

Below is a sample legal opinion/ professional advice written for a man charged with a series of criminal offences.

IN THE GILLINGHAM CROWN COURT

Case No. DXXXX

REGINA

v.

XXXX XXXX

and

XXXX XXXX

Advice ON AN APPLICATION TO STAY PROCEEDINGS AS AN ABUSE OF PROCESS

1. XXX XXX is charged with racially aggravated affray, two counts of robbery, having an offensive weapon, possessing a controlled drug, and possessing a controlled drug with intent to supply. He faces trial at Gillingham Crown Court. The preliminary hearing was heard on 8th February 2008 and the Plea and Case Management Hearing is listed for the 21st March 2008. I am asked to advise Mr XXX on the merits of making an application to stay the proceedings as an abuse of process.
2. In summary, I would advise that an application be made on Mr XXXX's behalf to stay the proceedings as an abuse of process on the grounds that;

- (i) in relation to the count of racially aggravated affray and the 2008 robbery, XX XXXX cannot receive a fair trial because the prosecuting authorities wrongly destroyed potentially exculpatory evidence;
 - (ii) in relation to the count of robbery dating from 2003, XX XXXX cannot receive a fair trial because of adverse publicity likely to cause a jury to be biased;
 - (iii) in relation to the count of robbery dating from 2003, it would be unfair to try XX XX because the prosecution is brought in breach of a promise not to prosecute made by XX XXX;
3. The crown case is that on Thursday 2nd February 2008 XX XXX, together with XX XX, committed a racially aggravated affray at a petrol station on XXX XXX Road, and then went on to rob two women who were walking along XXX XXX Road (although XX XX is charged with the robbery of only one of the women). Mr XXX's defence to these charges is one of mistaken identity. CCTV footage of the petrol station and XXX XXX Road was destroyed upon authorisation by the police.
4. Upon being stopped and searched in connection with the affray and robbery later on 2nd February 2008, XXX XXX was found to be in possession of an offensive weapon (a lock-knife) and a quantity of heroin. During a search of Mr XXX's house, conducted on 3rd February 2008 a larger quantity of heroin was discovered. Mr XXX is also charged with robbery, which he is alleged to have committed in an unconnected incident in 2003.

Jurisdiction of the Court

5. The court has a discretion to prevent a prosecution proceeding against a defendant by staying the proceedings where the proceedings are considered by the court to be an abuse of its own process (*Connelly v DPP* [1964] AC 1254, HL).

6. The Court of Appeal in *Beckford* [1996] 1 Cr App R 94, held that in order for an application to stay proceedings as an abuse of process to succeed, it must be shown either that;
- (i) the defendant could not receive a fair trial, or,
 - (ii) it would be unfair to try the defendant.

The Defendant could not receive a fair trial

7. In *S* [2006] 2 Cr App R 23, it was held that the discretionary decision whether or not to grant a stay as an abuse of process is an exercise in judicial assessment dependant on judgement rather than any conclusion as to fact based on evidence. However, there are some circumstances which have been recognised as grounding an application to stay proceedings as an abuse of process.

Failing to obtain, losing and destroying evidence

8. In *Medway* [2000] Crim LR 415, police destroyed CCTV evidence after deciding it contained nothing of value. The Court of Appeal upheld the trial judge's refusal to stay the proceedings as an abuse of process in the absence of the CCTV footage, because there was no evidence of malice, and nothing to show that the absence of the tape made the conviction unsafe. Similarly, and more recently in *Khalid Ali v Crown Prosecution Service, West Midlands* [2007] EWCA Crim 691, the Court of Appeal emphasised that in such cases, the mere fact that missing material might have assisted the defence will not necessarily lead to a stay. The Court of Appeal in *Medway* did however hold that a defendant could be disadvantaged in a case where evidence had been tampered with, lost or destroyed, but it was only in exceptional circumstances, for example where such interference was malicious, that a stay was justified.

Obligation to obtain and/or retain material

9. In *R (Ebrahim) v Feltham Magistrates' Court* [2001] 2 Cr App R 23 it was held that the first question to ask when seeking to stay proceedings on the ground that the prosecuting or investigating authorities have failed to obtain, lost or destroyed evidence is to what extent the investigator was under a duty to obtain and/or retain the material in question, giving consideration to Criminal Procedure and Investigations Act 1996, and the A-G's Guidelines: Disclosure of Information in criminal proceedings.
10. According to CPIA 1996, 3.5, investigating officers should pursue all reasonable lines of enquiry, whether those point to or away from the suspect, and according to 3.6, where the officer in charge of an investigation believes that other persons might be in possession of material that may be relevant to the investigation, he should ask the disclosure officer to inform them of the existence of the investigation and invite them to retain the material in case they receive a request for its disclosure. The duty of the investigating officer in the case to retain material however, relates only to that material which may be relevant to the investigation (CPIA 1996 5.1)
11. Destruction of evidence by the police is relevant in XXX XXX's case in relation to the racially aggravated affray (Count 1), and the street robbery (Count 2). It is clear that in this case the police were under a duty to obtain and retain footage from the petrol station. The two cameras pointed towards the door and the till in the petrol station shop, and so it would have likely been possible to establish from the footage from those cameras whether XXX XXX did in fact enter the petrol station on the day in question. I would not in any case envisage a problem in establishing the duty of the police to retain the footage from the petrol station, as in his statement, PC XXX XXX concedes that PC XXX was mistaken in forming the view that identification would no longer be in dispute and so the footage would not be required. PC XXX further concedes that PC XXX told Mr XXX this and so Mr XXX deleted the footage.

12. With regards the footage from the local authority cameras situated on XXX XXX Road, it may be more difficult to establish that this amounted to 'relevant material'. In his statement, PC XXX states that he can confirm the cameras did not show either the petrol station or the area where the street robbery is alleged to have taken place, that the lighting in the areas the cameras covered was poor, and that the quality of the footage was also poor. PC XXX does however state that the footage does show a car driving into the petrol station. The driver of this car is a potential witness, and I am therefore of the opinion that the police were under a duty to retain the local authority CCTV footage.

Serious prejudice caused to the defendant

13. Secondly, in *R (Ebrahim) v Feltham Magistrates' Court*, the court held that if there was a breach of the duty to obtain and/or retain the material then the defence must establish on the balance of probabilities that as a result of the breach the defendant is 'seriously prejudiced'. By 'seriously prejudiced', the court meant 'could not have a fair trial'. It was however stressed that the normal forum for challenges was the trial process itself; the presumption seems to be in favour of refusing to stay. According to Brooke LJ, there has to be either an element of bad faith, or at least some serious fault, on the part of the police or the prosecuting authorities.

14. In this case, I am of the opinion that although the police were under a duty to retain the local authority CCTV footage from XXX XXX Road, the destruction of this footage does not serious prejudice XXX XXX in the sense that he cannot have a fair trial. It seems that the destruction of this evidence was not carried out in bad faith, and it will also be possible to question the destruction of the evidence in cross-examination at trial.

15. In my opinion an application to stay proceedings as an abuse of process based on the destruction of the petrol station footage stands a greater chance of success. XXX XXX's defence to the charges of robbery and affray is one of mistaken identity, so clearly any evidence which may have

been capable of substantiating his claim that he was not present at the petrol station that night, or showing that another person fitting his description was present, would be central to his defence. The fact that this CCTV footage is no longer available, and that no police officer ever saw the footage to find out whether it could substantiate XXX XXX's defence in my opinion has seriously prejudiced Mr XXX's chances of having a fair trial.

16. The prejudice caused to Mr XXX is increased by the breaches of PACE 1984 which occurred during the street identification procedure, as a result of which the prosecution evidence supporting identification may turn out to be weak. This is relevant given that Brooke LJ in *R (Ebrahim)* said at 27 that if 'there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed'. In my opinion the mistakes made by the police in gathering evidence relating to identity may mean that the evidence available in absence of the CCTV footage from the petrol station does not meet this test.

Adverse publicity

17. Although adverse publicity has been held to constitute grounds for staying a prosecution as an abuse of process (see, for example, *R v Reade*, unreported, CCC October 15, 1993, in which Garland J stayed a prosecution for this reason), it is very rare for an application made on this ground to be allowed.
18. In *Montgomery v H.M. Advocate* [2003]1 AC 641 it was held that the test was whether the risk of prejudice was so grave that whatever measures were adopted, the trial process could not reasonably be expected to remove it. Similarly, in *R v Abu Hamza* [2007] 1 Cr App R 27, the Court of Appeal held that the fact that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the

trial judge concludes that, with his assistance, it will be possible to have a fair trial.

19. In this case, there may be grounds for making an application to stay proceedings in relation Count 7, the 2003 robbery. Around the time of the alleged robbery, the local newspaper, the *Tottenham and Wood XXX Independent*, ran a series of articles about robberies in the area, and according to XXX XXX, on at least two occasions printed photographs of Mr XXX.
20. I am of the opinion that an application to stay proceedings on this ground is unlikely to succeed. Some 4 years have passed since the articles and photographs were published, and it may be difficult to establish that any potential jurors would even recall having seen them, let alone that they may be biased as a result. Even if the judge were to accept that a jury drawn from the area of circulation of the *Tottenham and Wood XXX Independent*, he may still find it possible to hold a trial in another part of London where jurors would not have had access to the articles and photographs in question.
21. It is, however, not possible to come to a firm conclusion in relation to this matter without having details of the contents of the articles, or seeing the way in which the photographs of Mr XXX were presented in relation to the articles.

It would be unfair to try the defendant

Going back on a promise

22. In *Croydon Justices, ex parte Dean* [1993] QB 769, the Divisional Court held that where the prosecuting authorities or the police make a representation, undertaking or promise to a defendant that they will not proceed with a prosecution in relation to a particular offence, this may amount to grounds for staying any subsequent prosecution as an abuse

of process, and that in such circumstances it is not necessary for the accused to show that there was bad faith on the part of the police.

23. However, more recently in *Abu Hamza* [2007] 2 WLR 226, the Court of Appeal held that these circumstances are not likely to constitute an abuse of process unless;

- (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted, and;
- (ii) the defendant has acted on that representation to his detriment.

24. XXX XXX claims that DC XXX (the officer in the case) approached him and asked him to act as a police informant. According to Mr XXX, DC XXX assured him that in return the proceedings against him for the 2003 robbery charge would be discontinued. Mr XXX agreed and the officer told him that as far as Mr XXX was concerned that was the end of the proceedings against him, and he would be contacted about making a statement in due course. Mr XXX received no further communications from DC XXX, and so did not attend Snaresbrook Crown Court on the date of his trial.

25. On the facts as presented by Mr XXX this seems to be a fairly compelling case for staying proceedings for the 2003 robbery as an abuse of process. More information is needed about the exact words used by DC XXX in making the representation to Mr XXX that he would not be prosecuted, however on the facts as they stand it would seem that the representation made was not equivocal. In my opinion it will also be possible to show that Mr XXX did rely on the promise to his detriment, in that on the basis of his agreement with DC XXX, Mr XXX failed to attend his trial for the relevant charges. It would be useful to know whether Mr XXX also did act as an informant for the police, in consideration of the promise made by DC XXX.

26. However, there is a problem in this case regarding available evidence to support XXX XXX's version of events. Instructing solicitors inform me that they have contacted DC XXX who has stated that there was no record made of such an assurance having been given by DC XXX, and unfortunately DC XXX has since died and is therefore obviously unable to substantiate the facts as presented by XXX XXX. However, it may be that the fact that the police made no attempt to execute the warrant issued for Mr XXX's arrest after his failure to attend Snaresbrook Crown Court for trial is evidence of the fact that they did not intend to bring proceedings against him.
27. In *Bloomfield* [1997] 1 Cr App R 135 it was held that it is irrelevant whether the person who represents to the defendant that the case will be discontinued actually has the authority to discontinue the case; in that case the defence were entitled to assume that prosecuting counsel had such authority and rely upon the promise. In this case it is therefore not relevant whether DC XXX actually had the authority to make a deal with XXX XXX in relation to the 2003 robbery offence.
28. In my opinion, an application to stay proceedings as an abuse of process on the basis that the proceedings constitute a breach of promise by the police should be made, and if the court accepts XXX XXX's version of events there is a good chance the application will be successful. However, the success of the application will be largely dependant on whether the judge accepts Mr XXX's allegation that a promise was in fact made.

Procedure

29. The procedure for making an application of no case to answer in the crown court can be found in the consolidated criminal practice direction, Part IV. 3.6. According to Part IV.36.1, a defendant must give written notice of application to the prosecuting authority and any co-defendant not later than 14 days before the date fixed or warned for trial. Notice must;

- (i) give the name of the case and the indictment number;
- (ii) state the fixed date or the warned date of the trial;
- (iii) specify the nature of the application;
- (iv) set out in numbered sub-paragraphs the grounds upon which the application is to be made;
- (v) be copied to the chief listing officer at the court centre where the case is due to be heard.

30. The automatic directions which are to apply can be found in Part IV.36.3;

- (a) The advocate for the applicant must lodge with the court and serve on all other parties a skeleton argument in support of the application at least five clear working days before the relevant date. If reference is to be made to any document not in the existing trial documents, a paginated and indexed bundle of such documents is to be provided with the skeleton argument;
- (b) The advocate for the prosecution must lodge with the court and serve on all other parties a responsive skeleton argument at least two clear working days before the relevant date, together with a supplementary bundle if appropriate.

Next steps

31. It would be useful to have a copy of the articles published by the *Tottenham and Wood XXX Independent* relating to the 2003 robbery, and the accompanying photographs of Mr XXX, so that it might be possible to analyse any prejudice which may have been caused to Mr XXX by their publication.

32. Enquiries should be made of XXX XXX as to whether he has any evidence which may support DC XXX having made a promise that he would not be prosecuted for the 2003 robbery in return for acting as a police informant. It would also be helpful if XXX XXX could provide a more

detailed account of exactly what was said to him by DC XXX when making the representation that Mr XXX would not be prosecuted for the 2003 robbery. Instructing solicitors should enquire as to whether Mr XXX, in consideration for the promise made by DC XXX, acted as a police informant.

Conclusion

33. I advise that an application to stay proceedings as an abuse of process be made on all three grounds outlined above. I am of the opinion that the case for staying proceedings based on destruction of evidence is the strongest and is likely to succeed. The application to stay proceedings because the prosecution is brought in breach of a promise not to prosecute may succeed if the court finds that the promise was in fact made. I am however of the opinion that the application to stay proceedings for abuse of process based on the adverse publicity is likely to fail because the court will feel able to accommodate for any potential bias within the trial process.

7th March 2008
Inns of Court Chambers