IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CRIMINAL DIVISION)

No. 99/6296/Z2 & 99/7367/Z2

Royal Courts of Justice
Strand, London,
WC2A 2LL

Friday 10th November, 2000

B e f o r e:

LORD JUSTICE KENNEDY
MR JUSTICE ALLIOTT
AND
MR JUSTICE BELL

– – – – – – –

REGINA

– v –

HARDWICKE AND THWAITES

– – – – – – – – –

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Alun Jones QC (for Hardwicke) and Miss Deborah Morris (for Thwaites)
Martin Hicks (instructed by CPS for the prosecution)

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Judgment
As Approved by the Court

1. On 22nd September 1999 in the Crown Court at Blackfriars, the appellant Thwaites was convicted of supplying 2.44 grams of cocaine to Mazher Mahmood on 2nd September 1998 (count 1). The appellant Hardwicke was convicted of being concerned in that supply (count 2), and of supplying a further 1.49 grams to the same recipient on 3rd September 1998 (count 3). They were each sentenced to terms of imprisonment which were suspended. They now appeal against conviction by leave of the single judge.

Facts

2. Hardwicke is the Earl of Hardwicke, and in 1998 he and Thwaites were partners in a motor scooter business. In August 1998 they were approached by a man who invited them to meet his employers, some "wealthy Arabs" at the Savoy Hotel, London, with a view to selling motor scooters for export to the Middle East. The invitation was accepted, so on the evening of 2nd September 1998 the two appellants went to the hotel where they met Mazher Mahmood, the Investigations Editor of the News of the World newspaper, and Ali Malik, a free lance investigatory journalist, posing as Perry Khan and Sheikh Mohammed. Unknown to the appellants the meeting was video recorded. The appellants were plied with drink and there was some talk about motor scooters, but eventually there was also talk about drugs. Malik complained of having a sore throat as a result of using inferior drugs, and Hardwicke said that if they wanted speed "we can sort some out in about half an hour". There was then shaking of hands and laughter, followed by this exchange –

"Hardwicke: This is why I'm up here.

Thwaites: I thought that it was some bikes you wanted.

Hardwicke: You don't want bikes, do you?

Malik: No, we always mix business with pleasure."

3. When the order for drugs was placed by Thwaites, using his mobile telephone, Mahmood offered to send some money round, but Hardwicke declined. Mahmood pressed and Hardwicke said "we'll take fifty". Money was then passed from Mahmood to Hardwicke and on to Thwaites. The party then went down to the River Restaurant for dinner, after which they returned to the private room for more drink. Thwaites then offered to go and see if "Paul", who was to bring the drugs, had arrived, saying –

"Thwaites: we call it 'help'.

Hardwicke: Yeah, we call it 'help'.

Mahmood: Help.

Hardwicke: Yeah. That's what we call coke.

Mahmood: Our help.

Hardwicke: Help, because we need it....."

4. A little later they returned to the quality of the drugs –

"Hardwicke: Its good stuff here when you can get it.

Thwaites: Yeah, unfortunately the stuff tonight will only be average, but at least its coke. Its just average. I mean I'd like to get you something better.

Hardwicke: OK. When its average you just do twice as much."

5. While Thwaites was out of the room to see if Paul had arrived Hardwicke explained what a successful drugs dealer Thwaites had been, dealing with mug Sloanes introduced to him by Hardwicke. Hardwicke said "we caned the whole lot" and then last year decided to stop it and run the motor scooter business.

6. Thwaites then came back to the room with the first consignment of cocaine. Some of it was used by Hardwicke and Thwaites then and there.

7. On the following day Hardwicke supplied a second consignment to Mahmood at the Bibendum Restaurant in Kensington, for which Mahmood paid £120.

8. On 6th September 1998 the News of the World publicised what had occurred, and then handed the video recordings and other material to the police. The appellants were interviewed but declined to comment. They were committed for trial, and thus came before Judge Pontius at Blackfriars Crown Court in September 1999.

The Trial

9. Mr Alun Jones QC for the appellant Hardwicke and Miss Deborah Morris for the appellant Thwaites made three submissions to the trial judge, namely –

"(1) That the court should stay the proceedings as an abuse of process because of the way in which evidence had been obtained.

(2) Alternatively, that the evidence as to what took place in the Savoy Hotel and in the Bibendum Restaurant should be excluded from the trial pursuant to section 78 of the Police and Criminal Evidence Act 1984 because of its effect on the fairness of the proceedings.

(3) That in any event the case against Thwaites should not proceed because of the extent and prejudicial nature of the press publicity"

10. In a careful judgment the judge rejected those submissions, and the trial then proceeded. The appellants did not give evidence. No evidence was called on their behalf, and when convicting the jury added this rider:

"The jury would like to say that the circumstances surrounding this case have made it very difficult for us to reach a decision. Had we been allowed to take the extreme provocation into account we would undoubtedly have reached a different verdict."

R v Shannon

11. On 13th August 1997 Mahmood and his fellow journalists had conducted a similar exercise at the Savoy Hotel when their guest was a television actor whom they suspected of drug dealing. He was convicted at Snaresbrook Crown Court in May 1999, and his appeal to this court was dismissed on 14th September 2000. The submissions made in the present case echo many of those made in the case of Shannon, and in the light of that decision Mr Jones accepted at the outset of the appeal before us that he could no longer rely upon the

provisions of section 78 of the 1984 Act. However, as he pointed out, the court in Shannon was largely concerned with the need to disclose the identity of the informer, which is not an issue in this case, and was not much concerned with the issue of abuse of process which is at the heart of the case presented to us.

Grounds of Appeal.

12. As to abuse of process, Mr Jones submitted that the trial judge should have taken into account not only what was done by Mahmood and his accomplices on this occasion, but also their similar behaviour on other occasions. Mr Jones further contended that the judge was in error in not recognising such behaviour as criminal, and as "commercial lawlessness" for short term gain, which outweighed any criminal behaviour on the part of the appellants, as can be seen from the jury rider, and the newspaper's own decision not to inform the police before publication. Miss Morris adopted the submissions made by Mr Jones, but also emphasised the lack of admissible evidence of Thwaites being anything more than a drug user asked to supply, and the damage done to him by newspaper publicity.

Abuse and Fairness

13. In any case of this kind it is important to start by recognising that there is no defence of entrapment in English law. Relevant evidence, however obtained, is admissible (R v Sang [1983] AC 403 and R v Khan [1997] AC 558). However, the judge has a discretion to exclude admissible prosecution evidence if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to admit it". That pre–existing common law discretion is now made statutory by section 78 of the 1984 Act, and in the exercise of that discretion one of the factors to be considered may be how the evidence was obtained.

14. But even if a fair trial is possible, if the defendant has been brought before the court as the result of an abuse of power, then the court may have to consider not only the potential fairness of the trial but also "a balance of the possibly conflicting interests of prosecuting a criminal to conviction and discouraging an abuse of power" (per Auld LJ in R v Chalkley [1998] 2 Cr App R 79 at page 105 D). That is the abuse of process jurisdiction which, Mr Jones submits, the trial judge should have been prepared to exercise in favour of the appellants in this case.

Authorities

15. The modern foundation of this jurisdiction is the decision of the House of Lords in ex parte Bennett [1994] 1 AC 42 where the defendant claimed that he had been kidnapped in South Africa to stand trial in England. The Divisional Court of the Queen's Bench Division considered that it had no power to enquire as to how he had been brought within the jurisdiction, but the House of Lords decided otherwise. Lord Griffiths at 62 B said that the judiciary should accept the responsibility of overseeing executive action in the field of criminal law. Similarly at 67 G Lord Bridge said :

> "When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of International law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view"

16. As Mr Hicks, for the respondent, points out, in Bennett the court was considering executive lawlessness because what was alleged was that the police and prosecuting authorities had deliberately by−passed normal extradition procedures.

17. In R v Latif and Shahzad [1996] 2 Cr App R 92 the facts were more complicated. Shahzad, a supplier in Pakistan, delivered 20 kilograms of heroin to an informer. The drugs were then brought to England by a customs officer who had no licence to import them. Shahzad and Latif then arranged with the informer to collect the drugs from him and to pay for them in London. When they sought to do so they were arrested. At 97 E Lord Steyn said −

> "The principles applicable to the court's jurisdiction to stay criminal proceedings, and the power to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 in a case such as the present, are not the same."

18. He then referred to the judge's decision in that case, and at page 99 he turned to the arguments deployed at that case in relation to abuse of process. It was argued that the customs officers encouraged Shahzad to commit the offence and, secondly, that the customs officer who brought the drugs to England committed the same offence of which Shahzad was convicted. The first argument was rejected on the facts, even allowing for the fact that the particular importation would not have taken place when and how it did without the assistance of the informer and the Customs and Excise. As Lord Steyn said at 99F −

> "The highest that the argument for Shahzad can be put is that Honi gave him the opportunity to commit or to attempt to commit the crime of importing heroin into the United Kingdom if he was so minded. And he was so minded. It is not necessarily a decisive factor, but it is an important point against the claim of abuse of process."

19. Turning to the second matter Lord Steyn was prepared to assume without deciding that the customs officer was guilty of an importation offence. At 100F Lord Steyn turned to the legal framework in which the issue of abuse of process must be considered, and said −

> "If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion; it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been a abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed."

20. Lord Steyn then referred to Bennett and continued at 101D −

> "An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is

> possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

21. In fact the criminal conduct of the officer had not been considered by the judge but as Lord Steyn said that made no difference because "any criminal conduct of the customs officer was venial compared to that of Shazad".

22. Before we leave the decision in Latif it is of some importance to note that what the court seeks not to condone is "malpractice by law enforcement agencies" which "would undermine public confidence in the criminal justice system and bring it into disrepute". Obviously that is not a consideration which applies with anything like the same force when the investigator allegedly guilty of malpractice is outside the criminal justice system altogether.

23. In Mullen [1999] 2 Cr App R 143, as in Bennett, the British authorities by−passed extradition procedures in order to get the defendant into an English court. That was not known at the time of trial, but the point was taken on appeal, and the appeal was allowed. Rose LJ said at 158A −

> "In arriving at this conclusion we strongly emphasise that nothing in this judgment should be taken to suggest that there may not be cases, such as Latif, in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant's presence within the jurisdiction. In each case it is a matter of discretionary balance to be approached with regard to the particular conduct complained of and the particular offence charged."

In this case − Hardwicke

24. With those authorities in mind we turn to the decision in this case. Mr Jones submits that it was right to look first at the criminal conduct of the investigatory journalists who spent money freely to provide copy for their newspaper. Plainly they were inciting the appellants to supply drugs, and they were probably committing a number of other statutory offences as well. As Mr Jones points out, the Misuse of Drugs Act 1971 does not, save in section 5(4) which for present purposes is irrelevant, provide a defence of reasonable excuse. A motive of an offender is irrelevant, and, Mr Jones submits, Mahmood and his associates were not first offenders. Indeed Mr Jones further submits that discovery should have been granted so that the full track record of the journalists could be deployed before the trial judge.

25. The judge did have regard for the conduct of the journalists. He recognised that Mahmood was "far from being a novice in such investigations" but he refused to embark on any wider examination of the News of the World's journalistic activity. In our judgment that was right. There may be cases in which it would be necessary to look a little more deeply in order properly to evaluate the conduct of an investigator in relation to the instant case, but this was not such a case. As the judge said his duty was −

> "To examine the circumstances of this particular case and to look at what these particular journalists did in order to reveal the criminal behaviour of these particular defendants."

26. However the judge went on to say –

> "Of course, in my examination of what has happened in this particular case, if I were to conclude that improper, unlawful or morally reprehensible means had been used in order to trap these defendants, then I should be obliged to condemn such behaviour. However, I do not reach any such conclusion in this case."

27. Mr Jones places considerable reliance on that passage which, he submits, shows that the judge wrongly concluded that the journalists had not committed any offence. Had he concluded otherwise his decision would have been different. We agree that if that passage stood alone it could bear that interpretation, but it does not stand alone. After referring to the natural tendency for newspapers to target those in the public eye, the judge said –

> "The way in which such investigations are pursued, albeit they may rightly or wrongly be described by some as distasteful, is not in my view judicially to be condemned where it is not unlawful. Thus, when I examine the facts of this case and, in particular, the acts of these particular journalists on the 2nd and 3rd September 1998, and set those against the offences with which the defendants are in consequence charged before this court, I readily conclude, borrowing and adapting the words of Lord Steyn in the case of R v Latif once more, the conduct of Mr Mahmood and his colleagues was not so unworthy or shameful that it would be an affront to the public conscience to allow the prosecution to proceed. Realistically, any criminal behaviour, if any has been established, by these journalists was venial compared to that of the defendants."

28. It is clear from the last sentence that the judge did not exclude the possibility of "criminal behaviour" on the part of the journalists. He knew what the behaviour was, evaluated it, and set it against the offences with which the defendants were charged. In other words, as it seems to us, he carried out the balancing exercise envisaged by the House of Lords in Latif. He made one discernible error favourable to the defence in that he seems to have accepted that commercial lawlessness and executive lawlessness should be treated in the same way. As we explained when dealing with Latif that is not correct.

29. Mr Jones' next point in relation to the balancing exercise was that the judge failed to recognise or give sufficient weight to the fact that the offending disclosed and charged was at the lower end of the scale. We accept that it is relevant to look at what has been disclosed, especially if it has been necessary to stray across the boundary of the criminal law in order to make the discovery, and we would expect the Crown Prosecution Service to make that kind of evaluation even before a matter comes to court, but what was disclosed in this case was not trifling, and the judge so found in the passage last cited. Judging by what Hardwicke said in the absence of Thwaites it was more like the tip of an iceberg, and once the evidence was available the decision to prosecute was virtually inevitable.

30. Mr Jones then invited attention to the fact that the newspaper deliberately published its story before supplying information to the police. That, he submits, was relevant when considering all of the circumstances in order to decide whether or not there was abuse. No doubt the sequence of events was dictated by the need to avoid proceedings against the newspaper for contempt, as happened in Attorney–General v Morgan and News Group Newspapers Ltd 15th July 1997, where publication took place on the day after the persons investigated had been arrested and charged. In the present case the trial judge was not impressed by this point. He said at 15A –

"The decision as to publication does not affect my consideration of the essential matters I must bear in mind when determining whether it is fair for these defendants now to be tried."

31. In our judgment that was too exclusive. The decision as to publication did have some significance because it showed beyond argument what were the real priorities so far as the journalists and the newspaper were concerned. When the time had clearly come for the police to be informed, but if that step were taken the newspaper was likely to be unable to publish its story, it was the needs of the newspaper rather than the interests of justice which were regarded as paramount. But the judge's refusal to consider the priorities of the investigators was of no great significance because, as we have already said, he gave full weight to what the journalists in fact did.

32. Mr Jones, rightly in our judgment, did not seek to rely on the European Convention of Human Rights, which he considered added nothing to the English law of abuse. This was the only issue on which Mr Jones and Miss Morris parted company. She invited us to look at Teixeira de Castro v Portugal [1999] 28 EHRR 101. As was said by this court in Shannon –

"The judgment in Teixeira is specifically directed to the actions of police officers and the safeguards (in the form of judicial control) properly to be applied to them in the course of their investigations as agents of the state."

33. Furthermore, as the judge said in this case, the facts in the case of Teixeira were very different, because there –

"Influence had been exercised in order to incite the commission of an offence by a man whom there was no reason to suspect of involvement in drugs offences hitherto and in circumstances where there was nothing to suggest that he would have committed the offence without such incitement."

34. As a final point Mr Jones invited our attention to the jury's rider. It was not of course available to the trial judge when he was considering the submission in relation to abuse of process, but it can be taken as an indication that, to the minds of twelve well informed lay people, the investigatory procedure adopted here did amount to an affront to the public conscience. Mr Hicks, for the prosecution, points out that the jury did not have to give reasons for its rider, and furthermore the jury did not have available to it all of the evidence which was before the judge at the time when he made his ruling in relation to abuse, because the prosecution chose not to lead before the jury what was said by Hardwicke in the Savoy Hotel in the absence of Thwaites.

Thwaites

35. As Miss Morris pointed out, the newspaper story was not edited in the same way as the prosecution edited the evidence laid before the jury, but having regard to the lapse of time between publication and trial the trial judge was, in our judgment, clearly entitled to find as he did that a fair trial was possible despite pre–trial publicity.

36. Miss Morris pointed out that it took four hours to get the cocaine to the Savoy Hotel, and that, she submitted, was some indication that Thwaites at least was not an accomplished supplier, as opposed to a user, prepared when asked to assist a friend. She submitted that there was no admissible evidence of Thwaites making any previous supply and contended that the judge failed to recognise that, in his case, but for the incitement by the journalists he would not have been involved in any supply at all. For the Crown Mr Hicks contends, and

we accept, that the unassailable video recording affords clear evidence that both appellants were ready to seize the opportunity to supply drugs when that opportunity was offered to them by the journalists. Mr Jones in reply submitted that the clarity of the recording is irrelevant to the issue of abuse. In our judgment it has some relevance, although of course it is primarily irrelevant in relation to the fairness of the trial.

Conclusion

37. The judge was assisted, as we have been assisted, by citation of the relevant authorities. He realised that the balance had to be struck, and looked carefully at the circumstances he considered to be relevant. In certain minor respects set out in this judgment we differ from his evaluation, but the differences are not such as to effect the overall conclusion. Accordingly these appeals against conviction are dismissed.