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2018/00962/B5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 27th March 2018

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE KING

and

HIS HONOUR JUDGE PATRICK FIELD QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

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Mr G Walters appeared on behalf of the Applicant

Mr R Gibbs appeared on behalf of the Respondent

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J U D G M E N T
(As Approved by the Court)

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Tuesday 27th March 2018

LORD JUSTICE DAVIS:

1. This is an application referred by the Registrar, for which this court has today granted leave, seeking to appeal from a ruling of His Honour Judge Ward sitting in the Crown Court at Wolverhampton given on 26th February 2018. The ruling was given in advance of any trial date obtained.

2. The ruling in question was one whereby the judge decided that the proceedings should be stayed as an abuse of the process. The indictment in question had contained one count of causing death by careless driving.

3. The Crown gave notification of its intention to appeal against this decision, which had been by way of a terminatory ruling, under section 58 of the Criminal Justice Act 2003. So it is that this matter has come before this court.

4. We should make clear that reporting restrictions under section 71 of the Criminal Justice Act 2003 apply to this judgment until further order.

5. The factual background, in summary, is this. On the evening of 27th December 2010, the respondent (a young man then aged 20) was driving his 125cc Aprilia motorcycle down Wolverhampton Street in Darlaston, Walsall. This was a two lane, single carriageway, with one lane in each direction and a dividing central line. The applicable speed limit was 30mph. There had been snow previously and the pavement and gutters were, as also revealed by photographs, covered in snow. It seems, however, that there had recently been something of a thaw and the

carriageway itself was described as wet but not icy. At the time in question (around 9pm) the weather apparently had been clear. The area was described as well-illuminated by street lighting, with good visibility both for pedestrians and for vehicles.

6. Mr Lal, who lived nearby, had been drinking in a local public house. He left on foot at around 8.50pm. In a witness statement subsequently supplied, it was said that he showed no signs of inebriation when he left, although he had been consuming alcohol. A later toxicological analysis assessed him as being at the relevant time almost exactly twice the drink-driving limit, having 156mg per 100ml of blood (the limit is 80mg). He was apparently wearing dark clothing.

7. The respondent was driving his motorcycle down Wolverhampton Street in the direction of Wednesbury. The motorcycle had "L" plates on it. At about 9.01pm, close to the point where there is a junction between Dorsett Street and Wolverhampton Street, the motorcycle came into contact with Mr Lal who was in the carriageway of Wolverhampton Street. The collision was subsequently described by an expert accident investigator as a "substantial" collision. Mr Lal was projected some distance away. He suffered very serious injuries, primarily to his right side. He did not regain consciousness before he died. He died either on the way to the hospital or at hospital.

8. The motorcycle also travelled some distance along the ground before it ended up by an adjoining workshop. The respondent himself suffered significant injuries. The point of collision had been to the right-hand side of the front of the motorcycle.

9. No one had seen the actual collision, although other drivers and local residents came out on to the scene very soon thereafter. Various witness statements were in due course obtained from

various of those attending. Such assistance as could be offered to each of Mr Lal and the respondent was given as they lay on the ground until the emergency services arrived.

10. In due course a post-mortem examination of Mr Lal established the cause of death as spinal cord injury and traumatic amputation of the right leg.

11. The respondent was interviewed in hospital on 28th December 2010 and subsequently at a police station on 31st December. At no time was he arrested or bailed. There was no suggestion that he himself had been drinking that particular evening.

12. In interview the respondent said that he had indeed been riding his motorcycle that evening. He described the road conditions as "wet" and "greasy". He said that, as he travelled down the carriageway, the pedestrian (Mr Lal) had walked out of Dorset Road on to Wolverhampton Street, gone up the street a little way and then "he just like, he didn't even look at me, he just ran across". The respondent said that before then the pedestrian had been walking in the road along the gutter, by the side of the carriageway, with his back to the motorcycle and then had just "run across". He said that he (the respondent) had been carrying on at the same speed and "Well, I thought he was going to wait for me to come past – you know what I mean?" The respondent said that he had seen no reason to move his motorcycle over, more into the centre of the road, as he did not think that the pedestrian posed any kind of hazard. He put his speed at around 30mph, but at all events not more than 35mph; although he accepted that, given that the road conditions were not very good he "should have been going a bit slower".

13. In due course the file was sent to the Crown Prosecution Service. On 3rd June 2011 it was decided that no further action should be taken and that no charges were to be brought against the respondent. The deceased's family were so notified. However, it appears that that decision was

never formally communicated to the respondent himself.

14. In early 2011 a full and detailed Accident Report had been obtained from an experienced police accident investigator who had attended the scene shortly after the incident had occurred. Amongst other things, the investigator had found no signs of braking marks; although that was considered not to be surprising given the wet road conditions at the time. The scene of the impact was, by extrapolation from available data, placed a little before the junction with Dorsett Road. This conclusion, therefore, did not altogether coincide with the respondent's account of events as to where the actual collision had occurred. The overall conclusion of the investigator as to speed was that the respondent had not been travelling significantly, if at all, in excess of the 30mph speed limit.

15. An inquest was held in July 2011. The police accident investigator gave evidence at the inquest. It appears that she somewhat modified in his favour her estimate of the speed limit at which the respondent had been travelling. The respondent himself (who was not legally represented) also gave evidence at the inquest, as might be expected. We were told that the Coroner may have given a narrative verdict, indicating, amongst other things, that Mr Lal had stepped out into the carriageway and that the respondent had not taken avoiding action. At all events, there matters seemed to rest.

16. However, in May 2013 – nearly two years later – Mr Lal's daughter wrote to the West Midlands Police asking for the file. She indicated that there might be a possible complaint with regard to the police investigation of the accident. Such a complaint was eventually made in July 2013, although it appears that the respondent was not made aware of this at the time. Indeed, we are told that, previous to this, solicitors for the respondent had written to the estate of Mr Lal intimating a potential claim. We were informed today that proceedings had been issued on 21st

May 2013, which was around the time that the request was first made for the police file by Mr Lal's family.

17. At all events, the Independent Police Complaints Commission investigated the complaint as so raised. Its conclusion was delivered on 13th June 2014. It was to the effect that the original investigation had been carried out in accordance with proper police standards. Mr Lal's daughter then challenged that decision by appealing it. Accordingly, in around October 2014 the decision was reviewed.

18. There followed some delay, but in the result a further report from an entirely new accident investigator was obtained. That report (a very full report, as had been the first one) was dated 13th June 2016. It contained a conclusion, derived particularly from momentum calculations based on the available data, that the speed of the motorcycle just before the point of impact was around 49mph.

19. Thereafter, on 9th May 2017, a summons was issued against the respondent. This was now some six and a half years after the original incident. The matter was sent to the Crown Court. Thereafter, in December 2017, and before any date had been fixed for trial, the respondent applied for a stay of the proceedings. It was said that, in all the circumstances, the respondent could not have a fair trial; alternatively, that in all the circumstances it was not fair for the respondent to be tried at all.

20. When the matter came before Judge Ward, he received extensive submissions. His decision was contained in a detailed written ruling, in which he fully set out the background and the chronology. He referred to a number of relevant authorities. He made clear that he bore in mind that to grant a stay on the ground of abuse was ordinarily to be regarded as an exceptional course

to take. Amongst other things in the course of the ruling the judge said this about delay. He noted that there were many cases, for example historic sex abuse cases, where there has been great delay but a defendant nevertheless can have a fair trial. He also noted that sometimes delay can be caused by a lack of evidence at the time which subsequently emerges many years later owing to advances in science. He then said this:

> "This case is different. All the evidence was available at the beginning. It was investigated at the time the events occurred and a decision was taken by CPS not to prosecute the [respondent] for any offence… In my judgment the [respondent] was entitled to conclude, after a number of years without notification that he was going to be prosecuted for an offence, that he was not going to be prosecuted."

The judge went on to find, entirely understandably, that there had been fault on the part of the prosecution. He said:

> "The amount of time it has taken to review a 2011 decision is unconscionably long."

The judge then went on to refer to various other legal matters, including authorities relating to the prosecution going back on a promise and things like that. He said, amongst other things:

> "The longer a person is left to believe he will not be prosecuted, the more unjust it becomes for the prosecution to renege on their promise …."

However, the judge also made a specific finding that there had been no unequivocal representation by the prosecution that the respondent would not be prosecuted, albeit that is what the respondent, understandably, believed. At the conclusion of his ruling the judge then said

this:

> "In my judgment – considering the two main grounds upon which I might exercise my discretion to stay this indictment separately: merely to say that seven years' delay means that the [respondent] is prejudiced would not be enough, by itself, for me to say that he is so prejudiced that the indictment should be stayed.
>
> The trial process is equipped to address prejudice caused simply by the passage of seven years.
>
> However, this case is more complex than that. It cannot reasonably take six years to review a decision not to prosecute. The prosecution cannot simply discard a reputable expert, and some years later find another expert whose opinion will allow them to say in isolation that there is now a realistic prospect of conviction, whereas before there was not. The [respondent] was 20 when the events occurred which led to Mr Lal's death and his own serious injury. He is now 27 – that means that a quarter of his life he has spent not knowing if he would be prosecuted – most likely believing that he would not be – and now, when he was 26, being told that he would. I cannot in all conscience say that I am satisfied that the trial process can address that issue. Telling the jury to make allowance, and if he is convicted, make a reduction in sentence to take account of this, does not in the particular circumstances of this case address the issue. The jury do not get to decide whether it is right to allow [the respondent] to be prosecuted. Only I have that discretion: to be exercised only in the most exceptional of cases.
>
> Mr Walters for the Crown submits that I must be careful not to elide the one ground – delay – into the other: whether the interests of justice require that I stop this case based on the prosecution going back on what can only be an implied promise not to prosecute.
>
> In the particular circumstances of this case I cannot completely compartmentalise the two, for the reasons I have explained. In my judgment this is an exceptional case. I do not consider that a fair trial is possible in 2018 (no date has yet been set) for this case, after so many years and with the history I have examined in detail. I will order that this indictment be stayed."

21. We turn to the law. The authorities in this field are legion; but some of the relevant principles can be summarised as follows:

1. As is well-established, there are two bases on which a stay in this kind of context may be granted. Put shortly: first, where the defendant can no longer have a fair trial; and second, where it is not fair for the defendant to be tried at all: see *ex parte Bennett* [1994] 1 AC 42.

2. The granting of a stay is an exceptional remedy – a remedy of last resort (as it has been said).

3. That the delay may have been occasioned by fault on the part of the prosecution does not of itself mean that there should be a stay. Even where any delay is unjustifiable, still the imposition of a stay should be the exception: see *Attorney General's Reference (No 1 of 1990)* 95 Cr App R 296.

4. In cases based on limb 1 of the abuse principles, a stay should not ordinarily be granted in the absence of serious prejudice to the defendant which cannot be remedied through the trial process.

5. In cases where an indication has been given that there will be no prosecution, a stay of a subsequent prosecution will ordinarily not be granted unless there is an unequivocal representation to that effect and that the defendant in question has acted to his detriment in reliance upon that unequivocal representation: see, for example, *R v Killick* [2012] 1 Cr App R 10.

6. It is not the function of a grant of a stay simply to punish default on the part of the prosecution.

22. Applying the legal principles to the facts of this case, we are driven to the conclusion, somewhat reluctantly but with no real doubt, that, with all respect, the judge's ruling cannot stand. We so conclude for the following reasons.

23. First, it is well-established that the approaches to limb 1 and limb 2 of the abuse principles are distinct. However, aspects of the judge's reasoning in places seem to interweave elements of both approaches; albeit it seems that ultimately, as his conclusion at the end of his ruling indicates, he was inclined to focus on limb 1. At all events, insofar as reliance was placed on limb 2, one only has to consider the facts of, and the approach adopted in, cases such as *Warren v Attorney General for Jersey* [2012] 1 AC 22 and *R v Maxwell* [2011] 2 Cr App R 31 to see how difficult it is to sustain such an argument, even in cases of significant misconduct. In the present case, at all events, there has been no suggestion whatsoever of any kind of bad faith on the part of the prosecuting authorities. In the circumstances of this case it cannot possibly be said that to pursue these proceedings could be styled as an affront to the integrity of the criminal justice system or might bring the administration of justice into disrepute. Plainly, therefore, this is not a case which can fall within the ordinary application of what may be styled limb 2 abuse. The reality is that this has been a re-think: albeit, and admittedly in circumstances of considerable delay, in the light of a fresh expert's report obtained in consequence of the complaint to the IPCC and appeal therefrom. Moreover, we note in this regard the fact that this arose by way of complaint because of objections from the family of the victim is itself a relevant matter to take into account – and, if anything, in favour of declining to grant a stay: see *Killick* (cited above).

24. Further, as the judge himself rightly found, there was no unequivocal representation on the part of the prosecution to the respondent that he would never be prosecuted. To the contrary, no

express representation was made to him at all. It is clear – and as the judge found – that the respondent, insofar as he thought about it, would have assumed that he would not be prosecuted. But even that, in the absence of detriment or prejudice, would not preclude the prosecution from reconsidering the matter thereafter and, as appropriate, commencing proceedings: see *Killick*.

25. Consequently, the key question here has to be that of prejudice. As the judge rightly appreciated, delay can give rise to potential prejudice which, nevertheless, can be accommodated within the trial process itself. As he also rightly noted, there are many prosecution cases relating back to events occurring very many years earlier which cannot be said to be incapable of a fair trial, even where memories may well have faded and even perhaps where potential evidence may have been lost.

26. That being so, where in the present case is the significant prejudice to the respondent which cannot be accommodated within the usual trial process? Quite simply, no such prejudice has, at all events thus far, been identified. Although in the written arguments Mr Muller of counsel, who had then appeared for the respondent, said that a trial now would be a "mockery", Mr Gibbs, who appears on behalf of the respondent today, has, quite rightly, not associated himself with such language. It is not a "mockery" to have a trial simply because there has been a very significant lapse of time between the events in question and the trial itself. It all depends on the circumstances and, as is well-established and as we have said, the trial process can normally accommodate itself to delay.

27. It is understandable that the judge thought that it would be hard for the respondent, some six years later, to have to face a trial when he reasonably thought that he would never have to face a trial. It has been submitted by Mr Gibbs today that what happened here, although no more than an implied representation, was as close to an unequivocal representation as is possible. That is

the way he put it. But, as we have said, there was no unequivocal representation here; and, as we have also said, that, in any event, is not enough. Still the respondent must show detrimental reliance upon such promise as might have been made. No such detriment or prejudice has been identified at all.

28. The reality is, as matters currently stand, that the respondent is in a position to defend himself and a fair trial can be had. No irremediable prejudice has been identified. It may be that, hereafter, during the course of the trial, perhaps something might happen which might then demonstrate real prejudice to the defence by reason of the delay that has occurred. But that would be to speculate. Suffice it to say, as matter stand today and as matters stood before the judge, that was not the position.

29. In those circumstances we must reverse the ruling. We think, with all respect, that the judge erred in principle in conflating aspects of the requirements of the second limb relating to abuse of process with aspects of the requirements of the first limb relating to abuse of process. Perhaps in consequence, the judge then failed to assess whether there was significant prejudice, over and above the natural disappointed expectations of the respondent, such that a fair trial could no longer be had. In the result, therefore, whilst we have some sympathy for the respondent, we must reverse the ruling.

30. It is, in fact, an important element of the interests of justice that conduct which is adjudged by those entrusted with making the prosecutorial decision to be criminal with sufficient prospects of successful prosecution should ordinarily be the subject of criminal proceedings. The rights and interests of victims and their families are not simply to be subordinated to those of a defendant in any given case. Further, as has been said, the public interest in prosecuting offences transcends any considerations of punishing the prosecution for delay – always, of

course, we add, subject to the delay not having given rise to any significant prejudice to the defence which cannot be accommodated by the trial process.

31. We should also add that extensive reference was made in the written arguments on behalf of the defence – and indeed were deployed before the judge below – to Article 6 of the Convention on Human Rights and to various cases such as *Porter v Magill* [2002] 2 AC 357; *Dyer v Watson* [2004] 1 AC 379; and *Attorney General's Reference No 2 of 2001* [2004] 1 AC 73. But those do not really assist in the present case. The present case is not one where unreasonable delay has been said to have arisen after the charges were brought or after the likelihood of criminal prosecution had been notified to the respondent. Rather, all the delay relied upon relates to the antecedent period before any charges were brought or notified. In such circumstances, reliance on those authorities by reference to Article 6 can add nothing of substance in the present context: as Mr Gibbs accepted. The present context is amply covered by the well-established principles relating to abuse of process, which themselves are amply Convention-compliant.

32. We therefore allow the appeal. We reverse the judge's ruling on the basis that it involved an error of principle and resulted in a ruling which was not reasonable for the judge to have made. We will therefore order that the proceedings for the offence charged be resumed in the Crown Court.

33. Reporting restrictions will apply until the conclusion of any trial or further order.
