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IN THE GUILDFORD CROWN COURT
(Indictment No. T2009/0070)

Regina

-v-

SEEMA MISRA

SKELETON ARGUMENT TO STAY
FOR ABUSE OF PROCESS

1. Application is made to stay Count 1 of this indictment for an abuse of process, on the grounds that the Defendant is seriously prejudiced in preparing, and presenting, her defence case, and it is unfair for the Prosecution case to continue against her.

2. The Defendant is indicted with one count of theft (Count 1) and 6 counts of false accounting (Counts 2-7). To this indictment she pleaded guilty to counts 2 to 7 (false accounting) on 20/3/09, and not guilty to Count 1. Trial on Count 1 was fixed to take place on 30/05/09, but was stood out on the day on the defence application for enquiries to be made as to the integrity of the Post Office Horizon computing system, which is central to the Prosecution case. The trial was re-fixed for 30/11/09. However this fixture was again broken on 20/11/09 because of outstanding and awaited disclosure material from the Prosecution. The trial is now re-fixed to start on 15/03/10.

3. (i) The case against the Defendant is that between 29/06/05 and 14/01/08 she stole £74,609-84p from the West Byfleet Post Office at which she was the sub-mistress. Although, she has pleaded guilty to false accounting, at the first available opportunity, the Prosecution still

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seek trial on theft. The Defendant accepts she falsely accounted to conceal accruing loses at her Post Office; she denies theft of the monies. She maintains losses accrued from staff thefts and failures of the Post Office Horizon accounting computer system.

(ii) Guidance is given by the Court of Appeal in R-v-Eden (1971) – *(see Archbold para 21-238)*, that the prosecution should elect on theft or false accounting unless there is good reason not to do so. In that authority (attached) it is said that the Prosecution should not rely upon a conviction of one offence to prove another. This dicta is relied upon is part of the overall Defence application as to whether this case should be stayed for an abuse of the process by reason of failure by the Prosecution to disclose requested material evidence and documentation to date.

Trial history:

4. The case was called on for trial on 30/05/09 and stood out because of concerns as to the reliability of the Horizon computer system. Time was given for this area of evidence to be explored. New solicitors were instructed by the Defendant.

5. The case was re-listed for pre-trial review and directions on 14/07/09. Directions were given which included the service of experts' reports. The case was listed for trial for 30/11/09 with the Prosecution to give disclosure.

6. The Prosecution, by letter dated 14/08/09 to the Defendant's former solicitors and sent to the Defendant's current Solicitors on 25/08/09, said it would instruct Fujitsu, the supplier and operator of the Horizon computer, to assist as experts. In that letter the Prosecution stated that the request for data had been submitted to Fujitsu and acknowledged.

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This is in total contradiction to the statement received from Gareth Jenkins of Fujitsu who states no requests have been made for any data relating to the West Byfleet branch.

7. The first interim Defence expert report, Professor McLachlan, was served on 01/10/09 to advance case/trial preparation.

8. A s8 C.P.I.A. disclosure application was made on 01/10/09, and listed for hearing on 20/11/09. This caused the Prosecution to state it was still reviewing disclosure but would be unable to provide it in time for Professor McLachlan to prepare a final report for the trial date of 30/11/09. The fixture was, therefore, broken.

9. A view of the Post Office, machinery and method of working at West Byfleet Post Office was undertaken by Counsel and Solicitors on 06/11/09, and Professor McLachlan was permitted to view the same on 17/11/09. In addition Professor McLachlan and Defence Solicitors viewed, on 16/11/09, an un-named Post Office that is currently experiencing problems. (This caused Professor McLachlan to provide his 2nd interim report dated 13/11/09, and served on the prosecution on 20/11/09, to help direct disclosure of relevant material).

10. At the hearing on 20/11/09 the Prosecution requested that the Defence help further by producing a more detailed request for disclosure. This was duly done and served on 30/11/09. Despite this, no responses were forthcoming until after the Defence listed the matter for mention for non-compliance by the Prosecution. Some information was supplied between 28/01/10 and 08/02/10. The Defence takes issue with the Prosecution assertion made on 05/02/10 that it had complied with the Defence requests.

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11. At the hearing on 01/02/10 the Defence was ordered to notify the Prosecution by 03/02/10 of those matters which it regarded as still outstanding and any further requests arising out of the new, albeit limited, served material. This request was duly served on 03/02/10, having obtained a third interim report from Professor McLachlan. To date no response or acknowledgement has been received.

12. The Prosecution had failed, until 01/02/10, to instruct an expert. At the Court hearing on 01/02/10 the Prosecution stated it had identified their expert, Gareth Jenkins from Fujitsu, but not yet instructed him. The Court confirmed that the Prosecution expert should report by 08/02/10.

13. A short statement, dated 08/02/10, was served from Mr Jenkins on 08/02/10. In that report Mr Jenkins generally could not assist because:-

    a) he had not been given sufficient material and documentation by the prosecution to answer questions raised by Professor McLachlan in his three interim reports,
    b) he had only just been instructed to assist and would need time to consider Fujitsu material to produce answers,
    c) some of the questions raised by Professor McLachlan he did not understand,
    d) some of the information requested from Fujitsu should, in fact, come from the Post Office.

    It is apparent that the Prosecution has given no clear instructions to its own expert, or provided him with adequate material to assist the Court.

14. Arrangements have been made by the Defence for Professor McLachlan and Mr Jenkins to speak to resolve confusion over questions, and attempt to discover if there is common ground between the experts. This was done on 12/02/10 and is now the subject of a fourth interim report from Professor McLachlan. Not surprisingly, this

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report has raised further queries and a fourth request for disclosure was served on the Prosecution on 22/02/10.

15. In Professor McLachlan's first interim report he raised various hypotheses to which he has continued to refer in subsequent reports. As no disclosure had been forthcoming, he based these on his experience of transaction systems. Having at last, as late as 12/02/10, been able to speak with Mr Jenkins from Fujitsu, he has been able to confirm that his initial hypotheses are well founded but would require a considerable amount of work to further develop. Professor McLachlan has now indicated that he is not in a position to provide a final report for trial due to the persistent failure by the Prosecution to provide material requested.

16. The Defence has acted with due diligence and expedition to progress this case but, despite this and because of the persistent failing by the Prosecution, is unable to proceed on the trial date of 15/03/10. The Defendant is unable to have a fair trial, despite the prosecution being given every opportunity to provide disclosure (and which they appeared to have also denied their own experti).

Law on abuse of process

17. For convenience we summarise the general principals as:

Basic law is to be found in **Archbold 2010** from **4 - 48.** (The relevant paragraphs from 4-54 to 4-57 are copied which provides a convenient summary upon abuse of process and prejudice.).

R-v- Connelly -v- DPP (1964) AC 1254 (at p1354, 1361 and 1347), wherein the H.L found that the courts "*Have an inescapable duty to secure fair treatment for those who are brought before them*" and "*the court had inherently in its power the right to see that its process was not*

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abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the court had a right to protect itself from such an abuse.." and *"a power to safeguard an accused person form oppression or prejudice"*

It is accepted that a stay is a remedy of last resort – see for example in relation to delay **The Reference of the Attorney General (No 1 of 1990) (1992) Q.B. 630, 95 Cr.App.R. 296.**

R. v. Horseferry Road Magistrates' Court, ex parte Bennett (1994) 1 A.C. 42, makes clear that the doctrine of abuse of process is not limited to situations where the defendant could not receive a fair trial.

R. v. Mullen (1999) 2 Cr.App.R. 143, supports the proposition that proceedings may be stayed in the exercise of the court's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest and the integrity of the criminal justice system that a trial should take place.

Two types of case exist where proceedings may be stayed on the grounds that their continuance would be an abuse of process:

(a) where the defendant would not receive a fair trial, *(In Misra's case the*

submission is the failure of the Prosecution to provide proper disclosure material and the failure of the Prosecution to adequately instruct its own expert and to provide the necessary material and information for him to properly report and assist the Court).

and/or

(b) where it would be unfair for the defendant to be tried. **R. v. Beckford (1996) 1 Cr.App.R. 94,** *(In Misra's case the submission is possible loss, or non-disclosure, of evidence)*

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Here, unusually, it is submitted both principles apply, and it would be unfair for the defendant to be tried because the Prosecution has failed to provide adequate disclosure.

18. This is a case where the trial against the defendant should be stayed either:

a. due to the non-disclosure of relevant and essential evidence material to the Defence, serious prejudice has been caused which cannot be remedied by the trial process, **R. v. Beckford (1996) 1 Cr.App.R. 94**, or

b. because the series of errors in the Prosecution case amounts to serious fault on the part of the Prosecution which means that it would be unfair to try the defendant, (irrespective of whether a fair trial would be possible); *R (on the application of Ebrahim) v. Feltham Magistrates' Courts'* (2001 EWHC Admin 130, (2001) 1 All ER 831).

Lack of Disclosure:

19 Disclosure of Fujitsu and Horizon computer material/documentation is essential to the Defence. The absence of this material fetters the Defence, as it is believed that the sought documents could:

a) (i) Undermine the credibility of the prosecution computing records.

(ii)Show how limited training by staff and the defendant could lead to mistakes on imputing information into the Horizon computer system.

(iii) Show how innocent financial errors may occur.

(iv) Show failings of the horizon system in calculating alleged losses accruing.

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(v) Demonstrate the Defendant's innocence of the alleged theft count.

b) But, more importantly, the absence of this evidence and an expert to adequately report on Horizon denies the Defendant the opportunity to show, by independent means, that she could not have committed the alleged theft offence.

20 Disclosure has been requested of the Horizon and Fujitsu documentation since the court hearing on 14/07/09, the Prosecution having been put on notice of the issue by the Defendant at the adjourned trial of 30/05/09. Requests have been made in writing on 28/08/09, 01/10/09 and 13/11/09, and at court on 10/11/09 and 20/11/09, and again in writing on 30/11/09, 03/02/10 and 22/02/10.

21 The Prosecution, at the hearing on 20/11/09, submitted that this documentation would be provided/served in 14 days i.e. by 04/12/09. There was an order for it to be served by 04/12/09. Nothing of material value has been forthcoming despite further requests, until 27/01/10, and then this is deficient. A further written request (third request for disclosure) setting out the inadequacy of disclosure was served on the prosecution on 03/02/10.

22 Further, the Defence has sought clarification from the Prosecution as to how it intends to deal with expert evidence. Nothing of value has been forthcoming.

23 The importance of the Horizon evidence/documents was realised by the prosecution as early as 30/05/09 as evidenced by the Defence

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application to adjourn the listed trial for investigation of the Horizon computing evidence.

24 In a further attempt by the Defence to obtain adequate disclosure the Defence have caused the experts to speak. However, this is too late for it to be of assistance to the Defence in being able to adequately prepare the defence case for trial.

25 Finally the Post Office has consistently stated that the use of and access to a Fujitsu engineer would be sufficient for the purposes of this case. The conversation between Professor McLachlan and Gareth Jenkins has shown otherwise. It is now known that the Fujitsu element is only part of a much larger integrated system on which Mr Jenkins was unable to pass comment. A whole new avenue of essential enquiry has been opened up.

Conclusion

25. The case against the Defendant ought to be stayed on the basis that the lack of disclosure outlined above cannot be remedied by the trial process without again adjourning/delaying the trial date. Such failures cannot be remedied within the current trial process/date, and the Prosecution was *under a duty to provide this information at an early stage. Delay in providing* the requested material has caused prejudice to the defence, which can only be cured by further adjourning the trial date. This would be unreasonable in its own right given the history of this case and adjournment of the previous November 2009 trial date by reason of failure of adequate disclosure and review of the evidence by the prosecution. In other words it would be unfair to try the Defendant (R (on the application of Ebrahim) v Feltham Magistrates Court).

26. In the alternative the conduct of the Prosecution, regarding the failure to disclose the relevant documents, to instruct its own expert in proper time, and ensure its own expert was able to be properly instructed and advised in

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the time granted since 30/05/09, gives rise to such a serious fault on its part as to bring into question the integrity of the disclosure system put in place by the Prosecution, arguably bringing the administration of justice into disrepute.

28. *For all the above reasons, it is submitted Count 1 of this indictment* should be stayed as an abuse of process.

Keith Hadrill 24th February 2010

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