned. The applicant knew none of that at the time. On Tuesday April 21, the applicant made two further witness statements to the police, in which he identified a knife belonging to Gallagher, and a watch belonging to Eades which he had seen on the floor of the Scorpio. He was not cautioned, or offered legal advice, or told that he was to be charged. The explanation offered is that Detective Superintendent Bassett was awaiting instructions in writing from Mrs. Hyde to charge the applicant, and had forgotten that when he sent the two officers who took the additional statements. On Monday April 27, the applicant was charged with the offence under section 4(1) of the Criminal Law Act 1967. That was over five weeks after he first in effect admitted the offence; throughout that period he had been treated as a prosecution witness; and he had been helping the police with their inquiries to a substantial extent, although he did not at times tell them the truth or the whole truth.

Disputed evidence

There are affidavits from the applicant, his father, his solicitor and the solicitor's representative. These describe occasions when rather more specific assurances are said to have been given by the police, that the applicant would not be prosecuted in

connection with the murder. They occurred either when the tape recorder was switched off, or when there was no occasion for tape recording. They are denied in affidavits from the police officers. There is, however, this important passage in the affidavit of Mrs. Hyde, in connection with her decision, taken after a conference with Detective Superintendent Bassett and Detective Inspector Newton, that the applicant should be charged:

> "In issuing instructions to charge and giving the director's consent to that charge, I was aware of the actions the police had taken and I was informed of the contents of the video recording referred to in paragraph 24 of the applicant's affidavit dated October 7, 1992. I had read the statements of evidence and records of interviews and I knew that the police wished to use the applicant as a prosecution witness and had stated to him that he would not be prosecuted for offences associated with the murder of Ronald Eades. I saw the video recording a few days later when the police brought a copy to my office."

Are judicial review proceedings appropriate?

In the ordinary way an application to quash a committal, particularly if an indictment has been signed, as it has in this case, should be made to the Crown Court before the start of the trial. That is even more appropriate if there is disputed evidence to consider. It is true that in *Telford Justices, ex p. Badhan* (1991) 93 Cr.App.R. 171, [1991] 2 Q.B. 78 this Court held that it was appropriate to make an order prohibiting the justices from continuing committal proceedings. That was a case of very substantial delay, and the prosecution was held to be an abuse of the process of the court. In answer to a suggestion that a more appropriate remedy was for the Crown Court to hear a plea in bar, Mann L.J. said in delivering the judgment of the Court, at p. 178 and p. 90, "We disagree. We think that a plea of abuse should be open to the accused subject at the earliest opportunity."

However, there is also the decision of the Court of Appeal in *Attorney-General's Reference (No. 1 of 1990)* (1992) 95 Cr.App.R. 296, [1992] Q.B. 630, another case of delay. The opinion of the court was delivered by Lord Lane C.J., who said, at p. 301 and p. 642:

> "We would like to add to that statement of principle by stressing a point which is sometimes overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay."

No doubt many of the complaints which the Lord Chief Justice there referred to related to the admission or rejection of evidence and similar matters. But I do not regard his ruling as limited in that way. The case itself was, as I have said, concerned with delay. Lord Lane C.J. said later, at p. 302 and p. 643, "Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances." I accept and follow those principles without question, as we are bound to do. Indeed I consider that the application in the present case should almost certainly have been made to the Crown Court at trial, rather than by way of judicial review. In addition to the cases already cited, there is support for that view, in *Barnet Magistrates' Court, ex p. Wood* [1993] Crim.L.R. 78, where it was said that only in exceptional cases should committal proceedings be quashed once an indictment has been signed and the defendant arraigned. The applicant has not been arraigned on the section 4(1) charge in the present case. I do not overlook the fact that the application to set aside leave to apply for judicial review in these proceedings was

dismissed. But that did not occur until November 13, 1992, by which time the judicial review process was well under way.

If it is necessary for the disputed issues of fact in this case to be resolved by oral evidence, I consider that we should decline to deal with it by way of judicial review and should leave it to the Crown Court to decide whether there is abuse of process. It is only if we can decide the point on the undisputed facts, together with any other facts that we feel bound to accept as true, that we should undertake the task. But if that is indeed the situation, I consider that quite exceptionally we ought to reach a decision. Otherwise there will be an unnecessary inquiry, probably lasting several days, in the Crown Court and yet further delay. That may well be combined with or followed by a similar inquiry as to how much of the applicant's statements should be treated as inadmissible by reason of the provisions of the Police and Criminal Evidence Act 1984.

Abuse of process

It is submitted on behalf of the Crown Prosecution Service that they alone are entitled, and bound, to decide who shall be prosecuted, at any rate in this category of case; and that the police had no authority and no right to tell the applicant that he would not be prosecuted for any offence in connection with the murder: see section 3(2) of the Prosecution of Offences Act 1985. I can readily accept that. I also accept that the point is one of constitutional importance. But I cannot accept the submission of Mr. Collins that, in consequence, no such conduct by the police can ever give rise to an abuse of process. The effect on the applicant, or for that matter on his father, of an undertaking or promise or representation by the police was likely to have been the same in this case whether it was or was not authorised by the Crown Prosecution Service. It is true that they might have asked their solicitor whether an undertaking, promise or representation by the police was binding and he might have asked the Crown Prosecution Service whether it was made with their authority. But it seems unreasonable to expect that in this case. If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage.

We were referred to three cases which suggest that abuse of process in this context can only exist where there is (i) delay, or (ii) manipulation or misuse of the rules of procedure: see *Derby Crown Court, ex p. Brooks* (1985) 80 Cr.App.R. 164, 168, *Rotherham Justices, ex p. Brough* [1991] Crim.L.R. 522, *Redbridge Justices, ex p. Whitehouse* (1992) 94 Cr.App.R. 332, 336. But there is high authority that the concept is wider than that. In *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529, 536. Lord Diplock spoke of:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; . . ."

In *Connelly v. Director of Public Prosecutions* (1964) 48 Cr.App.R. 183, 269, [1964] A.C. 1254, 1354 Lord Devlin said:

> "Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer."

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Against that there is the decision of the New Zealand Court of Appeal in *Moevao v. Department of Labour* [1980] 1 N.Z.L.R. 464. There it was held that a magistrate had no jurisdiction to examine the exercise of the discretion to prosecute, for an immigration offence. Richardson J. said, at p. 482:

> "The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court."

Other Commonwealth cases have considered whether there should be a stay when the defendant had been promised immunity or something of that sort. In *Milnes and Green* (1983) 33 S.A.S.R. 211 the Supreme Court of South Australia held that a stay would not be granted, because an implied condition of the promise of a pardon, that the defendant would give truthful information, had been broken. But Cox J., whose judgment was approved on appeal, accepted, at pp. 225-226, that there should be a stay when the grounds for one were clearly made out. In the Supreme Court of Victoria, Ormiston J. was apparently disposed to grant a stay in *Georgiadis* [1984] V.R. 1030. In *Betesh* (1975) 30 C.C.C. (2d) 233 a stay was granted by a county court judge in Ontario. In *Crneck, Bradley and Shelley* (1980) 116 D.L.R. (3d) 675, Krever J. granted a stay to one defendant, but refused a stay to another. Most significant, to my mind, is *Chu Piu-wing v. Attorney-General* [1984] H.K.L.R. 411. There the Hong Kong Court of Appeal set aside a subpoena to a witness, as an abuse of process, and the consequent conviction of the witness for contempt of court. The ground was that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, although the subpoena was in the event obtained by the police. Both were held to be "arms of the Executive in its investigative function." McMullin V.-P. said at pp. 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."

In my judgment the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. Mr. Collins was eventually disposed to concede as much, provided (i) that the promisor had power to decide, and (ii) that the case was one of bad faith or something akin to that. I do not accept that either of those requirements is essential.

Conclusion

The undisputed evidence shows that the applicant was given to understand, over a considerable period, that he was to be a prosecution witness, from which it almost certainly followed that he was not himself to be prosecuted for any offence in connection with the murder. But the undisputed evidence does not show that he

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received any express promise, undertaking or offer of immunity. It is at this point that I must return to the affidavit of Mrs. Hyde of the Crown Prosecution Service. After her conference with police officers, she knew:

> "that the police wanted to use the applicant as a prosecution witness and had stated to him that he would not be prosecuted for offences associated with the murder of Ronald Eades."

In my judgment, we are entitled to treat that evidence as true and should do so. We should disregard the evidence of the police officers to the contrary.

It is then necessary to see how far the disputed evidence on behalf of the applicant supports Mrs. Hyde's statement. Perhaps the high point is in the affidavit of the applicant's father. He says that in the early evening of March 18, P.C. O'Brien told him:

> "that George would be released later on after he had made a voluntary statement concerning the matter, and that he was not going to be charged with anything because he was going to be their main prosecution witness."

The applicant himself says in this statement that on that day he was told, "We're definitely going to have you on our side." It is those passages which I think we are entitled to treat as truthful in the light of Mrs. Hyde's affidavit. In my judgment, particularly having regard to the fact that the applicant was only 17 at the time, although not, as he has since admitted, a stranger to crime, it was clearly an abuse of process for him to be prosecuted subsequently. The impression created was not dispelled for over five weeks, during which period he gave repeated assistance to the police. This case can, I think, be regarded as quite exceptional. The justices were bound to treat it as one of abuse of process.

I would quash the committal of the applicant for the section 4(1) offence.

BUCKLEY J.: I agree.

Application granted.

Solicitors: Bernstein Garcia for the applicant. Crown Prosecution Service, Croydon.

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PHILIP HENRY VIVIAN TOWNSEND
SIMON ROBERT DEARSLEY
GORDON MAXWELL BRETSCHER

COURT OF APPEAL (The Vice-President) Lord Justice Rose, Mr Justice Keene and Judge Hyam): May 7, 8, 1997

ABUSE OF PROCESS

Implied undertaking not to prosecute

Accused initially treated as prosecution witness—Effect on accused of course taken by prosecution—Whether accused seriously prejudiced—Whether abuse of process of the court.

INDICTMENT

Joinder of charges

Some charges transferred to Crown Court and others committed—Whether prohibition on joinder—Administration of Justice (Miscellaneous Provisions) Act 1933 (23 & 24 Geo. 5, c. 36) s.2(2).

The first and third appellants and a co-accused agreed to purchase a wholesale market business (H) which, although presented as of good standing, was close to insolvency. The first appellant and the co-accused were to provide the money and the third appellant was to run the company. The third appellant withdrew large amounts of cash from the company's bank account and when the business collapsed in January 1992 he was arrested. He claimed to have been misled when the company was purchased. He was released on bail and, having failed in the meantime to answer to his bail, he was interviewed again in January 1993 about a fraud in connection with another company (GW), in respect of which he subsequently gave evidence for the prosecution. After the collapse of H Co., the first appellant had taken over another wholesale produce business (F) into which he introduced the second appellant. Between August and September 1992 there was a shortfall of around £90,000 between cash received by the company and that paid into its bank account. The first appellant was arrested in December 1993. From October 1994 the third appellant was treated as a prosecution witness in connection with the H Co. fraud but by November 1995, after the first appellant had been interviewed and had cast the blame for that fraud on the third appellant, it was decided that the latter should be prosecuted. The first and third appellants were charged with conspiracy to defraud H Co. and the first and second appellants were charged with conspiracy to steal from F Co. The H Co. charges were transferred to the Crown Court under section 4 of the Criminal Justice Act 1987 and the F Co. charges were committed to the

Crown Court by the magistrates. Despite objection, the trial judge gave leave to prefer a single indictment containing both groups of counts. He rejected the third appellant's application that proceedings against him should be stayed as an abuse of process. The first and third appellants were convicted of conspiracy to defraud and the first and second appellants of conspiracy to steal. The first and third appellants appealed against conviction on the grounds that the judge's rulings were wrong. The second appellant appealed against sentence only.

Held, allowing the appeals against conviction, (1) that section 2(2)[1] of the Administration of Justice (Miscellaneous Provisions) Act 1933 imposed no prohibition on joinder of committed and transferred charges. It was permissible to join in one indictment counts founded on separate committals and transfers in respect of one or more defendants; but that in the present case the first appellant had in fact been prejudiced by the presence at the trial of the third appellant whose defence was hostile to the first appellant. Accordingly, his conviction on that count was unsafe. (2) That there could be cases of abuse of process outside the categories of fairness and prejudice where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible but that a breach of promise not to prosecute did not necessarily and, *ipso facto*, give rise to abuse; that since the third appellant had not changed his position in reliance on his treatment as a prosecution witness nor volunteered information potentially further incriminating himself in reliance on that status he had not been prejudiced thereby but that he had been seriously prejudiced by the service on the first appellant's advisors of his witness statements which led the first appellant to make a statement implicating the third appellant, and that, had the judge been aware of this prejudice, he would have been bound to conclude that a stay should have been ordered for abuse of process.

Cairns (1988) 87 Cr.App.R. 287 distinguished; *Groom* (1976) 62 Cr.App.R. 242 applied.

Appeal against sentence allowed; sentence varied.

(For abuse of process, see *Archbold* (1997) paras. 4-48 *et seq.* For section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 and joinder of offences in indictment, see *ibid.* paras. 1-204 *et seq.*)

Appeal against conviction and sentence.

On November 18, 1996, at the Crown Court at Portsmouth (Judge Selwood) the appellants were convicted, Townsend and Bretscher of conspiracy to defraud (count 1) and Townsend and Dearsley of conspiracy to steal (count 5). Townsend was sentenced to four years' imprisonment concurrent on counts 1 and 5 and disqualified for 10 years under the Company Directors Disqualification Act 1986. Brescher was sentenced to three years' imprisonment on count 1 and similarly disqualified for 10

[1] See p. 553G.*post*

years. Dearsley was sentenced to 15 months' imprisonment on count 5 and similarly disqualified for five years. The facts and grounds of appeal appear in the judgment. The appellants Townsend and Bretscher appealed against conviction and Dearsley against sentence only. The appeals were argued on May 7 and 8, 1997, when the following additional case was cited: *Osieh* [1996] 2 Cr.App.R. 145.

T. S. Culver (assigned by the Registrar of Criminal Appeals) for the appellant Townsend.
Zoë Johnson (assigned by the Registrar of Criminal Appeals) for the appellant Dearsley.
Desmond De Silva Q.C. and *Mrs Kim Hollis* (assigned by the Registrar of Criminal Appeals) for the appellant Bretscher.
Philip P. Shears Q.C. and *Adam Weitzman* for the Crown.

THE VICE-PRESIDENT (ROSE L.J.): On November 18, 1996, at Portsmouth Crown Court, after a trial before his Honour Judge Selwood, the appellants were convicted of offences of conspiracy, Townsend and Bretscher of conspiracy to defraud on count 1, and Townsend and Dearsley of conspiracy to steal on count 5. No verdicts were taken on counts 2 and 3, which alleged respectively conspiracy to steal and trading with intent to defraud a creditor, against Townsend and Bretscher. On count 4, conspiracy to defraud, Townsend was acquitted by the jury and Dearsley on the direction of the judge. No verdict was taken on count 6, fraudulent trading, which was an alternative count against Townsend and Dearsley. Counts 1 to 3 related to the business of J. Harrop & Co. Ltd in Liverpool between May 1990 and March 1992. Counts 4 to 6 to the business of A.G. Fehrenbach Ltd in Portsmouth between July and September 1992. Townsend was sentenced to four years' imprisonment on each of counts 1 and 5 concurrently, and disqualified for 10 years under the Company Directors Disqualification Act 1986. Bretscher was sentenced to three years on count 1 and disqualified for 10 years. Dearsley was sentenced to 15 months' imprisonment and disqualified for five years. Townsend and Bretscher appeal against conviction by leave of the single judge, who referred their applications for leave to appeal against sentence to the full court. Dearsley appeals against sentence by leave of the single judge.

There were three co-accused, Burraway, Joanne Douglas Maitland and Craig Douglas Maitland, who all pleaded guilty to conspiracy to defraud on count 4. Burraway had been indicted but was not proceeded against on counts 1 and 2.

Burraway was sentenced to 18 months' imprisonment subsequently reduced by a differently constituted division of this Court to nine months', consecutively to a sentence of five years' which he was then serving in relation to other matters. Joanne Douglas Maitland was sentenced to 12 months' imprisonment, subsequently reduced on appeal to six months', consecutively to the sentence she was then serving of 12 months' in relation to other matters. Craig Douglas Maitland was sentenced to three years'

imprisonment, reduced on appeal to two years', consecutive to the sentence he was then serving for other matters and he was disqualified as a director for 10 years.

The three Harrop counts and the three Fehrenbach counts had originally been the subject of separate indictments. The Harrop charges had been the subject of transfer to the Crown Court under section 4 of the Criminal Justice Act 1987. The Fehrenbach charges had been committed to the Crown Court by the magistrates.

On March 18, 1996 the trial judge gave leave to prefer a single indictment containing both groups of counts. On April 25, and on August 2, 1996 he rejected applications made on behalf of Bretscher that he should stay the proceedings against him as an abuse of process. On August 13, he ruled against applications on behalf of Townsend and Bretscher that the indictment should be severed so that they be tried separately. Each of these matters gives rise to a ground of appeal, and we shall return to them later.

The prosecution case in essence, was that there were conspiracies in which the appellants took part in relation to two separate businesses, those of Harrop and Fehrenbach, which were well-established fruit and vegetable wholesale companies, whereby the companies and their creditors were defrauded by dissipation for personal benefit rather than use for proper company purposes of the company's assets, stock and banking facilities.

In outline, what occurred was this. In relation to the Harrop counts, in October and November 1991 the appellant Bretscher placed advertisements in the "Fresh Produce Journal" offering to buy a wholesale market business and giving an address in Gloucestershire where he could receive mail. In consequence Peter Moss, who was then managing director of Harrops, replied, and subsequently entered into negotiations with Bretscher, Townsend and Burraway, all of whom were using false names. There was eventually an agreement in December 1991 for the purchase of the company for the sum of £40,000 plus a further £15,000 for Moss' shares. Townsend and Burraway were to provide the money, though only some of it was actually paid, and Bretscher was to run the company.

Although, for the purpose of negotiations, Harrops was presented as a company in good standing, it was, in fact, close to insolvency. For example, cheques for invoices were being written but put in a cupboard and not sent, and although the bank accounts appeared to be in credit, the company was in dispute with the Liverpool Council over unpaid rent and service charges for pitches leased in Liverpool Market, and a sum in excess of £70,000 was owed to a man called Carr. The extent to which these matters were described to the purchasers was a matter of dispute in the course of the trial.

Following the purchase, the appellant Bretscher was able to, and did, withdraw large amounts of cash from the company's bank account. In particular, although suppliers were being favoured with increasing orders, they were being paid at roughly half the rate prior to the purchase. Over

£55,000 was paid to a company called CSS, incorporated in the Virgin Islands, of which the appellant Townsend was the beneficial owner and sole signatory on the bank accounts, and from where Townsend's funds for his contribution to the purchase had apparently come.

Bretscher's explanation to Mr Moss and others still involved in the running of the company, for the late payment of bills, was that a big customer had failed to pay, and there were expenses being incurred in setting up a depot in Leicester which would serve satellite tracking stations and thereby produce big business. Bretscher ordered £80,000 worth of produce, which was sent to Conecroft, a storage depot in Leicester, and thence on to Covent Garden. One importer who had supplied melons to Harrops and had not been paid for them was surprised to see them being sold from the back of a trailer in Covent Garden. In mid January 1992 the business collapsed with liabilities which exceeded assets by over £370,000. At the end of January 1992 Bretscher was arrested and interviewed in the name, at that time of "Gordon Lord". He claimed to have been misled at the time of the purchase of the company. He said he had a large contract to supply fruit and vegetables but he would not say to whom. He denied telling people that he was going to supply satellite tracking bases. The premises in Leicester, he said, were a distribution warehouse, though he would not say where the distribution was to. He claimed to have been set up by Mr Moss, and said that he intended to pay the company's creditors. He did not admit any dishonesty.

Twelve months later, in January 1993, having, in the intervening period, failed to answer his bail, he was interviewed again, this time in his correct name, about a fraud in connection with Greens Wine. He said that he had used the name Lord in relation to Harrops to avoid the mother of his children, and that Townsend had used a false name because a previous company of his called Greenleaves had gone into liquidation. He was re-interviewed about Harrops, and he said that that company had "gone bust", not because he was taking money, but because, as he put it, "of the timing". He reasserted that Mr Moss had set him up, and denied that Harrops in Leicester was anything to do with him and his associates. He had fled bail and gone to the U.S. in order to avoid maintenance proceedings against him by the mother of his children.

In circumstances to which we shall return later, Townsend was interviewed in November 1995 and read from a prepared statement. He said that he and Burraway had been approached by Bretscher to invest in Harrops, and although he had not been involved in the negotiations, he had invested £17,500. He was unaware that creditors were unpaid or that Bretscher had withdrawn substantial amounts of cash, and he made a variety of allegations against Bretscher, which it is unnecessary to itemise.

In the course of the trial Townsend gave evidence. He had apparently been a butler and, at the same time, a director of Greenleaves wholesalers in Covent Garden which went into liquidation in May 1991 because, he said, it had expanded too quickly. He and Burraway, with whom he had

been co-director of another company 10 years before, had agreed to invest £20,000 each in Harrops. The books shown to him disclosed losses by Harrops for the last two years, but this had not put him off. He knew nothing of Bretscher's cash withdrawals. He looked only for the repayment of his investment. He had drawn two £10,000 cheques on the CSS account in favour of Burraway, and he had paid some bills for Burraway. He played, he said, no part in the running of Harrops or Conecroft. It looked, he said, as though Bretscher was being used by Burraway.

Bretscher did not give evidence. His case was that Harrops was run lawfully, that he had been deceived by Burraway and Moss, and he had only used company money to pay legitimate expenses, and he still expected payment to be forthcoming from Leicester.

In relation to the Fehrenbach accounts, it was the prosecution case that after the collapse of Harrops, Townsend, Burraway and others took over Fehrenbachs, this time with Craig Douglas Maitland as the front man. He, in July 1992, placed an advertisement in the Fresh Produce Journal similar to that which had initiated the Harrops' enterprise. Mr Webb, who was chairman and company secretary of Fehrenbachs, replied, and met Douglas Maitland, who was using a false name and claiming to act for a Dutch company. He also met Douglas Maitland's wife, who took notes of the meeting. It was agreed that Douglas Maitland would replace Webb as chairman and he, Douglas Maitland, took over responsibility for the accounts and invoices of the company.

At the beginning of August 1992 Craig Douglas Maitland introduced to the company the appellant Dearsley, who was also using a false name. It was said that he was to boost the company's turnover and collect difficult debts. He, Dearsley, was in the office daily. Douglas Maitland failed to bank all the money that he was given. It was admitted that in August and September 1992 there was a shortfall of almost £19,000 between the cash received by the company and that paid into the bank accounts. Hotels were used, cars bought, offices rented and a chauffeur employed part-time for the two Douglas Maitlands and Dearsley. All these were paid for by Fehrenbach cheques which had not been discussed with Mr Webb. Douglas Maitland bought but did not pay for £60,000 worth of goods. They were delivered to Birmingham and Covent Garden where Burraway working for Townsend, went round the market. Dearsley was Douglas Maitland's right hand man. He took instructions for him and was less involved in the running of the company. He made some of the deliveries.

Townsend was in the background at Fehrenbachs. Together with Douglas Maitland and Burraway they leased offices, including one in New Kings Road in London for Quality Flowers, of which Townsend was chairman. Fehrenbachs paid cheques to Townsend's companies. Townsend also wrote a delivery note for bananas to Birmingham. He, Townsend, was arrested in relation to this matter in December 1993, and he made no comment at that time when he was interviewed.

At about the same time Dearsley was confronted by the police at home.

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After initially denying who he was, he was arrested for conspiracy to steal from Fehrenbachs. He, too, made no comment in interview.

Townsend, as we have said, gave evidence in the course of the trial in relation to the Fehrenbach matters. He said that he had first met Douglas Maitland at a cash and carry, and he had told him that he and Burraway had been put into Fehrenbachs by Barclays Bank to sort out the business. He said he had met Dearsley at the London House offices of his company, Quality Flowers, which offices Burraway also used. He said that Burrawav often used false names and gave him, Townsend, bills to pay, and he had signed the banana delivery note to Birmingham because Burraway was dyslexic. Townsend's off-licence company called Watersons received Fehrenbach money through Douglas Maitland.

On behalf of Bretscher Mr De Silva Q.C. submits that the judge wrongly exercised his discretion in refusing to stay the proceedings against Bretscher as an abuse of process. In order to understand that submission, it is necessary, first, to trace the chronology of material events as they are set out in an agreed schedule.

As we have said, Bretscher was first arrested as Lord in January 1992, and was then interviewed for the first time about Harrops. He was released on bail without charge, subsequently failed to answer his bail, and was then, on January 25, 1993, arrested, as we have said, in relation to the Greens Wine fraud in which Burraway was also a suspect, and at that time he made a witness statement against Burraway in relation to that matter.

On the following day, January 26, 1993, he was rearrested in relation to Harrops, and there was a very substantial second interview of him in relation to that. Again he was thereafter bailed and not charged.

In July 1993 Bretscher gave evidence for the Crown in committal proceedings against Burraway and others in relation to the Greens Wine fraud.

In December 1993, as we have said, Townsend was arrested, as Burraway, and the two Douglas Maitlands and Dearsley were all arrested and charged in relation to the Fehrenbach matters.

On December 16, 1993 Townsend was interviewed and made no comment in relation to Harrops. In January 1994 Bretscher gave evidence for the Crown at the Crown Court trial of the Greens Wine fraud matter.

A week or two later there was a conference between police officers, counsel and others where Bretscher's position was discussed, and the conclusion was reached that, even though he was the front man at Harrops, it was difficult to see how he could be prosecuted consistently with the view taken of him at the Greens trial. Given that there was little prospect of him being prosecuted, it was agreed that it would be useful to seek a witness statement from him in relation to both Harrops and Greenleaves. The decision at that time was to consider using Bretscher as an "accomplice" prosecution witness. On June 6, 1994, by which time the investigation of a variety of fruit and vegetable fraudulent conspiracies had been centralised and a considerable number of prosecution statements

in relation to these matters accumulated, a letter was written by the senior Crown prosecutor indicating that Bretscher was to be used "as a prosecution witness warts and all". A message to that effect was passed to the Merseyside Fraud Squad.

On September 5, 1994 the Fraud Investigation Group, which was by then seized of these matters, decided that the Harrop fraud should be prosecuted, as should other frauds involving Townsend and others, and in October 1994 statements from Harrops' staff, creditors and haulage contractors and from the police were sent to the Fraud Investigation Group.

On October 25, 1994 Bretscher was interviewed by police and the interview was taped. He was told that he was to be a prosecution witness and, as a result of that interview, on November 17, 1994 he approved a draft statement prepared from that interview in relation to Harrops implicating Townsend and Burraway as being behind that fraud.

In March 1995 there were committal proceedings in relation to Fehrenbach. Between April and October 1995 the two Douglas Maitlands and Dearsley were tried for mortgage frauds unrelated to the matters presently under consideration, and that trial finished on October 19. During the course of that trial statements in relation to the Harrops matter were, probably in June, sent to Mr Shears Q.C., counsel who appears for the prosecution before us.

In October 1995 the prosecution served on Townsend's lawyers the witness statements made by Bretscher as unused material, and on November 2, that material having been served on those advising him, Townsend made the statement to which we have earlier referred, based on a written statement which he had prepared in which he blamed Bretscher in relation to Harrops.

On November 14, Mr Shears took the view that it would be impossible to put Bretscher forward as a prosecution witness on whom the jury could rely at the Harrops trial, bearing in mind that, although he had made many admissions in relation to his role in the running of that company, he consistently denied dishonesty.

On December 14, 1995, Harrops' case was transferred to the Crown Court. Mr De Silva submits that there is a strong public interest in people giving evidence for the Crown, and if the prosecution renege on promises not to prosecute, such people will be reluctant to come forward. He says that in the present case, there was a blatant and flagrant abuse of process by breach of assurances and undertakings not to prosecute. The present case, he submits, is on all fours with *Croydon Justices, ex p. Dean* (1994) 98 Cr.App.R. 76, [1993] Q.B. 769, which was approved by all members of the House of Lords in *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42, see *per* Lord Griffiths, with whom others of the majority agreed at p. 124 and p. 61D to 61F, and Lord Oliver, who dissented, at p. 132 and p. 70F. The judge, submits Mr De Silva, was

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wrong to distinguish *ex p. Dean* as having been decided on its own facts, because it disclosed a principle approved by the House of Lords.

In the light of the judge's findings that from mid-October 1994 until November 1995 Bretscher knew he was being treated by the Crown Prosecution Service as a prosecution witness and must have inferred that he would not be prosecuted in relation to Harrop and that his position was the same as if an express promise not to prosecute him had been made, the judge was wrong to conclude that there was no prejudice to Bretscher. Furthermore, submits Mr De Silva, although this aspect was not identified before the trial judge, there was serious prejudice to the defendant because his November 1994 witness statement having been served on Townsend's legal advisors in October, 1995, the consequence was that Townsend, on November 2, gave the interview in which, for the first time, he blamed Bretscher, and did so in terms which he subsequently, in evidence described as being "slanted" against Bretscher. The decision to prosecute Bretscher rapidly followed on November 14, Townsend's interview being on November 2.

In any event, submits Mr De Silva, as *Bennett*, particularly *per* Lord Lowry at p. 135 and p. 74G and *Schlesinger* [1995] Crim.L.R. 137, make plain there are two categories of abuse, namely as appears in *Schlesinger,* at p. 138:

> "The first was where there had been prejudice to a defendant or a fair trial could not be had. The second was where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible."

The present case, submits Mr De Silva, is in the second category, in which prejudice to the defendant does not have to be shown. He referred also to *Bloomfield* [1997] 1 Cr.App.R. 135, at 139D, and 143A, and *Wyattm*, unreported, Court of Appeal Criminal Division transcript January 28, 1997, and Auld L.J.'s reference at p. 11G of the transcript to a defendant's "sense of grievance".

It is, submits Mr De Silva, in reliance on those words of Auld L.J., and on what Staughton L.J. said at p. 82 and p. 777 in *ex p. Dean*, the effect on the defendant of the course taken by the prosecution which has to be considered.

In summary, Mr De Silva advances three propositions. First, where a defendant has been induced to believe he will not be prosecuted, this is capable of founding a stay for abuse: see *Bloomfield.* Secondly, where, in addition, a defendant has been told he will be called for the prosecution, the longer he is left in that belief the more unjust it becomes for the prosecution to renege on their promise. Thirdly, where, as here, the defendant, cooperating as a potential prosecuting witness, was interviewed without caution and made a witness statement, and steps were then taken which resulted in manifest prejudice to him, it becomes inherently unfair to proceed against him.

For the Crown, Mr Shears Q.C. accepts, in the light of *ex p. Dean,* that breach of a promise not to prosecute is capable of being abuse, and that legitimate expectation of a defendant that he will not be prosecuted may be worthy of protection. However, the matter has to be decided on the facts of the particular case, to which the judge was not only entitled, but bound, to have regard. The investigations into Harrops and Fehrenbachs were part of a much wider nationwide investigation into seven or eight apparently fraudulent company activities in the fruit and vegetable market with common features and a changing team.

The decision to prosecute Bretscher in November 1995 must be set in this context. It then became apparent that, in the light of his denials of dishonesty and his claim to be an innocent dupe of Townsend and Burraway, he could not be placed before the jury as a witness of truth. The judge, says Mr Shears, was referred to the relevant authorities. These, he submits, disclose these principles. First, the court will stay a prosecution if it considers that acts or omissions of the Crown have either severely prejudiced a defendant or prevented a fair trial of the issues. Secondly, where a fair trial is still possible the court will stay a prosecution where it considers the actions of the prosecuting authority to be so unfair that, despite there being no prejudice, the proceedings should not continue: see *per* Lord Griffiths at p. 124 and p. 61E in *Bennett.* Thirdly, since the stay of proceedings is an exercise of judicial discretion, the court will consider each case on its own facts: see *Bennett, per* Lord Lowry at p. 138 and p. 77C and *Bloomfield* at p. 143B. Mr Shears distinguishes *Bloomfield,* which was a case in which the Court was much influenced by that which had occurred in the face of the Court. In giving the judgment of the Court in that case Staughton L.J., at p. 143C, pointed out that the Court was not seeking to establish any precedent or any general principle in regard to abuse of process, but found that in the exceptional circumstances of that case an injustice had been done to the appellant.

Mr Shears submits that there is no principle that if there has been a breach of a promise not to prosecute, this itself gives rise to an abuse. It all depends on the circumstances. Mr Shears also drew the Court's attention to the speech of Lord Steyn in *R. v. Latif and Shahzad* [1996] 2 Cr.App.R. 92, 100, [1996] 1 All E.R. 353 at 360H,where the following passage occurs, by reference to the legal framework of abuse of process:

> "If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a

balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed."

Lord Steyn then refers to *Bennett.*
He goes on below at p. 101C and 361C:

"The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

Mr Shears submits that in *ex p. Dean,* Staughton L.J. made it plain at p. 84 that the facts of that case were "quite exceptional" and Mr Shears, as did the trial judge in the present case distinguished *ex p. Dean* from the present case on its facts.

Mr Shears further submits that the circumstances of the present case were not so exceptional as to amount to an abuse. The decision to make Bretscher a prosecution witness took place prior to the collection of the bulk of the prosecution evidence. The appellant's interview in October 1994 and witness statement in November 1994 took place either very shortly after, or at the same time, as the witness evidence from other sources was delivered to the Crown Prosecution Service by the police. The Crown Prosecution Service were not aware of the true extent of the central role that the appellant had played in the defrauding of Harrops, and there was no decision to take a statement from Bretscher when it was plain to the CPS and police that he would subsequently be prosecuted.

Bretscher made no clear admissions against interest in interview, and his interviews and witness statements were all substantially the same as those previously given although there were some additional matters later introduced in October 1994. There was no deliberate attempt by the prosecuting authority either to mislead the appellant or to prejudice his

position. He had, indeed, been offered legal advice prior to the October 1994 interview. No allegation of *mala fides* is made against the prosecution in this case. There had been no formal undertaking not to prosecute and no formal offer of immunity, and no indication given to the judge, as occurred in Bloomfield, though none of these matters, Mr Shears accepts, is in itself in any way decisive.

With regard to prejudice in relation to Bretscher, Mr Shears submits that none exists. So far as Townsend's November 2, interview is concerned, that dealt with many matters other than Bretscher's position at Harrops, and with matters with which, sooner or later, Townsend was going to have to deal. In any event, says Mr Shears, it would have been open to Bretscher's advisors at trial to seek to exclude the terms of Townsend's interview, having regard to the provisions of section 78 of the Police and Criminal Evidence Act 1984: (such an application seems unlikely to have merited success).

Mr Shears stresses that, in the course of the trial, no point was made by Mr De Silva on behalf of Bretscher in cross-examination of any witness, or in his submissions, which was not there to be made, and was made, in any event in the light of the evidence and documentation before the jury.

We accept Mr De Silva's three propositions. There is, as it seems to us, no difference, so far as the approach to the relevant principles is concerned, between Mr De Silva and Mr Shears. It is apparent to us that the trial judge found his task in relation to the stay for abuse application far from easy. In the light of the submissions made to him, we do not criticise the conclusion which he reached. On the contrary, he rightly directed himself that there can be cases of abuse outside the categories of fairness or prejudice, and that breach of a promise not to prosecute does not necessarily and, *ipso facto,* give rise to abuse, but may do if circumstances have changed. He was also entitled to conclude, having regard to the way in which the matter was presented to him, that Bretscher's case did not fall on the abuse side of the dividing line. Undoubtedly Bretscher knew, from October 1994 to November 1995, that he was being treated by the police and the CPS as a prosecution witness in relation to Harrops, and, as we have said he had earlier given evidence, apparently quite successfully, in relation to the Greens Wine fraud.

However, there was nothing improper or unfair in the prosecution interviewing Bretscher as a witness in October 1994, at a time when many other witness statements obtained in relation to Harrops had not been collated and considered, or in the mortgage fraud trial in relation to other Fehrenbach defendants being concluded on October 19, 1995 without any further decision being made about Bretscher, or in counsel's decision on November 14, 1995 that Bretscher could not be put before the jury as a prosecution witness or in the rapidity with which events subsequently moved, including the transfer of Harrops' case to the Crown Court on December 14, 1995. There was, as the judge found, and as it seems to us, nothing new of significance in relation to Bretscher's own position in his

November 1994 statement as compared with the contents of his 1992 and 1993 interviews. He had not changed his position in reliance on his treatment as a prosecution witness, nor, as the defendant had in *ex p. Dean,* volunteered information potentially further incriminating himself in reliance on that status.

However, although, as Mr De Silva frankly admits, he did not, at the time of trial, appreciate the significance of this or alert the judge to it, Bretscher's position was, it appears to us, seriously prejudiced by the service on Townsend's advisors of his witness statements in October 1995. For it was this which was a major factor, as is apparent from a part of the summing-up to which it is unnecessary specifically to refer, in leading Townsend, who had previously said nothing in interview to the police, making the statement implicating Bretscher and doing so, furthermore, if Townsend's evidence before the jury was correct, in a way which was excessively slanted against Bretscher.

If the judge's attention had been drawn to this prejudice, we have little doubt that it would have affected his decision, and he would have been bound to conclude that the prejudice to the defendant arising from his treatment as a prosecution witness, which effectively culminated in Townsend's allegations against him, was such that a stay should have been ordered for abuse of process. In consequence we allow Bretscher's appeal and quash his conviction.

Mr Culver, on behalf of Townsend, submits, first, that the judge exceeded his powers in ordering joinder of the Harrop and Fehrenbach counts. He referred us to *Cairns* (1988) 87 Cr.App.R. 287, where it was held that a circuit judge has no power under section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 to authorise a voluntary bill. Secondly, submits Mr Culver, the judge was wrong in refusing to sever counts 1 to 3 from counts 4 to 6, and to sever Townsend's trial from Bretscher's. He accepts that it would be difficult to contend that the judge exercised his discretion improperly were it not for the question of abuse of process in relation to Bretscher.

As to joinder, it is apparent that the judge considered whether he had the appropriate power. He looked at the provisions of section 2(2) of the 1933 Act which, in so far as is material, is in these terms:

> "Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—
>
> (a) the person charged has been committed for trial for the offence; or
>
> (aa) the offence is specified in a notice of transfer under section 4 of the Criminal Justice Act 1987. . . ."

The judge concluded, rightly in our judgment, that that provision imposes no prohibition on joinder of committed and transferred charges. It identifies the circumstances in which a bill of indictment may be preferred,

and limits the counts to those disclosed in the documents founding committal or transfer, but it does not deal with joinder.

We do not derive assistance in the present case from this Court's decision in *Cairns*. Mr Culver referred us to *Groom* (1976) 62 Cr.App.R. 242, [1977] Q.B. 6. In the *Practice Direction* arising from *Groom*, which is set out at (1976) 62 Cr.App.R. 251, in relation to different persons separately committed, it is said:

> ". . . it is permissible to join in one indictment the counts founded upon the separate committals despite the fact that an indictment in respect of any one of those committals has already been signed."

In our judgment that practice must apply *a fortiori* in relation to one defendant who faces separate signed indictments in respect of separate committals and, by analogy, indictments based on separate committals and transfers. No possible prejudice could arise, nor did arise, to the defendants in this case from joinder. The judge was, in our view, correct to permit the joinder of the counts, some of which had been the subject of committal, and some of which had been the subject of transfer in a single indictment.

As to severance, the matter was essentially one for the judge's discretion. So far as the impact on Townsend of the judge's refusal to order a stay against Bretscher is concerned, the crucial question is whether Townsend was prejudiced so that the verdicts against him should be regarded by this Court as unsafe.

It is to be noted that Townsend made the admissions which he did at a time when it was anticipated that Bretscher would be a prosecution witness not a defendant. In fact, Bretscher gave no evidence in the trial, either as a prosecution witness or as a defendant. Therefore, to that extent, Townsend's position was better than it might have been, and the jury were, as one would expect, directed that the contents of Bretscher's witness statements were not evidence against Townsend.

However it seems to us that the presence at Townsend's trial of Mr De Silva, on behalf of Bretscher, cross-examining witnesses and Townsend himself, and making submissions to the jury in support of Bretscher's case, which were necessarily hostile to Townsend's case, cannot be ignored by us. Furthermore, had Bretscher been absent from the trial, Townsend would have had free reign to blame Bretscher in a manner which Bretscher's presence at least inhibited.

It is, in our view, impossible to conclude that the jury's verdict against Townsend on the Harrop case would have been the same had he been tried separately from Bretscher, as necessarily he would have been if the proceedings against Bretscher had been stayed. Accordingly Townsend's conviction on count 1 must be regarded as unsafe.

The next question is whether, despite the matters to which we have referred, Townsend's conviction on count 5, in relation to the quite separate Fehrenbach activities, can be regarded as safe. Not without some

hesitation, we conclude that it cannot. The similarities in the *modus operandi* of Harrops and Fehrenbach, which was one of the proper factors properly justifying the two groups of counts being tried together in the first place, and the unquantifiable impact which the Harrops' evidence against Townsend may have had on the jury's approach to the Fehrenbach counts against him, means that the verdict on count 5 in relation to Townsend cannot be regarded as safe.

The appeals against conviction of Bretscher and Townsend are accordingly allowed, and their convictions quashed.

There can be no question of Bretscher being retried. We will, in a moment, hear submissions as to the possibility of a retrial in relation to Townsend.

That leaves the appellant Dearsley who, as we indicated at the outset, appears by leave of the single judge against the sentence of 15 months' imprisonment imposed upon him.

Miss Johnson, in succinct written and oral grounds of appeal submits that having regard to the reductions in sentence accorded to Dearsley's co-accused in relation to the Fehrenbach activities, the sentence of 15 months on Dearsley must properly be regarded as excessive having regard to the comparatively minor role which he played in these matters.

To that submission this Court accedes. His sentence of 15 months will accordingly be quashed and there will be substituted a sentence of eight months' imprisonment.

[The Court ordered a re-trial in respect of the appellant Townsend.]

Appeals against conviction of Townsend and Bretscher allowed. Appeal against sentence of Dearsley allowed. Sentence varied.

Solicitors: Crown Prosecution Service.