IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

KB-2024-000437_

Royal Courts of Justice
Strand
London, WC2A 2LL

[2024] EWHC 1266 (KB)

Wednesday, 24 April 2024

Before:

MRS JUSTICE MCGOWAN

B E T W E E N :

CROWN PROSECUTION SERVICE

Applicant

- and -

(1) TR
(2) PW

Respondents

MR M SHAW appeared on behalf of the Applicant.

MR N KARBHARI appeared on behalf the Respondents.

J U D G M E N T

(Transcript prepared without the aid of documentation)

MRS JUSTICE MCGOWAN:

1 The history of events in this case is adequately set out in the application before me, and I do not propose to rehearse either what is said to have happened on the day of these alleged offences or indeed what has happened since. The dates are set out in the Crown's application. By the time the matter came to the Crown Court, counsel, instructed on advice and in consultation with the Crown Prosecution Service, made a decision not to resist the defence application to dismiss.

2 That decision was made in ignorance of the fact that the Crown had CCTV footage seized from the petrol station, at which the offences took place.

3 The prosecution case included scientific evidence by way of examination of ballistic material and cell site evidence, all of which had clearly been thought sufficient to provide a case to answer. That was supported by "no comment" interviews provided by each of the defendants in the proceedings,

4 Counsel, the CPS – and indeed the officer who was holding the case papers at that stage – had not appreciated that in addition to that material there was also CCTV footage taken from the respondents' home addresses. That had been sent to the laboratory in good time by the officer who was originally responsible for the case; "the officer in the case". It had been examined by the laboratory in good time and returned to the police. For these purposes I accept that that material identifies these respondents and adds substantially to the weight of the evidence against them. Indeed, it is material upon which the Crown would seek to rely,

at the very least, as bad character evidence in the proceedings currently listed before the Inner London Crown Court.

5 There followed a catalogue of errors. The material was returned to the police. It was signed for and either not entered on the proper list, or if it was entered, it was not looked at by the acting officer in the case. In any event the acting officer in the case did not, at that stage, follow up what had happened to that material which had been sent to the laboratory for analysis. In any event, the combination of those factors, including the fact that these discs had slipped down the back of a cupboard or the back of a drawer, all led to a position whereby the material was not known to counsel and the Crown Prosecution Service who made the decision not to resist the defence application to dismiss. Accordingly, it was said by the Crown that the matter would not be resisted effectively – my quote, not theirs – "at this stage".

6 A period of months had passed between the date of the arrest and the date upon which the dismissal proceedings were dealt with by HHJ Charles. During that time the defendants knew they faced these serious allegations and must have, begun to make preparation in order to defend them, which included pursuing an application to dismiss.

7 When the officer who originally had responsibility for the case returned from sick leave, he began to investigate what had happened. Having discovered that this case had been dealt with by way of an uncontested application to dismiss, he began to investigate what had happened to the material which he had sent to the laboratory. In due course he found out where it was and what it showed. The Crown Prosecution Service was put on notice and then, what also seems to be a very unfortunate delay takes place, this matter is brought before this court in the early part of 2024. That is a substantial delay.

8 That is the background and I think that is probably all I need to say by way of summary, given, as I say, that there is no dispute about the history of events in this case.

9 Mr Shaw, on behalf of the prosecution, applies for the grant of voluntary bill. He observed that this is not an appeal against a decision of a court. He is not seeking to undo the decision of the magistrates to refuse to commit, nor is he seeking to undo the decision of the Crown Court judge who heard the uncontested application and dismissed the charges. He is seeking to obtain a voluntary bill against the history of a decision made on the facts available to counsel at the time, and made, as they say, with the proviso that it was being taken on the material available at that stage.

10 Mr Shaw very realistically concedes that this was material available to the Crown Prosecution Service. Whatever the catalogue of errors that led to the position in which counsel found themselves, the fact of the matter was that this was in the possession of the prosecuting authority. But he points out it was not a Crown Prosecution Service error in deciding to put this material to one side because they had looked and not realised how important it was, it is not one which they now seek to reverse because they have changed their minds. The fact of the matter is that the Crown Prosecution Service did not know what they had and, as a consequence, nor could counsel. The real issue, he says, is when the Crown had sight of it and became aware of its contents.

11 I add at this stage that it is accepted that this is significant material and makes the sort of difference that the authorities have considered relevant in previous cases.

12 It was, as he described, a human error. With respect, it was more than one human error but it was a combination of different errors made by different human beings involved in the process. He relies, in particular, on the public interest in proceeding to try allegations of this level of seriousness in the circumstances of this case when the potential defendants are facing trials in any event, and this is material about which they are on notice, insofar as it is, at the very least, already disclosed to them as potential bad character in the forthcoming trial.

13 Mr Shaw further argues that whatever the delay in this case, which again he accepts significant, he relies on the fact that there is no prejudice arising directly from that delay. The case depends on CCTV footage which is preserved and has not altered. It does not depend in any sense upon the recollection of a witness, and, in any event, is supported by other evidence which I have already outlined.

14 Mr Karbhari, who appears for both respondents today and who has very helpfully concentrated on the gravamen of these matters, points out that although the potential defendants are aware of this material it has not been served, even on the current indictment which they face. He accepts entirely that they are fully aware of what is contained in it. He raises the point that from the date of dismissal any enquiry into its integrity would have stopped, and any enquiry into potential defences that they might have had would also have stopped at that date. As I say, it seems that they had months in which to begin to establish an alibi if that was to be their defence. Any question of saying, "It is not me", shown on that CCTV is still available to them, and any further defence of saying, "Well, if it is me, I am not doing what you say I am doing", is equally available to them.

15 In essence, he relies upon the question of whether the test, which I must apply to this case, is met. He relies in particular on the authority of *R v. Davenport & Ors* [2005] EWHC 2828 (QB) and in particular in the judgment of Pitchers J at para.27:

> "In my judgment, the nature of the new material and the circumstances in which it was obtained must be examined with care when considering the question of whether the interests of justice require a Voluntary Bill to be preferred. It will plainly be much easier for the defence to argue that it would not be in the interests of justice if the prosecution could have produced that evidence in the original proceedings."

To extrapolate from the judgment, it is obviously right to say that the prosecution could have produced that evidence in the original proceedings. But it does not necessarily follow that is an end of the matter.

16 With due diligence and in the absence of human error, the prosecution could have produced this material in the original proceedings. Nonetheless, the test that I have to apply is whether or not this meets the overriding objective and whether it is in the interests of justice for the voluntary bill to be granted.

17 Relying as I am invited to do by the respondents in the document itemising the issues that need to be determined, and for the sake of speed, I will quote from the current edition of **Archbold** at chapter one, para.340:

> "An application for a voluntary bill following the dismissal of a charge in the Crown Court under sch.3 to the CDA 1988 procedure should only be granted where:
>
> (a) The Crown Court has made a basic and substantive error of law which is clear and obvious;
>
> (b) New evidence has become available that the prosecution could not put before the court at the time of the dismissal hearing;

(c) There has been a serious procedural irregularity; or

(d) There are other exceptional circumstances which might include correction of a prosecution mistake or a change of mind by the prosecution. In such circumstances the power will be used sparingly and its use will depend on the nature of the prosecution's changed position, the reasons for the new approach and the implications for the case as a whole. Where changes to the prosecution case have operated to the real prejudice of the accused, it will not be appropriate to grant the application."

It then goes on to deal with where the decision has been made based on a technicality.

18 It seems to me in this case that this is a combination of (b) and (d). This is evidence in the case. The question is, could it have been put before the court at the time of the dismissal hearing. It could, and had it not been for "human error", by the prosecuting authorities, it would have been used. Had the mistakes not been made this material would have been available and it would have been put before the court. It would not necessarily have determined the outcome of the dismissal hearing but it would certainly have determined the prosecution's response to it and the matters would have been litigated before the Crown Court judge at the time.

19 I add in parenthesis that given the nature of this material it seems to me unlikely that an application to dismiss would have been pursued in any event.

20 Going back to the overriding objective, and bearing in mind where the interests of justice lie in this case. These are very serious offences. There might have been death or serious injury as a consequence of what happened. It is said against these potential defendants that they have been involved in criminality on other occasions involving weapons.

21 There is undoubtedly a disadvantage to them insofar as offences which they thought had been dismissed are now going to be pursued. But in the scheme of things, I do not see that there is undue prejudice to them by the resurrection of these charges. In any event, as I have said already, these are matters which they have been aware of and preparing to rebut, both before the time of the dismissal and since the time that these matters have been disclosed, with a view to adducing them as evidence of bad character in relation to the other proceedings.

22 I do not think it is helpful add a homily about what went wrong in this case. But it is extremely unfortunate that if an officer who has responsibility for a case becomes ill and cannot comply with all his case commitments that there is not a better system to enable whoever it is that has to step into the breach to be informed about what is or is not outstanding. Whether that is a matter that was aggravated by the situation in the pandemic or not, I know not and about which I do not comment.

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