

## What the F? Historic abuse of process

On 21<sup>st</sup> July 2011 a five judge Court of Appeal<sup>1</sup> handed down its judgement in **R -v- F**<sup>2</sup>, an appeal in which the court had heard argument on 16<sup>th</sup> June 2011.

During the course of argument the court reviewed no fewer than 31 authorities on the subject of abuse of process in historic sexual cases, the net result of which was this – in future, judges hearing applications at first instance that cases should be stayed as a result of delay arising from the timing of a complaint should have regard to the principles in only four authorities: **R -v- Galbraith**<sup>3</sup>; **Attorney-General's Reference (No. 1 of 1990)**<sup>4</sup>; **R -v- Stephen Paul S**<sup>5</sup>; and now **R -v- F**, ante.

Since the decision of the Court of Appeal in **R -v- Smolinski**<sup>6</sup> (and as recently as 24<sup>th</sup> March 2011 when the court gave judgement in **R -v- TBF**<sup>7</sup>) it had been thought that the appropriate time to raise an application to stay proceedings owing to an abuse of process arising out of delay was at the close of the prosecution case. Consequent upon that has been the development of a form of hybrid half-time submission where abuse of process applications and submissions that the trial judge should stop the case owing to insufficient evidence have become confused: no more.

In **R -v- F** the Court of Appeal ruled that applications to stay proceedings as an abuse of process and applications to withdraw cases from the jury owing to insufficient evidence should no longer be elided. There are separate sets of governing principles that require separate consideration from the trial judge and, crucially, absent some specific reason to depart from the norm, at separate times. An application to stay proceedings as an abuse of process is to invite a judge to rule that a trial should not take place at all. On the other hand, an application that a case should be withdrawn from the jury on the ground of insufficient evidence only arises when a prosecution has been properly commenced and allowed to proceed.

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<sup>1</sup> The Lord Chief Justice, Lord Justice Hughes, Lord Justice Goldring, Mr Justice Ouseley and Mrs Justice Dobbs.

<sup>2</sup> [2011] EWCA Crim 1844.

<sup>3</sup> [1981] 1 W.L.R. 1039.

<sup>4</sup> [1992] 1 Q.B. 630.

<sup>5</sup> [2006] EWCA Crim 756.

<sup>6</sup> [2004] 2 Cr.App.R. 40.

<sup>7</sup> [2011] EWCA Crim 726

## When Should an Application to Stay Proceedings as an Abuse of Process be Heard?

The appropriate time for such an application to be made is before the trial commences, unless a defendant can point to a specific reason to defer an application until after the close of the prosecution case,:

*Where there are genuine grounds for an application to stay on the basis that a fair trial will be impossible because of incurable prejudice to the defendant caused by delay<sup>8</sup>, that application is, by its nature, preliminary to rather than part of the trial process. The contention is that the trial should not take place at all. If it is to be made, notice should be given before the trial begins. In the end of course the time when it should be dealt with by argument and ruling is a matter for the trial judge. Although we can envisage cases in which, for example, the application is based on prejudice resulting from the absence of long-lost evidence, such as institutional records, and where the evaluation of the significance of the absence of such evidence may best be undertaken at the close of the Crown's case, in general the question whether the trial should proceed at all should take place before evidence is called...unless there is a specific reason for deferment, an application to stay on abuse of process grounds is preliminary to the trial, and ought normally to be dealt with at the outset.<sup>9</sup>*

Although the Court in **F** identified an example of abuse which might be suitable for deferment until the close of the prosecution's case (lost records), it noted that the danger of so deferring is that the trial judge confuses an application for a stay with a half-time submission, thereby running the risk, if the application for a stay is allowed, of appearing to have usurped the function of the jury by making assessments about the evidence called that are properly and usually for the jury to make.

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<sup>8</sup> Attorney-General's Reference (No.1 of 1990) ante.

<sup>9</sup> Per The Lord Chief Justice at paragraph 45 of **F**.

## Submissions of no case to answer

Of course, none of the above means that submissions of no case to answer will no longer be appropriate in historic cases, but the Lord Chief Justice was at pains to issue a reminder as to the test to be applied, namely that which is set out in **Galbraith**.

Practitioners and judges were reminded that it is dangerous to ask questions such as “can the jury *safely* convict?” or “whether a jury verdict in the circumstances would be *safe*?” because such questions would require the judge to evaluate for himself the weight and reliability of the evidence. The simple test for a judge at the close of the prosecution case is whether the evidence taken as a whole is such that the jury could properly convict.

It perhaps goes without saying that questions concerning the safety of any such verdict are for the Court of Appeal.

For the avoidance of doubt, the Court pointed out that there is no separate **Galbraith** test for historic offences, whether or not those historic offences were of a sexual nature.<sup>10</sup>

## Overview

Although abuse of process applications in historic cases remain alive and well in the aftermath of **F**, they have certainly had their wings clipped.

An application that proceedings should be stayed as an abuse is effectively a “plea in bar” and the Court of Appeal has reminded practitioners and judges that the appropriate time for such arguments is before the trial begins.

The excessive citation of authority has been something of a bugbear for the Court of Appeal for some time now and once again the Court has sent out the message that this practice is to stop.

Provided that the principles in **Galbraith** and **Attorney-General’s Reference (No.1 of 1990)** are understood, the only other authorities to which reference should be made are **Stephen Paul S** and **F**.

As to **Stephen Paul S**, the principles to be applied by a judge on an application for a stay for abuse on the ground of delay are these:

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<sup>10</sup> Per the Lord Chief Justice at paragraph 41 of **F**.

- (i) even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
- (ii) where there is no fault on the part of the complainant or the prosecution it will be very rare for a stay to be granted;
- (iii) no stay should be granted in the absence of serious prejudice to the defence such that no fair trial can be held;
- (iv) when assessing possible serious prejudice, the judge should bear in mind their power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge; and
- (v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted.<sup>11</sup>

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**ONE PAPER BUILDINGS**

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<sup>11</sup> Per Rose LJ at paragraph 21.