Neutral Citation Number: [2024] EWHC 1350 (Admin)

Case No: AC-2023-LON-001659; CO/1964/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2024

Before :

PRESIDENT OF THE KING'S BENCH DIVISION
and
MR JUSTICE SAINI

- -

Between :

DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

- and -

JOSEPH BARTON **Respondent**

- -
- -

Tom Little KC and James Boyd (instructed by **Crown Prosecution Service**) for the **Appellant**
Simon Csoka KC (instructed by **Potter Derby Solicitors**) for the **Respondent**

Hearing dates: 15 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp P :

1. This is the judgment of the court.

Introduction

2. This is an appeal by way of case stated against a decision of District Judge (MC) Sweet (the judge) sitting in the Wimbledon Magistrates' Court on 31 October 2022. By that decision the judge stayed criminal proceedings brought against the respondent, Joseph Barton, in respect of an alleged assault in a domestic context against his wife, Georgia Barton on 2 June 2021. The judge stayed the proceedings on the grounds that they were an abuse of process. The appellant, the Director of Public Prosecutions (the DPP), argues that the judge erred in law in imposing a stay.

3. The main issue raised by this appeal is the fairness of a prosecution which relies upon *res gestae* hearsay statements made by a domestic violence complainant in circumstances where: (i) the prosecution has never intended to call the complainant; (ii) the complainant has retracted her complaints; and (iii) the prosecution declines the judge's invitation to call her as a Crown witness despite her availability at trial. The judge decided that such a prosecution would amount to an abuse of process. The issue arose in a context which both sides at the hearing before us accepted is not an unfamiliar one. It concerns the effective prosecution of cases where domestic violence is alleged; and where, despite apparently compelling contemporaneous evidence of violence against a complainant, the complainant either subsequently withdraws a complaint, or does not support a prosecution. There may be many reasons why this would happen.

4. Mrs Barton's allegation of assault was made in a recorded 999 call to the police immediately after the relevant events. When the police arrived at Mrs Barton's home she was waiting outside. She then repeated the allegation she had made over the telephone. The allegations were recorded contemporaneously on the attending police officers' body worn video camera, as was Mrs Barton's visible head injury and distress. Mr Barton was charged with assault contrary to section 39 of the Criminal Justice Act 1988. Some months later, in a letter to the Crown Prosecution Service (the CPS), Mrs Barton retracted the allegations she had made to the police and expressed a strong desire for the prosecution to be stopped. In fact the prosecution had never relied upon her as a witness and had never taken a statement from her. The prosecution considered that any evidence she might give at trial would be unworthy of belief. Instead, the Crown sought to rely as *res gestae* evidence upon the recorded initial complaints and evidence of injury at the time the officers attended her home.

5. In imposing a stay of the proceedings as an abuse of process, the judge held that it was impossible for Mr Barton to receive a fair trial. That was because the prosecution proposed to rely on the recorded *res gestae* statements of Mrs Barton without calling her to give evidence, when she was available. The judge held that this put Mr Barton at a significant disadvantage because the defence would be unable to cross-examine his wife on previous inconsistent statements. The correctness of the judge's approach and conclusion on this basis for the stay is the principal issue in this appeal. We will refer to this as "Issue 1" below.

6. In addition (according to the Case Stated dated 23 May 2023 (the Case)) the judge held that the prosecution had failed to comply with its disclosure obligations by failing to

disclose to the defence a copy of Mrs Barton's letter of retraction of her complaints. That was a supplemental reason for imposing a stay. The DPP argues that the nature of the disclosure failure in this case, if any, fell far short of rendering the prosecution a misuse of the court's process. We will refer to this as "Issue 2" below.

7. The narrative set out below is based on the facts set out in the Case, the material in the Appendices attached by the judge to the Case, as well as those documents added to the bundle pursuant to the Order of Fordham J dated 1 December 2023 (see further, para 29 and 30 below where we address this matter in more detail). These materials include the body worn video footage (which we have viewed) and the recording of the 999 call (which we have listened to). It is unusual to refer to more than the material contained in the Case Stated itself. It has been necessary to adopt this exceptional course however, because the Case as stated failed properly to record the material facts and the basis for the judge's findings of abuse of process. Further, though these deficiencies were drawn to his attention, the judge declined to address them by amending the Case, though invited to do so by the Director of Public Prosecutions (the DPP). Following the DPP's application to the High Court, Fordham J effectively adjourned these matters for our consideration. His Order permits the parties to refer to additional facts beyond those recorded in the Case. In order to address that accuracy issue and the issues of law raised by the appeal it has been necessary to refer to this further material. We will not however, depart from the facts stated in the Case but where necessary, will supplement them. Though we have adopted this course, which as we have said is an exceptional one, we should emphasise that the appropriate procedure for resolving such issues nonetheless remains that provided for by section 28A(2) of the Senior Courts Act 1981, namely an application to the High Court for the Case to be sent back to the court below for amendment.

The facts

8. On 2 June 2021, Mrs Barton called 999 and stated that she had been hit by her husband. Police officers arrived about 25 minutes after this call. PC Humphrey was the first officer to arrive on the scene. He spoke to Mrs Barton who provided an account of a verbal disagreement that resulted in Mr Barton pushing her down and kicking her in the head. PC Humphrey witnessed a "golf ball" size lump on Mrs Barton's forehead. This can be seen on the body worn video footage we have viewed. A few minutes later, Mrs Barton went back into the house and spoke to another officer, PC Stott. This account was recorded on PC Stott's body worn video footage. Mrs Barton described an argument concerning the family, during the course of which she said Mr Barton grabbed her by the throat, threw her down and kicked her. She showed PC Stott her injury, which was again captured on the body worn video footage.

9. Mr Barton was charged with assault by beating (of his wife) on 2 June 2021. Mrs Barton was unwilling to provide a witness statement from the outset and was never treated as a prosecution witness. The prosecution's case against Mr Barton rested principally on the recorded evidence and the complaints to the police when they attended the family home.

10. On 26 July 2021, Mr Barton pleaded not guilty to the charge of assault and the case was adjourned for trial. On 17 November 2021, District Judge Heptonstall heard an application by the prosecution to admit the 999 call as well as Mrs Barton's words as recorded on the body worn video footage (in which she stated her husband had assaulted

her). That application was granted on the basis that this evidence was admissible hearsay in the form of *res gestae*.

11. It was not suggested to us that this admissibility ruling was incorrect. Indeed it was plainly correct and consistent with the principles summarised in Archbold (2024) at para 11-56. District Judge Heptonstall dismissed the application made on behalf of Mr Barton that the evidence be excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984 (PACE). We have been provided with District Judge Heptonstall's notes of his ruling. Although this is not altogether clear, he appears to have decided that section 78 issue could be revisited if there was a change of circumstances prior to the trial in relation to the sufficiency of the police's efforts to persuade Mrs Barton to make a statement and give evidence. However, the prosecution's position was that it was never going to call Mrs Barton. That was the prosecution's position from the very start of the case and it never changed.

12. On 17 February 2022, Mrs Barton sent a letter (the Letter) addressed to the "London South Magistrates" at a Petty France address in London. The CPS shares the office building at this address with the Ministry of Justice. The Letter was not addressed to the CPS or marked for the attention of the reviewing lawyer at the CPS (who was based in Leicester). The Letter is principally relevant to Issue 2. The full text of the Letter is attached to the Case. In the Letter Mrs Barton said in summary, that she had told the police officer who came to her home (on the 6 June 2021) that she had been drinking heavily and that she was now not sure what she had said to the police officer at the time was accurate. Mrs Barton said that by the time the police arrived in response to her 999 call she was no longer convinced that her call was a true reflection of events; and that, having spoken to her friends present that night, she now believed the blow to her head had been caused accidently by one of her friends when the friend was trying to take her away from Mr Barton. She reiterated that she did not support a prosecution and that she had said from the outset she did not. Mrs Barton said it was possible she might have to be called as a defence witness and she was "worried sick" about having to come to court.

13. Mrs Barton did not receive a response to the Letter and there was an issue as to whether it was ever received by the CPS reviewing lawyer. Mrs Barton wrote three further emails (one on 24 February 2022 and two on 3 March 2022 which are before us pursuant to Fordham J's Order). In these communications she said she was under a state of emotional stress and had feelings of severe anxiety knowing she could be called as a witness in the case. She requested a response to her correspondence. These emails were received by the CPS; and on 4 March 2022 the police Witness Care Unit wrote to Mrs Barton (and on the 8 March 2022 called her) to inform her she was not a prosecution witness, and the prosecution did not intend to call her.

14. The matter came before the judge for trial on 18 March 2022. Mrs Barton was present. It became clear following remarks made by leading counsel for Mr Barton, Mr Csoka KC (who also appeared before us) that the above correspondence had not been disclosed to Mr Barton's lawyers. Counsel acting on behalf of the prosecution was unaware of the correspondence, although later that day Mr Csoka provided her with a copy of the Letter. Having taken instructions, prosecution counsel explained that the CPS was unaware of the contents of the Letter, although it was aware of the emails of the 24 February 2022 and 3 March 2022. Prosecution counsel provided defence counsel with copies of those emails. In view of these developments, and to allow prosecuting counsel

to take instructions, the judge rose. Before doing so the judge invited prosecuting counsel "to see if the [prosecution] wished to take a statement from [Mrs Barton]" (the Case at para 9). The officer in the case was present in court.

15. When the judge returned to court, the prosecution said it declined to take a statement from Mrs Barton. Further, it was not prepared to call her as a witness or take a witness statement from her because it was concerned that Mrs Barton would not give a truthful account. Prosecuting counsel accepted however that this was not a case where it could be said Mrs Barton was in fear. The prosecution invited the judge to proceed to trial as all witnesses were in attendance. Mr Csoka however said he wished to make an abuse of process argument. The trial was accordingly adjourned to 31 October 2022 to allow for the preparation of written submissions.

16. On 31 October 2022, Mrs Barton was again present at court and the judge invited counsel for the prosecution to take instructions as to whether they wished to take a statement from her. The invitation was again declined. Mr Csoka then made an application to stay the case as an abuse of process or to exclude the *res gestae* evidence pursuant to section 78 of PACE. It was also contended that there was a failure on the part of the prosecution to provide full and complete disclosure, namely the existence of the correspondence between Mrs Barton and the CPS. The defence said that the prosecution had resorted to unfair tactics in refusing to either interview Mrs Barton or call her as a witness. It was accordingly contended that the case should be stayed for either or both of the following grounds: first, misleading disclosure and second, the "stratagem" of refusing to interview and call Mrs Barton. In support of the second ground, reliance was placed in particular upon *Attorney General's Reference (No.1 of 2003)* [2003] 2 Cr App Rep 453, and *Barnaby v DPP* [2015] 2 Cr. App. R. 4. We will return to these cases below.

17. Counsel for the prosecution argued however that Mr Barton could receive a fair trial. It was submitted that the issue of disclosure had been rectified at the hearing on 18 March 2022 and that there was no prejudice to him. As for Mrs Barton, the prosecution said that she had not supported the prosecution from the outset; and there was no purpose in taking a statement from her because it would be exculpatory and assist Mr Barton. It was argued that it was within the prosecution's discretion as to who it called as a witness in a trial, and its decision not to call Mrs Barton was not an unfair tactic or manipulation of the court process. The prosecution submitted that in any event she was present at court and Mr Barton could have called her to give evidence.

18. In reply, Mr Csoka submitted that the prosecution was seeking to avoid adducing evidence in precisely the way that was envisaged in *Barnaby*. He submitted that this deprived the defence of the opportunity to cross-examine Mrs Barton on her previous statements. Counsel contended that calling Mrs Barton as a witness for the defence was not an adequate remedy for this unfairness.

The judge's opinion and the question for the High Court

19. In the final version of the Case, the judge stated:

> "I was of the opinion that:

> A. There was a failure on the part of the Applicant to comply with it's [sic] obligations in relation to disclosure. The Applicant received three letters from GB between February 2022 and March 2022, none of them were disclosed to the Respondent until the day of trial. The letter dated 17th February 2022 contained a different account from the account given to the police on the 2nd June 2021. It is unclear what instructions were given to the officer in the case by the applicant save that he did not attempt to take a statement from GB. I invited the Applicant to take a statement from GB on two occasions, on both occasions the Applicant knew of the existence of the letters. On both occasions the Applicant declined my invitation.
>
> B. The Applicant refused to call GB as a prosecution witness as it feared she would give an untruthful account. It was accepted by the Applicant that GB was not in fear. She was available having attended each hearing. The Applicant stated the respondent could call GB if they wished. This in my opinion is contrary to the principles laid down in R v Russell-Jones.
>
> C. In view of the above I concluded that JB could not have a fair trial and it would be unfair for JB to be tried".

20. The judge asked the following question:

> "Was my decision to stay the case Wednesbury unreasonable in circumstances where;
>
> 1. The Applicant sought to rely on the res gestae statements of GB but were not prepared to call GB.
>
> 2. I adjourned the case on two occasions to allow the Applicant to interview GB who was willing to be interviewed but the Applicant declined to do so.
>
> 3. GB was not in fear of giving evidence nor was she was vulnerable.
>
> 4. The Applicant failed to disclose important evidence to the respondent until the day of trial on the 18th March 2022 which had been in it's [sic] possession since on or about the 18th February 2022 namely the letter written by GB.
>
> 5. The Applicant now asserts in [its] Application to state a case that I should have called GB to give evidence, this was never suggested by Counsel for the Applicant at any time during the proceedings".

21. Although, as we have said, an application for him to do so had been made on behalf of Mr Barton, the judge made no ruling as to whether the *res gestae* evidence should be excluded pursuant to section 78 of PACE.

Deficiencies in the Case

22. As was explained in *Cuciurean v CPS* [2024] EWHC 848 (Admin) at para 31, an appeal from the Magistrates' Court to the High Court by way of case stated is only concerned with issues of law and jurisdiction. The High Court does not perform the role of fact finder. It is not open to the High Court to depart from the facts stated in the case: see *Wheeldon v CPS* [2018] EWHC 249 (Admin) at para 5. In those circumstances, it is self-evidently essential that the lower court takes care to identify the material facts on which it bases its conclusions and which are central to the issues it decides.

23. The judge found that the prosecution had: "…failed to disclose important evidence to [Mr Barton] until the day of trial on the 18th March 2022 which had been in it's [sic] possession since on or about the 18th February 2022 namely the letter written by GB". The basis upon which the judge made this finding of fact (namely, as to the possession of Letter, and upon which he then based his finding of abuse on the grounds of non-disclosure) is not clear. The Case also failed properly to record the facts or any detailed findings in relation to Category 1 abuse (see para 34 below) and the *res gestae* evidence.

24. Once the draft Case Stated had been sent to the parties, the DPP invited the judge to amend it: firstly, to indicate the factual basis for his finding (that the CPS had been in possession of the Letter); and secondly, to describe the material facts in full and the *res gestae* evidence. Unfortunately, the judge declined to do so. We will set out the rather unedifying history of this matter below. Much time and expense, including applications to the High Court, would have been avoided if the judge had simply acceded to this reasonable request. We turn to the procedural history.

25. On 10 November 2022, the DPP applied to the judge to state a Case suggesting that the following question be posed for the opinion of the High Court: "*Was I correct to stay the proceedings as an abuse of the court's process on the prosecution declining to call or tender the complainant as a prosecution witness*?". The DPP submitted that the articulated grounds of appeal (both individually and cumulatively) raised issues of significant public interest as to the correct approach to the prosecution of domestic abuse in this commonly occurring scenario, for which clarity was required. On 16 December 2022, the judge confirmed that he was willing to state a Case.

26. A first draft of the Case was not provided to the parties until 24 February 2023. Crim PR 35.3 requires a draft case to be served not later than 15 business days after a court's decision to state a case. This was therefore a significant and unfortunate delay even taking account of the Christmas break. The judge's first draft stated that he had additionally stayed the proceedings as a consequence of a "disclosure failure". This was a new point which does not appear to have featured in the judge's original decision to stay the proceedings. This disclosure failure was said to be that the CPS had failed to disclose the Letter prior to the first trial date of 18 March 2022, and that this letter had been in its possession "since on or about 18 February 2022". As this additional ground for staying the proceedings was inconsistent with prosecuting trial counsel's verbatim record of the judge's ruling, the DPP requested sight of the court's notes. The DPP also submitted that the Case, as drafted, was inadequate as it failed to provide enough detail

for the High Court to understand the basis upon which the judge had determined that the CPS was in possession of the Letter prior to the scheduled trial on 18 March 2022, and that its conduct in connection with the Letter amounted to an abuse. On 3 April 2023, the judge provided the parties with a second draft of the Case. The second draft failed to address either of the disclosure issues raised by the DPP. Accordingly, on 4 April 2023 the DPP made further representations asking the judge to give further consideration to amending the draft Case.

27. By an email of 19 May 2023, the judge declined to amend the Case. He said:

> "Turning to the issue of failure to comply with disclosure obligations, I agree with Mr. Csoka's comments. Your chronology may or may not be correct [but] the fact remains there was a failure to comply with disclosure obligations on the part of the CPS. The first letter written by Mrs Barton was not known about by prosecution trial counsel until it's [sic] existence was raised by Mr. Csoka on the day of trial."

28. The DPP responded on 22 May 2023. The DPP said (correctly) that this issue could not continue to be litigated through correspondence, but asked the judge to confirm that he did not make any finding that in failing to disclose the Letter, the prosecution had acted in bad faith. At the judge's request, the DPP's email of 22 May also attached those documents to be appended to the final Case. Two of those documents were the parties' skeleton arguments relied upon for the hearing on 31 October 2022. The prosecution's skeleton argument for that hearing (dated 17 May 2022) included as an appendix, the reviewing lawyer's chronology of Mrs Barton's correspondence with the CPS. Mr Csoka then wrote to the judge indicating that he objected to the reviewing lawyer's chronology being appended to the Case. Amongst the reasons given was that the lawyer had not been called to give evidence and the chronology did refer to the email sent by Mrs Barton on 24 February 2022.

29. On 23 May 2023, so some 7 months after the stay had been imposed, the judge provided the Case (in its final form). The judge confirmed that he had not found that the prosecution had acted in bad faith. Though he agreed with Mr Csoka's request to append to the Case Mrs Barton's email of 24 February 2022, he refused to append the appendix to the prosecution skeleton argument (i.e. the chronology) citing the reasons given by Mr Csoka.

30. The DPP subsequently applied to the High Court under section 28A(2) of the Senior Courts Act 1981 for the Case to be sent back for amendment. In the application he said that, despite his best endeavours to seek to ensure that this application was not necessary, the Case as presently drafted was deficient in two fundamental respects. First, it contained insufficient information to enable the High Court to understand the basis on which the judge stayed the proceedings on the ground of a disclosure failure. Secondly, the Case did not contain details regarding the nature of the *res gestae* evidence. In particular, the final version of the Case was limited to stating, "*On the 17th November 2021 the Court heard an application made by the Applicant to admit the 999 call made by GB as well as her words which were recorded on a police body worn video in which she stated JB had assaulted her.*" As the DPP said, this short statement

was deficient because it omitted to mention the nature and details of the alleged assault, and the existence of an injury arguably consistent with that allegation. It also omitted to include any reference to the information upon which the prosecution could conclude, with good reason, that Mrs Barton's change of account in the Letter meant her anticipated evidence was incapable of belief, and that the prosecution was not therefore acting in an unprincipled manner in refusing to call her to give evidence. On behalf of Mr Barton, Mr Csoka objected in forceful terms to both parts of the application.

31. The application came before Fordham J on the papers. Fordham J made some provisional observations in an Order of 17 November 2023. He had not been provided with all the documents referred to in the application. In due course, following receipt of these materials and further submissions, Fordham J declined the application to send the case back for amendment but directed that the material which the DPP wanted to put before the court (which included the *res gestae* evidence, skeleton arguments and correspondence) could be added to the hearing bundle for the Divisional Court *de bene esse*. As a result, both parties have addressed the full factual position before us.

32. The power of the court to stay a prosecution on the ground that it is an abuse of the process is an exceptional one; it is rarely exercised, and any court doing so, must provide full and sufficient reasons for its decision. The High Court is, as we have already said, limited on an appeal by way of Case Stated, to the facts found by the lower court. Full factual findings and reasons are essential in order for the High Court to be able effectively to exercise the limited jurisdiction it has on appeals of this nature. In the circumstances of this case, it was therefore incumbent on the judge to identify the core evidence and arguments before him, and to state the factual basis on which he had made findings of abuse of process. Regrettably, he failed to do so.

33. In the result, and in summary, we consider that the Case was deficient in the following respects:

    i) The judge failed to summarise the *res gestae* evidence beyond a very brief reference to some of the evidence.

    ii) The judge failed to explain the basis for his finding that the CPS were in possession of Mrs Barton's letter of 17 February 2022 "*on or about 18 February 2022*".

    iii) The judge did not identify the basis upon which he found as a fact any other "disclosure failure."

    iv) The judge failed to state (until asked to clarify) whether the disclosure failure, whatever that may have been, was an act of bad faith by the prosecution.

    v) The judge did not explain the basis upon which he concluded that the disclosure failure rendered the proceedings an abuse of the court's process, or under which limb he stayed the proceedings in respect of this failure.

Abuse of process: the law

34. Before we turn to Issue 1, we briefly summarise the principles concerning abuse of process. These were not controversial before us. In *Maxwell* [2010] UKSC 48; [2011]

1 WLR 1837 at para 13, Lord Dyson identified the two categories of case in which the court has the power to stay proceedings for abuse of process: (1) where it will be impossible to give the accused a fair trial, and (2) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. It is rare for there to be legitimate grounds to stay proceedings on the basis of a Category 2 abuse: *Post Office Ltd v Hamilton* [2021] EWCA Crim 577 at para 66.

35. These principles were recently affirmed and applied in *R v Ng and others* [2024] EWCA Crim 493 at paras 20 to 25. In that case Lady Carr of Walton-on-the-Hill LCJ emphasised that the power to stay criminal proceedings as an abuse of process is an important though exceptional remedy to be exercised with care and restraint. As she explained, a stay of proceedings is the exception, not the rule and is a measure of last resort. She further observed that within Category 2 abuse, fall cases where the police or prosecuting authorities have engaged in misconduct, and that such abuse is by its nature very rarely found (such cases will be "very exceptional"). The second limb does not arise unless the defendant charged with a criminal offence will receive a fair trial and something out of the ordinary must have occurred before a criminal court may refuse to try a defendant when that trial will be fair. There is a two-stage approach when considering Category 2 abuse. First, it must be determined whether and in what respect the prosecutorial authorities have been guilty of misconduct, such as very serious examples of malpractice and unlawfulness (as opposed to state incompetence or negligence). Secondly, it must be determined whether such misconduct justifies a stay on the ground of abuse of process. This requires an evaluation of the particular facts and circumstances of each case, weighing the public interest in ensuring that those charged with crimes should be tried, against the competing public interest in maintaining confidence in the criminal justice system.

36. A stay on the grounds of non-disclosure, in Category 2 abuse, would require errors in disclosure to reach the level of grave executive misconduct such that they would undermine public confidence in the criminal justice system and bring it into disrepute: see *R v Ahmed (Nazir) and others* [2022] 1 W.L.R. 3543 at para 59.

Prosecution duty to call witnesses: the law

37. Although there is an issue as to how these principles apply in the present case (which is concerned with *res gestae* statements by an available witness who is not called at trial) the general principles to be applied in deciding which witnesses the prosecution must call are well-established in both the Crown Court and the Magistrates' Court. They were summarised in *R v Russell-Jones* [1995] 1 Cr. App. R. 538 at page 544C-545D as follows:

> "(1) Generally speaking, the prosecution must have at court all the witnesses whose statements have been served as witnesses on whom the prosecution intend to rely, if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served.
>
> (2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered

> (3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial.
>
> (4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, the prosecutor regards a witness's evidence as unworthy of belief.
>
> (5) The prosecutor is the primary judge of whether or not a witness to the material events is unworthy of belief and has a wide discretion in deciding whether or not the witness's anticipated evidence is capable of belief."

38. If the prosecution acts improperly in not calling a witness, it is open to the court to invite the prosecutor to tender the witness and, if he refuses, to call the witness itself for cross-examination by the defence: *R v Wellingborough Justices, Ex p. Francois* (1994) 158 J.P. 813 at pages 4 to 5.

39. In *R v Haringey Justices, ex p DPP* [1996] QB 351 the Divisional Court reviewed the main authorities in this area in the context of a prosecution in the Magistrates' Court. The prosecution had decided not to call a police officer who had been suspended from duty. The defence asked for him to be called or tendered for cross-examination. The prosecution declined to do so and the justices dismissed the case on the ground that it was an abuse of process. That decision was quashed on a judicial review. The Divisional Court summarised the legal position as follows:

    i) The general principles identified in the leading cases, including *Russell-Jones*, apply in the Magistrates' Court as in the Crown Court.

    ii) Where the prosecution by way of providing advance information serve copies of witnesses' statements, that is equivalent to the service of witness statements in the Crown Court, after which the prosecution's discretion becomes fettered and it has a duty to call or tender those witnesses. This however is subject to the important and settled exception that by the time of the trial those witnesses remain capable of belief.

    iii) In circumstances where the prosecution's discretion is unfettered, because it has not explicitly or impliedly undertaken to call a particular witness, if the witness in question is anticipated to give evidence helpful to the defence, then the defence can make arrangements to call that witness.

    iv) Where, in the exercise of its unfettered discretion, the prosecution chooses not to call a witness whose evidence is central to the incident and the court is satisfied that the interests of justice require him to give evidence and that it was unfair to the defence for him not to do so, the court should so rule.

v) If the prosecution continue to refuse to call the witness, the justices cannot compel them to do so. However, if it is not appropriate for the defence to call the witness, the justices have the power to call the witness themselves (citing *Wellingborough*). The justices should do so in preference to dismissing the case as an abuse of process. This is a power that should be exercised sparingly and only if there is no alternative.

Issue 1: the prosecution refusal to call Mrs Barton

Submissions

40. Mr Little KC (who did not appear below) submitted on behalf of the DPP, that the judge's conclusion that it was impossible for Mr Barton to receive a fair trial unless the prosecution called Mrs Barton was wrong in law. He argued that there was no obligation on the prosecution to call Mrs Barton. He emphasised that, as was not disputed, Mrs Barton had never been treated as a prosecution witness; and, moreover, that in the light of the content of the Letter (which retracted her complaint) the prosecution had good reason to consider the evidence she might give, would be incapable of belief. In reliance on *Russell-Jones* and *Haringey*, Mr Little submitted that any perceived unfairness could have been cured by calling Mrs Barton as a witness for the defence, or by the court calling her of its own motion. Accordingly, he argued there was no basis for the judge to find that in refusing to call her, the prosecution was improperly manipulating the trial process to deprive the defence of an opportunity to elicit evidence that undermined the prosecution case.

41. Mr Csoka for Mr Barton, submitted that the judge was entitled within the "reasonable grounds" of his discretion to stay the proceedings on the basis of unfairness. He said that contrary to the position now adopted, it was not suggested below that the judge could have called Mrs Barton himself. Mr Csoka submitted that the *Russell-Jones* and the cases that followed it were decided before more recent decisions on *res gestae* and are irrelevant to the position which arose in this case. At no stage has a court sought to apply that line of authority to circumstances in which the prosecution sought to rely on an out of court statement from the witness, as opposed to dispensing with evidence from that witness altogether. Mr Csoka relied upon various authorities which he submitted established that where the prosecution is permitted to rely upon hearsay as *res gestae*, it is under a duty to call the witness so that the witness can be cross-examined. He relied principally in this regard on *R v Andrews (D)* [1987] AC 281 and *Attorney General's Reference (No. 1 of 2003)* [2003] EWCA Crim 1286. He further submitted that prosecution is not absolved of its duty if the defence is given the opportunity to call the witness (so that she can be cross-examined by the prosecution) or because it fears that the witness will be untruthful.

42. Mr Csoka placed particular reliance on Lord Ackner's observations in *Andrews* at p302D to F:

> "My Lords, the doctrine of res gestae applies to civil as well as criminal proceedings. There is, however, special legislation as to the admissibility of hearsay evidence in civil proceedings. I wholly accept that the doctrine admits the hearsay statements,

> not only where the declarant is dead or otherwise not available but when he is called as a witness. may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done… As a general principle, it could not be right that the Crown should be permitted to rely only on such part of a victim's evidence as they considered reliable, without being prepared to tender the victim to the defence, so that the defence could challenge that part of the victim's evidence on which the Crown sought to rely and, if advised, elicit that part of her evidence on which the defence might seek to rely."

43. Mr Csoka submitted that the prosecution's refusal to interview and to call Mrs Barton was a tactical decision. In seeking to uphold the judge's ruling, he described the prosecution approach as "unfair tactics" and a manipulation of process or a "device". He argued that the only reason advanced below for not calling Mrs Barton was precisely the reason which, on the basis of authority, is not a proper reason, namely, that she might give an untruthful account.

44. In the alternative, Mr Csoka submitted that the facts provide "unchallengeable" reasons to exclude the *res gestae* evidence under section 78 of PACE. As we have noted above, this issue does not arise on the Case as stated to us. Mr Csoka submitted however that if the judge had addressed the section 78 application based on his findings of fact, it is inevitable that he would have excluded the *res gestae* evidence, without which the prosecution could not have proceeded. Such a result would have been inevitable in light of the decisions in *Andrews, AG Ref No.1 of 2003*, and *Barnaby*. Accordingly, even if the judge's decision on abuse was in error, this appeal is academic.

Analysis

45. We start with the opinion of the judge (see para 19 above). In summary, he found that it would be unfair and abusive to allow the prosecution to proceed against Mr Barton for a combination of reasons: Mrs Barton was present and available to be called as a witness at trial; the prosecution had refused to call her on the ground her evidence was unworthy of belief; the prosecution had refused the judge's invitations to take a witness statement from her and the submission that the defence could call her was contrary to the principles in *Russell-Jones*.

46. We accept, as submitted by Mr Little, that the judge's approach was wrong in principle and contrary to authority.

47. The starting point is that the prosecution is only obliged to call those witnesses whose statements have been served as witnesses on whom the prosecution intends to rely. The rationale for this rule is that by serving a statement on the defence as evidence (and not

as unused material) the prosecution has impliedly undertaken to have that witness in court so that they may be examined. The defence do not need therefore to approach that witness for a statement, and are not taken by surprise or prejudiced by the loss of evidence of potential value to their case. There was plainly no such implicit undertaking in this case. On the contrary. Mrs Barton had never provided a witness statement and had expressed an unwillingness from the outset to give evidence against her husband. She had further reinforced this unwillingness by writing the Letter many months later in which she expressly retracted the initial allegations (recorded on body worn video footage) upon which the prosecution relied.

48. Nor is the prosecution obliged to call a witness where it is anticipated, with good reason, that their evidence will be untruthful. The position is different where the witness's evidence is capable of belief; in that case, it is the prosecutor's duty to call the witness even though their evidence may be inconsistent with the case the prosecution seeks to prove: see *R v Oliva* [1965] 1 WLR 1028 at page 1035H. The prosecution has a wide discretion however in deciding whether or not a witness is capable of belief (and we note that there is no suggestion in the Case or indeed by Mr Csoka that it was not permissible for the prosecution to form its view in respect of Mrs Barton).

49. On the facts of this case, in our judgment, it was not unfair for the prosecution to decline the judge's invitation to take a witness statement from Mrs Barton. No prejudice could conceivably have been caused to Mr Barton if Mrs Barton had been called by the defence (or by the court for that matter). She was not a witness who would have been called "blind", as Mr Little pointed out. The contents of the Letter identified in clear terms what her evidence was likely to be. The defence knew well in advance of the trial what she was likely to say and how this differed from her previous accounts and was able to prepare its case accordingly. Mrs Barton had made it clear in the Letter that the only evidence she would give would be evidence in support of her husband. And this is why on both occasions when the case was listed for trial, she had attended court with him. In the circumstances, there was no basis for concluding that the prosecution was obliged to take a statement from her, or for inferring it had manipulated the process, or was guilty of malpractice because it refused to do so.

50. The prosecution's duties of disclosure are clear; it must disclose to the defence all unused material, including any account or witness statement containing evidence which contradicts the prosecution case or which may lay the foundation for a defence. Provided that is done sufficiently in advance of the trial, the defence will be able to interview the witness and arrange for the witness to be at court to give evidence as a defence witness if necessary. In this case, the defence were aware of the existence of the Letter at the very latest by 18 March 2022, and had ample time therefore to determine whether they wished to procure Mrs Barton's attendance as a defence witness before the scheduled trial date of 31 October 2022.

51. The prosecution's decision that it would not call Mrs Barton, and its submission that Mrs Barton could be called by the defence, was not an improper exercise of its discretion; nor did its stance prevent Mr Barton from receiving a fair trial. As the Divisional Court explained in *Haringey* at page 358A to B, whether the inability to cross-examine a witness places the defence at a disadvantage, and is contrary to the interests of justice, is always a fact-sensitive issue. There were good reasons why the court in that case, and in *Wellingborough*, determined that the type of questioning required of police witnesses, could most effectively be conducted through cross-

examination. In this case however, there is no basis for concluding that the defence would have been placed at an illegitimate disadvantage if they could only ask non-leading questions of Mrs Barton as their witness.

52. Indeed, there is force in Mr Little's submission that it made more sense for Mrs Barton to be called by the defence, given the evidence it was anticipated she would give, was unequivocally in favour of her husband. That is consistent with the general rule of practice that a witness is to be called by the party who wishes to adduce their evidence. Given the history, we are confident that the defence would have had no difficulty in eliciting from her, through open questions, evidence which was favourable to Mr Barton. Nor would the defence have had difficulty in eliciting why the account she provided to the police at the time of the incident was different in fundamental respects to the one she had given in evidence. It is also not clear what part of Mrs Barton's evidence the defence might have wished to challenge through cross-examination in order to have a better prospect of successfully defending the charge.

53. In the circumstances of this case, it would have been proper for the defence to have called Mrs Barton, and for the prosecution to have cross-examined her. It could not be a valid objection that this would have been unfair simply because it might have undermined her evidence in support of Mr Barton. We would add that even if the prosecution had called Mrs Barton, it would inevitably have applied to treat her as a hostile witness and likely cross-examined her therefore in any event.

54. Finally, we should mention the possibility that the judge might have called Mrs Barton himself. As noted in the Case, this possibility was not mentioned below; however the judge did rely on *Russell-Jones* where such a possibility is referred to at 543F (citing *R v Oliva*)). We mention this because if, contrary to our view, there was some unfairness (in the prosecution not calling Mrs Barton) *Haringey* establishes that it was not open to the judge to take the exceptional course of staying the proceedings. Instead, any such unfairness could have been cured by the judge calling the witness, and giving both parties the opportunity to cross-examine her.

55. For these reasons we consider that the judge erred in principle in staying the proceedings, a conclusion we have been able to reach without travelling outside the limited terms of the Case. In short, it was not an abuse of process for the prosecution not to call Mrs Barton. This decision was not an improper tactic or manipulation of the court's process. but a legitimate exercise of the prosecution's well-established discretion to choose which witnesses it calls.

Section 78 of PACE

56. The judge was invited by the defence to exclude the prosecution's *res gestae* evidence under section 78 of PACE. He declined to deal with the issue in this way. However, Mr Csoka 's argument now is that had the judge undertaken this exercise he would have inevitably excluded the *res gestae* evidence. He submitted that the case law establishes a wide-ranging general principle that apart from a case where a complainant is "in fear" of attending court to give evidence, a defendant will not receive a fair trial where the prosecution is relying on the complainant's *res gestae* evidence, unless the prosecution either calls or tenders the witness to give evidence. Mr Little's simple submission is that there is no absolute rule to this effect and that each case depends on its own particular facts.

57. Whether there is such a principle is not an issue which arises on the Case. As we have received full argument on this point however, we will explain why we do not accept there is a wide-ranging general principle of the kind described by Mr Csoka, and why, in our judgment, the cases, when properly analysed, turn on their own facts.

58. The principle is said to be found in the dicta of Lord Ackner in *Andrews* which we have cited above at para 42. It is important to note however that Lord Ackner's observation was not made against a factual background in which the maker of the statement had subsequently retracted it; or where any evidence they would now give would be supportive of the defendant. Lord Ackner's observations understandably presupposed that the anticipated evidence of the available maker of the statement would remain adverse to the defendant, hence the reference to not depriving the defence of an opportunity to "cross-examine" him. The observations are certainly not apt, we would suggest, to cover cases of domestic violence, where the person concerned may have a range of reasons for either not wanting to give evidence or might want to give evidence which the prosecution properly regards as being unworthy of belief when compared to *res gestae* statements.

59. Mr Csoka also relied on *AG's Reference (No. 1 of 2003*. This case concerned a series of spontaneous exclamations made to a number of witnesses by the complainant who accused her son of assaulting her. She subsequently retracted those allegations in a deposition obtained by the justices on behalf of the prosecution under the procedure set out at paragraph 4 of Schedule 3 of the Crime and Disorder Act 1998. The prosecution sought to adduce evidence of what she had said to the witnesses as admissible *res gestae*. The Crown Court judge, relying on *Andrews,* ruled that the evidence was inadmissible because the prosecution was using the *res gestae* principle as a device to avoid calling the complainant, the maker of the statements. On the reference on a point of law, it was held that the judge's approach was wrong as a matter of principle. The Court of Appeal explained that the fact that the complainant was available, but was not being called by the prosecution, did not go to the admissibility of the *res gestae* evidence. Rather, it concerned the entirely separate question as to whether it should be excluded under section 78 of PACE.

60. The Court of Appeal recognised that the fact that the maker of the hearsay statements could be called did not render *res gestae* evidence inadmissible. It also accepted that the prosecution was not using *res gestae* as an improper device to avoid calling the complainant, as the reason for not calling her was that the prosecution considered her anticipated evidence incapable of belief. It was observed however that had the judge considered the issue through his exclusionary discretion under section 78, he "might well" have considered it unfair to admit the evidence unless the prosecution tendered the complainant for cross-examination.

61. It follows from the contingent language it used, that it cannot be said that the Court of Appeal in *AG's Reference (No 1 of 2003)* concluded that it will always be unfair to allow the prosecution to adduce *res gestae* evidence in such circumstances. The Court of Appeal also did not consider whether the potential for unfairness may be removed if the court calls the witness itself (see para 54 above). It is also significant in our judgment that the Court of Appeal was unable to give a definitive answer to the question posed in the reference. As it explained, all "depends on circumstances in which the statements were made and on how practicable it is to make the witness available"; and

as the issue concerned a matter of discretion rather than law, "there is no black and white answer."

62. In *Barnaby*, another case relied on by Mr Csoka, the defendant was convicted of assault. The police were called and spoke to the alleged victim of the assault, 6 minutes after the incident. The victim refused to make a statement. Evidence was admitted of 999 calls made by the victim and also of her statements to police on their arrival, all implicating the defendant. There was also evidence that the victim was agitated and upset and showed signs of injury; and of incriminating text messages sent by the defendant to her. Fulford LJ was satisfied that the evidence of the telephone calls and of the conversations with police officers shortly afterwards fell within the *res gestae* principle. The prosecution had not sought to call the victim to give evidence, nor had the prosecution tendered her for cross-examination. The victim had expressed her fears as to the likely consequences of further harm if the defendant discovered she had co-operated with the police. Fulford LJ concluded that this was not a situation in which the prosecution was seeking to resort to unfair tactics in order to avoid introducing evidence that was potentially inconsistent with the case against the defendant or because it simply anticipated that there was a risk the witness might give an untruthful account. Rather the prosecution stance was a seemingly sensible recognition of the potentially dangerous situation in which the victim had been placed. In those circumstances it was appropriate to admit the *res gestae* evidence notwithstanding that in a strict sense the victim was available as a witness.

63. It is no part of the ratio of *Barnaby* however that a court is always obliged to exclude *res gestae* evidence if the available declarant is not "in fear" of giving evidence and the prosecution do not propose to call her as one of its witnesses. We also note too that in *Barnaby* the complainant had not provided an account retracting her allegation. This was not therefore a situation where the prosecution reasonably anticipated that the complainant's evidence was incapable of belief, a factor capable of relieving the prosecution of its duty to tender that evidence (see para 48 above).

64. In the sensitive and specific context of domestic abuse, the position, in our opinion, is very different to that advocated for by Mr Csoka. It is that it will often not be unfair to allow the prosecution to adduce the *res gestae* evidence of a complainant where they are not called as a witness, and there is an absence of fear. As is now well understood, it is not uncommon in such cases for there to be sufficient evidence to prosecute the alleged perpetrator of the abuse even where the complainant does not to support the prosecution. In our opinion, in such cases, the public interest may often demand the use of *res gestae* evidence, particularly recorded evidence, regardless of the cooperation of the complainant.

65. As the Court of Appeal observed in *R v C* [2007] EWCA Crim 3463, at para 12:

> "… an alleged victim of domestic violence is in a peculiarly unhappy position, namely of being required to give evidence against someone with whom perhaps she is still living but certainly for whom she still has feelings of affection. She is unlikely therefore to want to make matters worse for him, still less to have to do so in a public place. To require her, if that is her attitude and if she has made clear that she does not want to support the prosecution publicly, to go into the witness-box and

> be cross-examined by the prosecution in that way may, in certain circumstances, only exacerbate the wretched situation in which she finds herself."

66. At para 14, the Court of Appeal considered how the prosecution could deal with this common situation. It explained that it could seek to adduce that evidence which properly fell within the *res gestae* exception, together with any direct evidence, such as police body-worn footage, that tended to support the veracity or accuracy of the hearsay evidence, without any need to rely on the complainant's testimony. It is to be noted that the CPS Guidance on Domestic Abuse for building a robust prosecution case is consistent with this approach; it takes a "*suspect-centric approach*" which is not focused solely on the evidence of the victim: see https://www.cps.gov.uk/legal-guidance/domestic-abuse. The Guidance also explains the importance of the possibility of proceeding without the victim's support being kept under review by the prosecutor.

67. In *McGuinness v Public Prosecutor for Northern Ireland* [2017] NICA 30, the Court of Appeal of Northern Ireland had to decide whether the trial judge was right to have admitted the *res gestae* evidence of the complainant in a domestic abuse case, or whether she should have excluded it under the Northern Ireland equivalent of section 78 of PACE. The Court of Appeal explained at para 29 that in determining whether to exclude admissible *res gestae* evidence there are a variety of circumstances that may arise that are relevant to the truth of a complaint and to the fairness of the proceedings. It observed that it is not simply an issue as to whether the maker of the statement is available to give evidence. Having considered the cases *Andrews*, *AG Ref (No 1 of 2003)* and *Barnaby*, the Court of Appeal concluded at para 41:

> "As to the purpose of the prosecution in relying on the res gestae exception, this is not an instance of seeking to avoid inconsistent evidence or anticipating an untruthful account or providing protection from reprisal. Rather, this is an instance of providing support to the Complainant in the changed circumstances brought about by the reconciliation of the parties while at the same time seeking to deal with the alleged previous conduct of the Appellant. This is a balance which the prosecution has to make in deciding whether and in what manner to prosecute the Appellant and does not involve any improper motive or device or unfair tactics."

68. We respectfully agree with these observations.

69. Finally, in *R v AS* [2021] EWCA Crim 1227 the applicant sought leave to appeal against his convictions for assaulting his ex-partner. We note that the facts are similar in many respects to the case before us. The applicant argued that the trial judge should have excluded the *res gestae* evidence as the complainant was an available witness and therefore should have been called to give evidence. The Court of Appeal considered *Andrews* and *McGuinness* and concluded at para 19:

> "…the fact that the complainant did not want to give evidence and that she instead wanted to move on in her life did not make the admission of the evidence unfair. There is an important public interest in cases of this kind being heard, and the desire of the complainant is by no means determinative. There was no proper basis for excluding the evidence under section 78. There is a real distinction to be drawn between evidence which is detrimental to the defence (as this clearly was), as compared with evidence which is unfair or prejudicial falling within section 78. The fact that the evidence had been recorded and does not depend upon the recollection of an officer is further material that enhances the fairness of its admission. The issue of the weight to be attached to the evidence was a matter for the jury."

70. Mr Little was right to draw attention to the fact that *Andrews* and *AG Ref (No 1 of 2003)* were both decided before the hearsay provisions in the Criminal Justice Act 2003 (the 2003 Act) were brought into force. It is probably sufficient to point out that the unavailability of the maker of the statement is not a statutory precondition for the admissibility of *res gestae* evidence; but as Mr Little also points out, it is difficult to identify what useful purpose was served by retaining (within the 2003 Act) the *res gestae* exception to the hearsay rule if such evidence cannot in all cases be fairly admitted if the maker is available, because the exception would then add little if anything to what is already provided for by section 116 of the 2003 Act (which provides the conditions for the admissibility of hearsay evidence, where the relevant person is not called at trial).

71. Finally, as was explained in *R v Riat and others* [2013] 1 WLR 2592 at para 22, the non-exhaustive considerations listed in section 114(2) of the 2003 Act, which apply to an application made under section 114(1)(d) to admit hearsay evidence, also provide a useful framework for any judge considering the admissibility of hearsay evidence under section 78 of PACE.

72. Had the judge therefore addressed the issue through his exclusionary discretion, and thus had recourse to those considerations, it is difficult to see how the only conclusion open to him would have been to exclude the *res gestae* evidence. The following points would have been significant. The truth and reliability of the hearsay evidence of Mrs Barton was strongly supported; the fact that the statements had been made could not be in dispute (they were recorded on body worn footage); and the difficulties for the defence in challenging those statements unless she gave evidence for the prosecution were significantly overstated.

73. In all the circumstances, we reject the submission that the judge would have been bound to exclude the *res gestae* evidence under section 78 of PACE. We emphasise however that we make no determination ourselves in relation to this matter. This will be an issue for the judge who considers the remitted trial, if such an application is made on behalf of Mr Barton.

Issue 2: failures in disclosure

74. We can deal with this second issue more briefly. Mr Csoka accepts in his skeleton argument that this aspect of the judge's decision was not "a key part of the learned judge's decision making". In the event, in his oral argument Mr Csoka (rightly) did not submit that the judge's findings on failures of disclosure, provided a freestanding ground for the staying this prosecution as an abuse.

75. The complaint of non-disclosure seems an artificial one in circumstances where it is a reasonable, if not an overwhelming, inference that the respondent knew that Mrs Barton had written the Letter and where the defence were in possession of it at the time the matter was first listed for trial (on 18 March 2022), if not before then. Putting these points to one side however, we have already described the deficiencies in the Case in relation to the findings of non-disclosure. The judge found that the prosecution had "…failed to disclose important evidence to [Mr Barton] until the day of trial on the 18th March 2022 which had been in it's [sic] possession since on or about the 18th February 2022 namely the letter written by GB." This appears to be a finding that someone within the prosecution had received the Letter and then failed to provide it to the defence. In circumstances where the reviewing lawyer said he did not receive the Letter, it is not clear how the judge arrived at this finding on the evidence, or who within the CPS was responsible for this failure to disclose it. We do not need go behind the finding that the Letter was received however, since the judge made no finding that the CPS generally or the relevant reviewing lawyer acted in bad faith. Indeed, no suggestion of bad faith was made by Mr Csoka. In the event, the apparent failure to disclose the Letter is simply nowhere near the sort of grave prosecutorial misconduct that would render it unfair to try Mr Barton and is required for the purposes of abuse of process.

Conclusion

76. We answer the Question posed in the affirmative. We allow the DPP's appeal. We will remit the case to be tried by a differently constituted court.