Neutral Citation Number: [2023] EWCA Crim 1018

Case No: 202301370 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Lucraft KC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2023

Before:

LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE FULFORD
(Sitting in Retirement)
and
MR JUSTICE CHAMBERLAIN

- -

Between:

BHQ	**Applicant**
- and -	
THE KING	**Respondent**

- -
- -

Mark Summers KC and Edward Craven (assigned by **The Registrar of Criminal Appeals**) for the **Applicant**
Mr Duncan Penny KC and Ms Kate Wilkinson (instructed by **Counter Terrorism Unit**) for the **Respondent**

Hearing date 13 July 2023

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Approved Judgment
(Jurisdiction only)

This judgment was handed down remotely at 10.00am on 8 September 2023 by circulation to the parties or their representatives by e-mail.

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Lord Justice Fulford:

This is the judgment of the Court to which we have all contributed.

The full version of this judgment is subject to reporting restrictions until the conclusion of the trial. This version contains the Court's decision on jurisdiction which can be reported in full.

[…]

The issues raised at the Pre-Trial Preparatory Hearing

7. Mr Mark Summers KC, on behalf of the applicant, advanced submissions to the Recorder of London, His Honour Judge Lucraft KC, on various preliminary issues prior to a jury being empanelled, within the ambit of a pre-trial Preparatory Hearing (see section 29(1B) of the Criminal Procedure and Investigations Act 1996).

[…]

The judge's decision and the application for permission to appeal

10. The judge decided against the applicant on each of the matters raised, as set out in two written rulings: on 10 March 2023 (as regards Issues 1, 2 and 3) and on 18 April 2023 (as regards Count 3). On 18 April 2023, the judge refused permission to appeal. On 18 May 2023 the Registrar of Criminal Appeals referred the applicant's application for permission to appeal to the full court.

Jurisdiction

11. The first question we need to address concerns jurisdiction, which was raised by the Registrar of Criminal Appeals on 28 April 2023 ("(d)oes the Court have jurisdiction to deal with a ruling on abuse of process as an interlocutory application?"). The parties have each filed written submissions and addressed us briefly in oral argument on it. The question of jurisdiction with respect to the appeal against the ruling on abuse of process was not raised by the prosecution. We will turn to the statutory provisions but note immediately that appeals from rulings in preparatory hearings are in respect of "questions of law". The resolution of questions of law commonly involves making findings of fact or require the judge to make evaluative assessments. For the reasons which follow, our conclusion is that an appeal lies to the Court of Appeal from a ruling in a preparatory hearing on the question of abuse of process.

The Criminal Procedure and Investigations Act 1996

12. Section 6A(1) of the Criminal Procedure and Investigations Act 1996 ("CPIA 1996"), as amended, provides that a defence statement is a written statement which does certain

specified things, including "(d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose".

13. Section 29 empowers a judge of the Crown Court to hold a preparatory hearing where it appears to him or her that an indictment raises a case of such complexity, a case of such seriousness, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing (a) before the time the jury is sworn and (b) for any of the purposes mentioned in section 29(2). Those purposes are: (a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial; (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them; (c) determining an application to which section 45 of the Criminal Justice Act 2003 applies; (d) assisting the judge's management of the trial; and (e) considering questions as to the severance or joinder of charges.

14. In certain cases, a preparatory hearing is mandatory. Among these are cases, such as the present, where at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence: see section 29(1B), read together with section 29(6).

15. Section 31(1) provides that, at the preparatory hearing, the judge may exercise any of the powers specified in section 31. These include, in section 31(3), making a ruling as to:

> "(a) any question as to the admissibility of evidence;
>
> (b) any other question of law relating to the case;
>
> (c) any question as to the severance or joinder of charges."

16. The remainder of section 31 confers specific case management powers. Section 35(1) provides that an appeal shall lie to the Court of Appeal from any ruling of a judge under section 31(3), but only with the leave of the judge or the Court of Appeal. Section 35(3) empowers the Court of Appeal to confirm, reverse or vary the decision appealed against.

The Criminal Justice Act 1987

17. With the exception of the provisions that make a preparatory hearing mandatory in certain cases, sections 29 and 31 CPIA 1996 were modelled on and closely resemble sections 7 and 9 of the Criminal Justice Act 1987 ("CJA 1987"). Section 9 CJA 1987 empowers the judge to "determine", rather than "make a ruling as to" certain matters, but this court has already noted that this difference is not material (see *R v AUH* [2023] 1 WLR 1399, [67]). The matters which the court is empowered by section 9 CJA 1987 to determine are not identical to those on which it is empowered by section 31(3) CPIA 1996 to make a ruling, but they both include "any other question of law".

18. The question which arises here is whether a ruling on an application for a stay for abuse of process is a ruling on "any other question of law relating to the case". There is a great

deal of authority which bears on that question, both in the context of the CJA 1987 and in the context of the CPIA 1996. We have sought to identify the key principles.

R v Aujla

19. In *R v Aujla* [1998] 2 Cr App R 16, this court heard and determined an appeal from the ruling of the trial judge, in a preparatory hearing under the CPIA 1996, that it was not an abuse of process to use material obtained by foreign telephone tapping. The question of jurisdiction was not considered. However, it is of some interest that the Crown did not argue that the ruling was not on a "question of law relating to the case".

R v Alps

20. In *R v Alps* [2001] EWCA Crim 218, this court heard and determined an appeal from the ruling of the trial judge, in a preparatory hearing under the CPIA 1996, rejecting his application for a stay on the ground of abuse of process, because he had immunity from prosecution under the Geneva Convention and because he was charged under the wrong statutory provision. Again, the question of jurisdiction was not considered.

R v H

21. In *R v H* [2007] UKHL 7, [2007] 2 AC 270, the House of Lords considered whether section 9(11) CJA 1987 conferred jurisdiction on the Court of Appeal to hear an appeal from a ruling on disclosure made in the course of a preparatory hearing. The Appellate Committee was divided on the question whether the powers that may be exercised at a preparatory hearing were confined to those in section 9 CJA 1987. But, as Lord Hope explained at [18], that question did not matter. What mattered was whether a ruling which determines an application for disclosure, given by a judge while he is conducting a preparatory hearing, can be the subject of an appeal.

22. As to that, the ratio of the case is to be found in the majority judgments. Before going to those, however, it is pertinent to point out Lord Scott's clear disapproval, at [32], of previous case law to the effect that determining an abuse of process submission fell outside the purposes for which a preparatory hearing under the CJA 1987 could be held. In this respect, he was agreeing with Lord Rodger (at [50] and [53]) and Lord Mance (at [91]) that the permitted purposes should be broadly construed.

23. Lord Hope emphasised that a preparatory hearing is a part of the trial, albeit a part which takes place before the jury is empanelled. The judge had power under section 8(2) CPIA 1996 to deal with disclosure applications and did not require the powers in section 9 CJA 1987 to do so. Such applications should normally be dealt with before the preparatory hearing. Moreover, an application for disclosure would not in itself raise a question of law "relating to the case": see generally at [19]-[26].

24. Lord Rodger explained that sections 7 and 9 CJA 1987 were intended to confer powers which it may be beneficial for the judge to exercise in advance but which, under the law as it had stood previously, could only be exercised at the trial proper. But an application for disclosure is not a "question of law", even if it required the judge to identify the scope of his powers and duties, so could not be "question of law relating to the case": [59]. This view was bolstered by considering the report of the Roskill Committee, upon which the CJA 1987 was based. That committee had intended that

preparatory hearings would be used to determine "points of law which go to the root of the case or any point of law relating to the admissibility of evidence as disclosed on the papers": [60]. It was important that preparatory hearings were intended to take place after the essential work of preparation for the trial had been completed and so, "the judge would determine questions of law relating to the case, as fully prepared for trial, not questions of law relating to the essential preparations for the trial of the case": [62]. The absence of any mention of disclosure in section 9(3) was not a lacuna but reflected a legislative intention that applications for disclosure should not take place at, but preferably before, the preparatory hearing: [65].

25. Lord Mance also referred to the Roskill Committee's phrase "points of law which go to the root of the case" and said that Parliament had in section 9(5)(b)(iii) conferred a power to require the defendant to inform the court and the prosecution of "any point of law (including a point as to the admissibility of evidence) which he wishes to take", noting that the power given by section 9(3)(c) would enable them to be determined: see at [96]. The reasons why disclosure applications did not fall within section 9(3)(c) "as such and without more" included that they did not go to the root of the case, the Roskill Committee thought they would be dealt with before the preparatory hearing, they do not come within the ordinary meaning of "points of law relating to the case" and the CPIA 1996 made no reference in the context of disclosure to the preparatory hearing procedure: [110].

Warren v Attorney General

26. In *Warren v Attorney General* [2009] JLR 248, the Jersey Court of Appeal considered whether there was a right of appeal under Article 86(3) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 against a ruling on an application for a stay on abuse of process grounds, because the prosecutorial authorities had acted "in contravention of the rule of law". That paragraph provided for an appeal against a ruling at a preparatory hearing on "any question as to the admissibility of evidence and any other question of law relating to the case".

27. At [17], the court said the determination of an application for a stay on the ground of abuse of process was within the discretion of the first instance judge. However, the focus of the jurisdictional provision was "not on the nature of the ruling but on the nature of the issue to be determined" (applying *R v H*). At [19], they noted that, as observed in *R v Latif* [1996] 1 WLR 104, there was "considerable overlap" between the principles applicable to the court's jurisdiction to stay criminal proceedings and the power to exclude evidence. They continued: "If the question of the admissibility of evidence is to be regarded as one of law, as the statute expressly provides, in our judgment, it falls within the intention of the legislature that an application to stay proceedings as an abuse of process should be regarded also as a question of law." At [20] they noted that an application to stay on the ground of abuse of process "goes to the root of the prosecution".

R v VJA

28. In *R v VJA* [2010] EWCA Crim 2742, this court determined whether it had jurisdiction to consider an appeal from an abuse of process ruling given at a preparatory hearing under the CJA 1987. At [37], the following principles were derived from *R v H*:

> "First, the purposes set out in section 7(1), for which a preparatory hearing may be ordered, should be interpreted broadly and generously […]. Secondly, the orders that a judge may make 'as part of' a preparatory hearing proper are limited to the specific matters set out in section 9 […]. Thirdly, the judge should make an order under section 9(3) only if he reasonably considers that to make such a ruling would also serve a useful trial purpose within one of the purposes set out in section 7(1) […]. Fourthly, the scope of what falls within section 9(3)(c) i.e. 'any other question of law relating to the case', is restricted. Whether a ruling falls within that provision depends on the nature of the issue which the order or ruling decides […]. Fifthly, section 9(3)(c) does not cover rulings on disclosure 'as such and without more' […]. The words in quotes are from Lord Mance's speech. The 'question of law relating to the case' must relate to something more specific than the question of whether the judge misdirected himself and so vitiated his decision… The questions of law have to go 'to the root of the case' of which Lord Mance gave some examples […]. Lastly, the Court of Appeal's jurisdiction to give leave to appeal under section 9(11) in respect of a determination made by the judge under section 9(3)(c) is limited to the types of question of law that fall within section 9(3)(c)."

29. At [41], the court decided that the ruling appealed in that case was not the determination of a point of law relating to the case. Its reasons were these:

> "First, it is not argued that there is some independent issue of law that has to be determined prior to deciding the overall question of whether there should be a stay because the proceedings are an abuse of the process of the court. Secondly, it is not argued that the judge erred in law in applying the well-known principles that he had to consider in deciding that overall issue. Thirdly, there is no explicit argument in the proposed Grounds of Appeal that the decision of the judge was so unreasonable that no reasonable judge, properly directing himself, could have come to that conclusion. To the extent that it is implicit in them, in our view, in the context of this case and the issue decided by the judge, such an argument does not constitute 'any other question of law relating to the case' under within section 9(3)(c) as interpreted in *Regina v H*, as Lord Scott of Foscote specifically stated at [41]."

R v AUH

30. Very recently, in *R v AUH* [2023] EWCA Crim 6, [2023] 1 WLR 1399, this court considered whether it had jurisdiction to entertain an appeal from an abuse of process ruling made under the CPIA 1996. It held that the ruling did determine a question of law because it involved the question whether someone was an "exempt person" for the purposes of paragraph 2(4) of Schedule 3 to the Legal Services Act 2007 and ancillary questions of law relating to nullity and abuse: see at [65]-[67]. The broader question whether, without more, there is jurisdiction in respect of appeals against rulings relating to abuse of process was not considered.

Submissions for the applicant

31. For the applicant, Mr Summers notes that the question posed by the Registrar to the parties in this case *("(d)oes the court have jurisdiction to deal with a ruling on abuse of process as an interlocutory application?")* was also posed in *R v AUH*. He submits that the answer in that case determines the answer here. That answer is also consistent with prior authority.

32. The CPIA 1996 itself proceeds on the basis that "any point […] as to an abuse of process" is a point of law: see sections 6A(1)(d) and 11(6)(b) and Mr Summers submits that the Jersey Court of Appeal was correct in *Warren* to focus on the nature of the issue (abuse of process), rather than the particular ruling under appeal.

33. *R v H* concerned disclosure, a question which went to "essential preparations for the trial of the case", rather than "questions of law relating to the case, as fully prepared for trial" (Lord Rodger, [62]). An application to stay on the ground of abuse of process goes "to the root of the case" (Lord Rodger, [60]; Lord Mance, [96]).

34. *R v VJA* can be distinguished because in that case it was not argued that there was any independent issue of law that had to be determined prior to deciding the overall question of abuse of process, nor that the judge had erred in applying the legal test, nor that the conclusion was so unreasonable that no judge, properly directing himself, could have come to it. Here, by contrast, both misdirection and perversity are alleged.

Submissions for the Crown

35. For the Crown, Mr Duncan Penny KC submits that the approach to be applied in deciding whether the rulings appealed from were rulings as to "any […] question of law relating to the case" is that in *R v VJA*. Here, both the principal arguments advanced on behalf of the applicant inviting the judge to stay the proceedings as an abuse of process required the judge to make factual determinations against a background "largely of agreement as to the relevant principles". His rulings "principally involved his assessment of factual matters".

36. Although the applicant's grounds have been cast in terms of legal error, and it is suggested that there is an error of approach, the analysis is debatable. The Crown does accept, however, that insofar as the ruling concerns the correct approach to the question of double jeopardy in respect of foreign proceedings, "it may properly be regarded as a question of law, although the [applicant's] grounds are in substance connected with the judge's conclusions about the facts of the cases before him".

37. Moreover, an appeal under the interlocutory procedure provided for by the CPIA 1996 is not an opportunity to bring a claim for judicial review of a matter relating to a trial on indictment, which is precluded by section 29(3) of the Senior Courts Act 1981.

Discussion

38. In our view, it is important to distinguish two stages of the analysis, both of which may be termed "jurisdictional", but in different senses. The first asks whether, in principle, an appeal lies under section 35(1) from a ruling made in a preparatory hearing on an application to stay proceedings on the ground of abuse of process. That question turns

on whether the ruling appealed from is a ruling "on any […] point of law relating to the case" within the meaning of section 31(3) CPIA 1996. If the answer is "No", the court should not embark on the task of considering the substance of the appeal. If, however, the answer is "Yes", a second stage of analysis arises: how should the appellate jurisdiction in section 35(3) be exercised? In particular, in what circumstances can and should this court intervene to reverse or vary the judge's ruling?

39. The majority in *R v H* considered that the answer to the first question (in the statutory context of the CJA 1987) turned on the nature of the issue being determined. One factor regarded as important was whether the issue goes to the root of the case. Another was whether the issue relates to the case, as fully prepared for trial, rather than to preparations for the trial. Where the ruling is on a disclosure application, neither question can be answered affirmatively. Where it is on an application to stay for abuse of process, both can.

40. Lord Mance at [96] noted that, on his reading, section 9(3)(c) CJA 1987 enabled the judge to deal with points of which the statute envisaged the defendant being required to give notice under section 9(5)(b)(iii) ("any point of law (including as to the admissibility of evidence) which he wishes to take"). We note that, in section 6A(1)(d) CPIA 1996, the defence statement is required to include "any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take" (emphasis added). This seems to us to be a further indication that "any other question of law" is wide enough to encompass a ruling on an application to stay for abuse of process. We also see force in the conclusion of the Jersey Court of Appeal in *Warren* that a statutory scheme which permits appeals on the admissibility of evidence ought in principle to permit appeals on applications for stays on the ground of abuse of process, given the overlap between the two.

41. We can readily understand why, in *VJA*, this court was reluctant to accept that it has jurisdiction in a case where it was not contended that the judge had misdirected himself in law or acted irrationally or beyond the limit of his discretion. But in our view, these questions arise at the second stage of the analysis. At the first stage, the focus should be on the nature of the issue being determined in the judge's ruling, not on the errors or alleged errors it contains. Otherwise, the court would not know whether an appeal lies without investigating the extent to which the ruling turned on questions of law. In the present case, Mr Penny submits that ruling was made "against a background largely of agreement as to the relevant principles" and "principally involved his assessment of factual matters" (Notice of Grounds of Objection, paragraph 3); whereas Mr Summers identifies a series of misdirections and alleges perversity (Applicant's Submissions on Jurisdiction, at [17]). If the question of principle whether an appeal lies depended on which of these submissions was correct, it would become impossible to determine it without determining the substance of the appeal.

42. In this case, the application to stay for abuse of process was made on three bases which, we consider, were "points of law relating to the case" within the meaning of section 31(3) CPIA 1996. If successful, they would have barred the prosecution from proceeding. They were applications made on the (written) evidence as prepared for trial, not with a view to preparing the case for trial. They had been raised by the defence in writing. They were suitable for determination at a preparatory hearing. We conclude that, in principle, an appeal from the judge's ruling lies to this court.

43. The concerns of the court in *VJA* can and should, however, inform the analysis at the second stage, when considering whether the appellate jurisdiction should be exercised. A conclusion that, in principle, an appeal lies does not mean that it will be appropriate for this court to exercise its appellate jurisdiction by substituting its judgment for that of the first instance judge. It is important to reiterate that a ruling on abuse of process typically involves findings of fact and a multi-factorial balancing exercise, leading to a judgment about "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": see *R v Latif* [1996] 1 WLR 104, 112 (Lord Steyn). It is not the function of this court, whether on an interlocutory appeal or on an appeal from conviction, to remake the judge's findings of fact or to perform the balancing exercise afresh, unless the judge has erred in law or approach, taken into account something irrelevant or failed to consider something relevant or reached a decision that no reasonable judge could reach.

44. We emphasise that a judge is not obliged to deal in a ruling with every piece of evidence adduced or every submission advanced. Submissions that a judge has left out of account a material consideration should be made sparingly and only where the transcript and ruling, read as whole, justify it.

[…]

Conclusion

122. We refuse leave to appeal on all of the grounds advanced on behalf of the applicant and dismiss the application.

123. All of the issues considered in this judgment were fully argued and given the jurisdiction issue in particular is one of importance, we give permission for this judgment to be cited notwithstanding this was an application for permission.