Neutral Citation Number: [2018] EWCA Crim 2426

Case No: 201803047 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRADFORD
His Honour Judge Burn
T20177399

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE PHILLIPS
and
SIR JOHN SAUNDERS
(sitting as an additional Judge of the Court of Appeal)

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Between :

THE QUEEN	**Appellant**
- and -	
E	**Respondent**

- -
- -

Richard Wright QC (instructed by the Crown Prosecution Service) for the Appellant
Paul Greaney QC & Mr Nicholas de la Poer (instructed by Kamrans, Solicitors) for the Respondent

Hearing date : 11 October 2018

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Approved Judgment

Sir Brian Leveson P :

1. On 19 July 2018, in the Crown Court at Bradford, on the basis that a fair trial would not be possible, His Honour Judge Burn imposed a stay on proceedings against E who was charged in an indictment alleging assault by penetration contrary to s. 2 of the Sexual Offences Act 2003 and sexual assault contrary to s. 3 of the same Act. Having given the appropriate undertakings, the prosecution now seeks leave to appeal pursuant to s. 58 of the Criminal Justice Act 2003 ("the 2003 Act") against what constitutes a terminating ruling.

2. The provisions of s. 71 of the 2003 Act apply to these proceedings so that no publication may include a report of them, save for basic specified facts, until the conclusion of the trial unless the court orders that the provisions are not to apply. On the basis that the decision relates to the critically important issue of the extent of collateral inquiry and subsequent disclosure of unused material in allegations of sexual offending, we lift the restrictions so as to permit the principles of law involved to be reported albeit anonymously.

The Facts

3. At the material time, the respondent, E, was 18 years of age and the allegations concern his step sisters R (who was 17) and EC (who was a few days short of her 15th birthday). In short it is alleged that on 23 December 2016, E (who had been to a beer festival and returned home drunk) entered the bedroom of his step sisters and decided to play a prank on them by hiding in the wardrobe. Initially, they thought his behaviour funny but then E forced his hand into EC's pyjama bottoms, brushing past her stomach as he did so. He then turned to R. He lay on top of her and kissed her, at the same time forcibly penetrating her vagina with his fingers. R forced him off and he left the room.

4. A complaint was made to the police some months later; it was supported by evidence from both EC and R. E was arrested and, in interview, denied that he had ever entered the bedroom and further denied any sexual activity between him and his step sisters. That remains his case to this day and it is no part of this application to adjudicate between the allegation pursued by EC and R on the one hand and the denial maintained by E on the other.

5. R told the police during the investigation that she had reported what had happened to her in messages sent on her phone to two friends the night she alleges she was indecently assaulted. R's phone was seized by the police and the contents were downloaded. The prosecution relies on those messages as evidence of recent complaint.

6. EC was asked during the course of a video recorded interview whether she had told anybody else about the allegations. She said that she had only told her mother. She also said, when asked, that she hadn't told any of her friends what had happened. She said that she had no contact with E on her phone. She said she didn't have his phone number nor was she in contact with him on any messaging service including Facebook. In the light of those answers EC's phone was not seized by the police.

7. On 12th July 2017 the police took a statement from E's mother. In it she said that her husband, the father of both EC and E, had received a text from EC shortly after the alleged sexual assaults. Those representing E obtained a screen shot of the message. It read as follows:

> "Hi dad, just wanted to let you know that I realised I was really harsh and selfish, and you only want the best for me and was just a bit caught up in everything that was happening at the time. I just think I felt lonely as everyone was working a lot or going out and I wasn't, but it is much better now. I will be coming to yours every other weekend and Wednesdays as the others do. I love you very much. I am very sorry. I was just having a very hard time at school. I think I am ready to come back.'"

We were told by Paul Greaney QC, representing E, that E would also be present during weekends at his and EC's father's home.

8. Mr Greaney asserts that the police were under a duty to seize EC's phone at the time they received her initial complaint but that they should certainly have done so when they became aware of the existence of the text in July 2017. In that regard, he points to the very real issue between prosecution and defence prior to the trial about lack of disclosure, not only relating to the failure to seize EC's phone but, until shortly before the trial, the refusal to disclose the download of the contents of R's phone. This had led to an application under s. 8 of the Criminal Procedure Investigations Act 1996 ("the 1996 Act") for disclosure of the download of R's phone in which, as part of the application, questions had been posed about the failure of the police to seize and interrogate EC's phone. On 5 July 2018, that application led to a series of orders after which the prosecution continued to maintain that the download of R's phone was not disclosable but, following an intervention of prosecution counsel, that material was disclosed.

9. In relation to EC's phone the prosecution said that they had not seized EC's phone as that did not constitute a reasonable line of enquiry. Further, in response to a defence inquiry, the prosecution said that EC now had a new phone and the old one was broken. There was an issue at that stage as to whether the old phone could still be found; in the event, it was available.

10. The trial was due to start on 16 July 2018. By the time of trial, the stance adopted by the prosecution as to EC's phone had changed and, through counsel then prosecuting, both in written submissions and in court, it was conceded that from 12 July 2017, when the existence of the text was made known to the police, it would have been a reasonable line of enquiry to have seized EC's phone to examine the contents. In the light of that concession, Mr Greaney did not need to pursue his submission that there was a breach of duty when the complaint was first made by EC.

11. The concession having been made, the police seized both the old broken phone and EC's new phone and downloaded what they could. The results of these examinations, as told to the judge, was that there was no material which still remained from the relevant period of time. It had all been lost and was not recoverable from the cloud on which communications might be stored. The circumstances in which material prior to

June 2018 was not available was the subject of some argument and Mr Greaney pointed to the fact that, in the four weeks prior to the seizure, there were some 1538 pages of material (including both messages and other data) which had accumulated.

12. In the circumstances, Mr Greaney applied that the case be stayed as an abuse of the process of the court. He submitted that there had been a breach of duty by the police leading to the loss of material which might have supported E's case and, as a result, he could not have a fair trial. The prosecution accepted that there had been a breach of duty but submitted that there could still be a fair trial. The trial Judge found in favour of E and stayed the prosecution.

13. Judge Burn had "no doubt" that the failure to obtain or analyse the mobile phone "and/or the social media communications … or the failure to give advice to the police to … secure that evidence" constituted "a clear contravention of the Director's current guidelines". He postulated that there would have to be some evidential indication that the particular download may have yielded information of critical importance which, in the context of the case, he identified as the text message and the level of E C's communications with others. He observed that it was in a different category to corroborative evidence such as CCTV and scientific tests (such as identified by Brooke LJ in *Ebrahim* (*infra*) and went on:

> "There are two ways in which this is in a different category. The first is that … the phone download … for the majority of younger persons is tantamount to a running commentary upon their day to day lives, feelings and interaction. Secondly, evidentially … this evidence goes to the heart of the defence ability to cross-examine a complainant upon a record of their own making. The absence of such material deprives the trial process as a whole because it may be relevant to the prosecution case too, of likely very important contemporaneous evidence."

14. On behalf of the prosecution, Richard Wright QC (who did not appear in the Crown Court) seeks leave to appeal that decision arguing that the concession was one of mixed fact and law and was wrong on the basis that there was no breach of duty. In the alternative, if the concession either cannot be withdrawn or was correctly made, it was still possible for E to have a fair trial: the effect of the judge's ruling was that in every case of this type in relation to those who communicate through their mobile phones and social media, it would be necessary to seize and examine both phone and social media data on the basis that it " goes to the heart of the … ability to cross examine".

15. That application for leave (and the hearing of any appeal) falls to be considered pursuant to the provisions of s. 58 of the Criminal Justice Act 2003 ("the 2003 Act"), such that, pursuant to s. 61 of the Act, the court must confirm, reverse or vary any ruling to which such an appeal relates. By s. 67 of the 2003 Act, the Court cannot reverse a ruling on appeal unless it is satisfied that:

> "(a) the ruling in law was wrong;
>
> (b) the ruling involved an error of law or principle; or

> (c) the ruling was a ruling that it was not reasonable for the judge to have made."

16. In that regard, the approach to appeals of this nature has been elucidated in *R v B* [2008] EWCA Crim 1144 by Sir Igor Judge P (as he then was) in these terms (at [19]):

> "When the judge has exercised his discretion or made his judgment for the purposes of and in the course of a criminal trial, the very fact that he has had carefully to balance conflicting considerations will almost inevitably mean that he might reasonably have reached a different, or the opposite conclusion to the one he did reach. Leave to appeal under s. 67 of the 2003 Act will not be given by this court unless it is seriously arguable, not that the discretionary jurisdiction might have been exercised differently, but that it was unreasonable for it to have been exercised in the way that it was. No trial judge should exercise his discretion in a way which he personally believes may be unreasonable. That is not to say that he will necessarily find every such decision easy. But the mere fact that the Judge could reasonably have reached the opposite conclusion to the one he reached, and that he acknowledges that there were valid arguments which might have caused him to do so, does not begin to provide a basis for a successful appeal, whether, as in the circumstances here by the prosecution or, when it arises, by the defendant."

The Concession

17. In accordance with the provisions of the 1996 Act and the Code of Practice issued pursuant to s. 23 of that Act, there is an obligation on the police when investigating an alleged crime to "pursue all reasonable lines of enquiry, whether these point towards or away from the suspect". A failure to do so amounts to a breach of duty. The concession before Judge Burn was to the effect that, from 12 July 2017 (i.e. when the police learnt of the text message to E C's father), seizure of the phone was a reasonable line of enquiry. Mr Wright, on the other hand, now submits that there was no duty to seize and examine the phone at any stage during the inquiry. In short, seizing the phone was never a reasonable line of inquiry and therefore there was no breach of duty.

18. The first question is whether leading counsel for the prosecution should now be permited to withdraw the concession. Mr Greaney argues that this court must focus on the decision made by the judge based, as it was, on the material then before him. Furthermore, it is submitted that the withdrawal of the concession is made with the benefit of hindsight and that the one trial principle applies which requires that parties are held to decisions that they make in the course of a trial.

19. In relation to that last submission, the court referred the parties to the decision of this court in *R v R* [2015] EWCA Crim 1941, [2016] Cr App R 20 (page 288)**.** Dealing with concessions made during the course of the hearing in the Crown Court, it was made clear:

> "53. Before leaving this part of the case, three other issues must be addressed. The first is to underline one of the "Overarching Principles" set out in the Review of Efficiency in Criminal Proceedings (2015). The principle is "getting it right first time" and its relevance to the present case arises from the fact that the appellant's stance before this court is substantially different from that adopted before [the trial judge]. Before the judge (as discussed in further detail below), the appellant essentially acquiesced in the judge's proposals as to disclosure. The appellant's case below was that, with more time, they could and would comply with the requirements canvassed with the parties by the judge. On appeal, the case is that those proposals were misconceived with regard to the stage of initial disclosure, imposed upon them under protest and led the parties and the case onto the wrong road.
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> 54. Changes of case of this nature are disconcerting and potentially very wasteful of time and costs. Whether or not in the present proceedings the appellant is permitted to change its case on appeal, it must be emphasised that parties generally can have no expectation that such a course will be open to them. Save very exceptionally, a party is not permitted to acquiesce in an approach to the case before the judge at first instance and then renounce its agreement and advance a fundamentally different approach on appeal. Parties must get it right first time."

20. It is thus necessary to consider whether this is an exceptional case such that Mr Wright should be allowed to proceed on a premise different to that which was common ground before the judge. In that regard, it is necessary to consider the guidance that has been given by the DPP as to the circumstances in which seizing for examination the contents of a mobile phone is considered to be a reasonable line of enquiry. This guidance followed public concern about possible miscarriages of justice following a number of cases (many of which featured allegations of sexual offences made against a friend or former partner) where such an examination had not taken place until the matter came to court for trial yet then revealed material which was highly relevant to whether a crime had been committed.

21. The Crown Prosecution Service's 'Guidelines on Communication Evidence' ('CPS Guidelines'), released in December 2017 and updated on 26 January 2018, states:

> "1. Communications between suspects, complainants or witnesses can be of critical significance whether as evidence in support of the prosecution case or as unused material which either undermines it or assists the defence case. This is particularly so where the complainant and suspect have been in a personal relationship, however briefly, for example, in cases involving allegations of a sexual nature. This guidance is primarily directed to such cases. Its purpose is to ensure that the significance of communication evidence is understood and assessed at the appropriate time and that it is handled correctly.

Serious consequences have occurred and will continue to do so if this is not done. Such evidence includes communications by way of telephone or other electronic device or by social media and is not restricted to communications between the complainant and suspect but may include contact with third parties [see below].

2. Investigating officers are required to pursue all reasonable lines of inquiry, whether to exonerate or implicate suspects, under the Code of Practice issued under CPIA 1996. This will often include the obtaining and analysis of communication evidence whether it originates from devices or social media accounts belonging to the complainant or the suspect or, in some cases, to third parties. Prosecutors should be alert to the often critical importance of such evidence and, where such reasonable lines of inquiry have not been undertaken, should provide appropriate advice to the police to pursue them. This might be advice to obtain devices which have not hitherto been seized or to examine those which have in an appropriate way. In the category of cases to which this guidance is primarily directed, it would be rare indeed for communication evidence not to feature as part of the police investigation.

3. The Attorney General's Guidelines on Disclosure provide assistance on what amounts to a reasonable line of enquiry. The investigator must decide how best to pursue a reasonable line of enquiry in respect of such material, ensuring that the extent and manner of it examination are commensurate with the issues in the case. This should be achieved in consultation with the prosecutor, if appropriate. Therefore, the following advice is provided:

- Consider asking the suspect or/and complainant whether there might be communication material which may have a bearing on the case.

- It is necessary carefully to consider the facts of a particular case, the issues raised and any potential defence in order to decide what amounts to a reasonable line of enquiry.

- Prosecutors should provide assistance to investigators when making such a decision and, ideally, agree with them what amounts to a reasonable line of enquiry.

- In reaching such a decision, prosecutors are reminded that the whole of a relevant download falls to be considered i.e. all forms of message communication [even if deleted] and photographs / videos if stored. Equally the investigation should not be limited to messages between the complainant and the suspect only as communications between either of them and others may have an impact on the case, for

> example, when reference is made by either to the events which are the subject of the allegations.
>
> - In some cases it may be necessary for the whole of a download to be examined. The extent of any investigation of digital materials should only be confined if it is not considered to be a reasonable line of enquiry."

22. Subsequent to this ruling, on 24 July 2018, 'A Guide to "reasonable lines of enquiry" and Communications Evidence' was published by the DPP ('DPP Guide') which states:

> "13. The examination of mobile devices belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all, and thus no requirement for even a level 1 examination to be undertaken. Examples of this would include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will retain any material relevant to the period in which the conduct is said to have occurred and/or the complainant through age or other circumstances did not have access to a phone at that time…
>
> 19. What represents a reasonable line of enquiry is an investigative matter for the police and whilst the prosecution will do what they can to assist in identifying potential further enquiries, that ought not to be taken by the police as definitive or exhaustive. should only be confined if it is not considered to be a reasonable line of enquiry."

23. This guidance appears to us accurately to set out the considerations that investigators should have in mind when deciding what enquiries should be made during investigations into allegations of sexual offences. It should be noted that it does not say that mobile phones should be examined as a matter of course in every case: the decision is fact specific in each and every case.

24. It was submitted by Mr Wright that, in reaching his decision to stay the prosecution, the judge did so on the basis that there was always a duty on investigators to seize and interrogate the phone of any complainant who makes an allegation of a sexual offence. Given the way that he expressed himself, there is undoubtedly force in the submission that this was, indeed, the way in which the judge approached the matter. For our part, however, we do not accept that the police were or are under such a duty. If the judge had made his finding on that basis then it may well have been that he did so based on an error of law which impacted on his own assessment of the position.

25. On examination, however, the judge also clearly had in mind and applied the relevant guidance: he was referred to it and quotes parts with approval. Further, his ruling was that there was a breach of duty after 12 July 2017 when the contents of the text were made known to the police. He went on to consider the evidence relating to whether

the material on the phone would still have existed after that date. If the judge had been saying that there was a duty to seize mobile devices from the complainant in every case where the complaint is of a sexual offence, then the duty would have arisen as soon as the matter was reported to the police which was in March 2017. The concession made by prosecuting counsel, which the judge noted, was made on the basis that it was the knowledge of the text on 12 July which triggered the duty on the police to seize the phone and interrogate it.

26. Without deciding that the concession should not have been made, we consider that it was at least arguable whether it was appropriate not least because of the observations in *R v Khalime Shah* [2002] EWCA Crim 1623 (which apply equally to requests following disclosure of material by the prosecution). Kay LJ put the matter in these terms:

> "24. Decisions as to whether to investigate or not are essentially matters for the police to make their minds up as a matter of judgment by investigating officers and the court is always going to be very reluctant to intervene and suggest that an enquiry of some kind should have been made when none has been made.
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> 25. We want to make it clear that it was never the intention, as we understand it, of these provisions in some way that the defence could obtain a piece of information and then by sending it to the prosecution place upon them a duty to investigate matters, in the hope that in some speculative way, it might produce further information that would assist the defence case."

27. The concession was made by the prosecution doubtless having considered with the police what they should have done. In the circumstances, therefore, we do not consider that this case could fall to be considered as exceptional (as required by *R v R supra*) and proceed on the basis that there was a failure (after 12 July 2017) to seek further material from EC's mobile phone. That is not the same as concluding that there was a power of seizure on the grounds that it was evidence in relation to an offence being investigated or necessary to prevent evidence being concealed, lost, altered or destroyed: see ss. 19 and 20 of the Police and Criminal Evidence Act 1984: that is an issue which, in the context of this case, we do not need to resolve.

Fair Trial

28. We turn to the alternative submission made by Mr Wright that the judge was wrong to find that E could not have a fair trial following the loss of any evidence of the material (save for the text) that had been available on EC's phone (it not being suggested that any other social media data was sought or available).

29. It was common ground that the leading authority which deals with the power of a court to order a stay where evidence has been lost is *R(Ebrahim) -v- Feltham Magistrates Court* [2001] EWHC Admin 130, [2001] 2 Cr App R 23 (page 427) but there are many others, including the decision of the Supreme Court in *R v Maxwell (Paul)* [2011] 2 Cr App R 31. The two situations in which a stay should be ordered

are where the court concludes (i) that the defendant cannot receive a fair trial or (ii) that it would be unfair for the defendant to be tried. Mr Greaney argued (and the judge accepted) that this case fell within the first category on the basis that there has been a breach of duty by the investigators in failing to seize material evidence, such that R could not have a fair trial because of the missing evidence. We add only that the judge decided that there was no evidence that material from EC's phone had been deliberately erased or eliminated.

30. Although the judge focussed on the fault of the prosecution in failing to seize EC's phone and relied on *Ebrahim*, it is important to identify that in *Ebrahim* Brooke LJ (at [25] made it clear that fairness of a trial required those who were "undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted". He went on (at [27]):

> "It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

31. It is worth adding that although the judge was clearly critical of the investigation and the prosecution failure to obtain the mobile phone and social media communications, the application of the principles of abuse of process is not a disciplinary sanction. In *R v Loosely; Attorney Generals Reference (No 3 of 2000)* [2001] UKHL 53, [2002] 1 Cr App R 29 (page 360), Lord Nicholls of Birkenhead made it clear:

> "I should add that when ordering a stay, and refusing to let a prosecution continue, the court is not seeking to exercise disciplinary powers over the police although staying a prosecution may have that effect."

32. The judge observed that whether a fair trial could take place was a question which looked at the fairness of the process to the defendant and that it would be strange to ask whether a trial could take place which was fair to the prosecution. In our judgment, the proper approach is to look at whether the trial will be fair generally. That requires a consideration of all the circumstances of the case: it is a fact sensitive decision. The circumstances primarily revolve around the issues in the case and the likelihood that information relevant to those issues and of assistance to the defence would have been revealed by the material, had it been seized and retained. It is not, of course, permissible to speculate but, in many cases, it may be possible to draw proper inferences about what is missing from the material that is available. In that regard, consideration must also be given to whether any potential unfairness to a defendant would be removed by the trial process which involves the strength of any other evidence and the material that the defence could utilise in a trial.

33. Judge Burn correctly identified that the credibility of the girls was central to the case and whether these assaults took place or (as E alleges) the two girls were deliberately (for it could hardly be otherwise) making a false complaint. It was not a case where there was any suggestion of consensual sexual activity or innocent horseplay. In deciding the likelihood of whether there might be anything on the phone which would bear on this issue, the judge relied on the text message from EC to her father and the inference which he drew from the frequency of her use of her mobile phone in June 2018. This ignores her evidence that she did not communicate about the incident with anyone (which is not an assertion undermined by the fact that she was prepared to visit her father without reference to whether or not E was present).

34. What was lacking from the judge's analysis was any detailed consideration of whether and, if so, to what extent the trial process itself would remove any potential unfairness to E. He appears to conclude that, as it could not be said what was on the missing phone, any direction to the jury would involve speculation on their part which he observed "is dangerous to a fair trial". He does not consider the fact that R had made a consistent complaint immediately or shortly thereafter the event, that there was no suggestion of communications (taken from R's phone) between her and EC undermining their complaint and that R was equally able to speak about what happened to EC without it being suggested (at least before us) that she might have said something inconsistent with the complaint.

35. Having considered the reasons that the judge gave for concluding that there could not be a fair trial in the circumstances of this case and bearing in mind the observations cited above of Sir Igor Judge P in *R v. B*, we have come to the clear conclusion that the judge did reach a decision that was not reasonably open to him. First, we do not accept that it was legitimate for him to infer from the text sent by EC to her father (which deals with her relationship with him rather than with her step brother E) that it was likely there would be material relevant to whether sexual assaults took place on her phone and, for our part, without understanding the family dynamics of the relationship of EC with her father, as to which we know of no evidence, we have doubt about how far the text could be said to undermine her allegation.

36. Secondly, while we understand the observation about the extent to which young people contemporaneously record their thoughts in messages, we have no doubt that the judge gave it undue weight in the circumstances of this case: we repeat that we consider it highly unlikely that there would have been some material on the phone to support the suggestion that EC and her sister had invented this allegation or to undermine her credibility not least because messages on R's phone between her and her sister were available; no suggestion is made that any of them support the allegation of a collusive false complaint.

37. In that regard, we repeat that EC had made it clear that she had not told anyone. While that statement does not necessarily preclude the need for further investigation, there was no evidence to doubt what EC said about that. Information from the phone to support the suggestion that EC didn't like E takes the case no further: she made that fact clear in her video interview. Looking at those matters for ourselves, we have concluded that the proper inference to be drawn from what we do know is that there was unlikely to be anything of relevance on the phone.

38. In considering whether the trial process would be likely to resolve any possible unfairness, we have also considered the information that the defence did have to use during the trial. To such extent (if at all) as it assisted in assessing the relationship between EC and E, there was the text to EC's father and, even assuming no communication with her friends, there was also the difference in her approach to that of her sister. What EC might have told her friends and what might have been on the phone can be explored in cross examination and the subject of argument. What is made of EC's credibility and the forensic points would be a matter for the jury.

39. Third, we do not accept that a direction to the jury appropriate to the facts of this case would be ineffective. Such a direction could point out in the conventional way the disadvantage the defence may have been under caused by the absence of this material and direct the jury to take that into account when applying the burden and standard of proof.

40. Finally, although adding it was "not the point", the judge observed to the fact that neither complainant evinced a wish for the matter to be brought. In reality, (as agreed by prosecution and defence), this was simply incorrect but, in any event, we underline that this observation had no place in the analysis of the fairness of a trial.

41. Contrary to the views at least inferentially expressed by the judge, *Ebrahim* remains the law and it would be wrong to conclude that failure to comply with best practice should necessarily lead to an application to stay. That is not to say that such failures are irrelevant and it is clear that they must be taken into account in deciding any question which arises during the course of proceedings (see s. 26(4)(b) of the 1996 Act). Ordering that a prosecution be stayed, however, should be a last resort and only (in relation to this category of abuse) in circumstances where a defendant cannot receive a fair trial. That is not, in our judgment, the case here.

42. For all those reasons we consider that the judge's decision to stay the prosecution was not a reasonable ruling for him to have made. This is not a situation where, of two different possible conclusions, we prefer a different result to that of the judge. Pursuant to s. 67 of the 2003 Act, we conclude that the decision to stay the prosecution as an abuse of process was wrong in principle and did not constitute a reasonable exercise of his discretion. Thus, we grant leave to appeal and, in accordance with s. 66(1) and (2) of the Act, the ruling is reversed and we order that the proceedings on this indictment be resumed at the Crown Court before a different judge.