[2011] UKPC 10
Privy Council Appeal No 0111 of 2009

JUDGMENT

Curtis Francis Warren and others *v* Her Majesty's Attorney General of the Bailiwick of Jersey

From the Court of Appeal of Jersey

before

Lord Hope
Lord Rodger
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Dyson
ON

28 March 2011

Heard on 9 and 10 February 2011

Appellant	*Respondent*
Orlando Pownall QC Stephen Baker (Jersey Bar) (Instructed by Baker and Partners)	David Farrer QC Nigel Povoas (Instructed by Baker & McKenzie LLP)

LORD DYSON:

Introduction

1. On 7 October 2009, the appellants were convicted of conspiracy to import into Jersey 180 kg of cannabis, a class B controlled drug. The drugs had a street value in excess of £1m. Curtis Warren, who masterminded the conspiracy, was sentenced to 13 years' imprisonment. John Welsh, whose involvement it will be necessary to describe in more detail, was sentenced to 12 years' imprisonment. James O'Brien was sentenced to 10 years' and the other appellants each to 5 years' imprisonment.

2. In March 2008, there had been a preparatory hearing before Sir Richard Tucker sitting as a Commissioner. The appellants applied for a stay of the proceedings on the grounds of abuse of process. The basis of the application was that crucial evidence on which the prosecution wished to rely had been obtained as a result of serious prosecutorial misconduct. The Commissioner heard evidence and argument over a period of 4 days and on 20 March dismissed the application. The appellants then made an application for a ruling that the evidence obtained by the use of the audio device should be excluded under article 76(1) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the 2003 Law") which provides:

> "Subject to paragraph (2), in any proceedings a court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would so adversely affect the fairness of the proceedings that the court ought not to admit it."

3. This application was heard by the Commissioner on 29 April 2008 and dismissed on the same day. The Court of Appeal of Jersey heard a renewed application for leave to appeal against both decisions and dismissed both applications on 14 August 2008 (reasons being given on a later date).

4. The appellants now appeal to the Board, but only against the refusal of a stay. A successful appeal would inevitably lead to the quashing of the convictions.

The facts

5. In June or early July 2007, the States of Jersey Police received intelligence that the appellants were planning to import a large quantity of drugs into Jersey. They believed that Mr Welsh was intending to collect the consignment in Amsterdam and take it to a port in Normandy from where it would be shipped to Jersey. The original plan was for Mr Welsh to take his own Jersey-registered car to St Malo and drive from there to Amsterdam.

6. The police wished to deploy two surveillance devices in the car: a tracking device which would enable them to follow its progress and an audio recording device which would enable them to listen to and record conversations of any occupants in the car. They knew that they would need the authority of the Attorney General to install and use these devices in the car both in Jersey and abroad: see article 33 of the Regulation of Investigatory Powers (Jersey) Law 2005 ("RIPL"). They also knew that they would need the consent of the French, Belgian and Dutch authorities.

7. By 3 July 2007, the police had obtained authority from the Attorney General under article 33 of RIPL to install a tracking and audio device in Mr Welsh's car. On 11 July, the police obtained information that Mr Welsh was planning to undertake the journey imminently. On the same day, DI Pashley and DS Beghin arranged to meet Crown Advocate Jowitt at the Law Officers' Department in Jersey. Mr Jowitt is a senior member of that department. The purpose of the meeting was to arrange for the immediate transmission of letters of request to France, Belgium and The Netherlands. The officers asked Mr Jowitt whether evidence of conversations recorded by means of an audio device would be admissible in a Jersey court if consent for the device had not been obtained from the relevant foreign authorities. Mr Jowitt replied that he could not advise the officers to record conversations without the consent of the foreign authorities, but that if they did so and valuable evidence was obtained, it was unlikely that a Jersey court would exclude the evidence solely because it had been obtained unlawfully. He said that ultimately it was an operational decision for the police to make, and that "if it was me I'd go ahead and do it, but don't quote me on that": see para 18 of the Commissioner's judgment. The Commissioner recorded that Mr Jowitt accepted in his evidence that this advice could have been "more carefully and felicitously expressed, and he should have considered and researched the Law more carefully than he did". In the view of the Board that was something of an understatement.

8. The evidence of DI Pashley was that, following this meeting, he decided in view of the urgency that, if consent was not forthcoming from the foreign authorities, the police would install and use an audio device in Mr Welsh's car in any event. The intelligence available to the police at that time suggested that Mr Welsh was intending to leave Jersey on 13 or 14 July.

9. On 12 July, letters of request signed by the Attorney General were sent to the relevant authorities seeking permission from a judge for the installation and use of tracking and audio devices whilst the vehicle was being driven through France, Belgium and The Netherlands. The French response was to grant permission for tracking but not for audio monitoring. The Dutch response, when clarified, was also to refuse permission for audio monitoring. The Belgian response was that they would be happy to assist if a guarantee of reciprocity were to be given. Such a guarantee was given by the Jersey authorities on 12 July, but it is not clear what happened thereafter. On 13 July a further letter of request was sent to the French authorities. It was in terms that were similar to the earlier letter, except that it omitted the reference to an audio device.

10. In the morning of 18 July, the investigating officers became aware that Mr Welsh had changed his plan and now intended to travel to France as a foot passenger aboard a ferry and then hire a car in St Malo for the drive to Amsterdam. So far as the police were concerned, this change was sudden and unexpected. It called for urgent action. DI Pashley, DS Beghin, DCI Minty (who was in charge of the CID) and DI Megaw met Crown Advocate Jowitt. The witnesses differed in their evidence to the Commissioner about this meeting, and in particular as to what Crown Advocate Jowitt was told and what he said. The Commissioner made no findings about it, but it does not seem to the Board that the details of what happened at this meeting are material to the outcome of this appeal.

11. The officers then decided to request assistance from the French police in deploying a tracking device in the hire car that they believed Mr Welsh would use. They decided not to raise the issue of the audio device because, as DS Beghin said in evidence, "I was aware that they hadn't given us authority so there didn't seem any point in mentioning it". No doubt mindful of the advice of Crown Advocate Jowitt, DI Pashley recorded in the investigation policy book "any audio product obtained within Europe will be subjected to decision on admissibility via judicial proceedings in any subsequent prosecution".

12. The Jersey police officers were given permission by the French authorities to deal directly with the car hire firm. DS Beghin then gave instructions to two junior officers, DC Courtness and PC Hart to go to France and install both the tracking and audio devices in the car. He instructed PC Hart (who was to act as interpreter) that if the French police officers asked what the second device was, she was to tell him that it was a "back-up" for the tracking device.

13. The two junior officers travelled to St Malo during the evening of 18 July. At about 22.00 hrs, DC Courtness fitted the two devices in the presence of PC Hart and two French officers. As instructed, PC Hart told the French officers that the second device was a "back-up" for the first.

14. Early in the morning of 19 July, Mr Welsh travelled to St Malo by ferry, collected the hire car and began his journey to Amsterdam.

15. At 07.44 hrs on 19 July, DCI Minty emailed Mr Power, the Chief Officer of the Jersey police, saying that they had now wired the hire car for tracking and audio "pursuant to the original [Commission Rogatoire] and a police to police request to assist. French Gendarmes have their own judicial authority, and we have the full consent and co-operation of the owners of the car (Alamo rent a car). We took legal advice from the Crown yesterday and we/they are content with this."

16. In the early evening of 19 July, the investigating officers became aware that a small boat called "Skiptide" might be used by some of the appellants to transport some of the drugs back to Jersey. DI Pashley spoke to the Attorney General and obtained his authority to install a tracker device and an audio device on the boat for 72 hours. The Attorney General made it clear that, if the French authorities were not prepared to agree to the audio device, it would have to be switched off when the boat entered French waters. DS Pashley did not tell the Attorney General that the hire car was being the subject of audio surveillance without the permission of the French authorities.

17. Late in the evening of 19 July and into the morning of 20 July, the audio device recorded conversations between Mr Welsh and co-conspirator Mohamed Liazid whilst the car was being driven in the Amsterdam area. It was the prosecution case that this provided compelling evidence of arrangements for the planned importation of cannabis from The Netherlands to Jersey.

18. On 20 July, an internal police document entitled "Review of Property Interference and Intrusive Surveillance" was prepared on behalf of the Chief Officer of Police in respect of the deployment of the tracking and audio devices. The document gave the impression that the French authorities had consented to the installation and use of an audio device in the hire car in France. At para 14 of the review document, Chief Officer Power wrote that he had been told that "the intrusive action was taken in France by the French Police under the appropriate authority under French Law".

19. There was a good deal of evidence as to what passed between the Jersey Police and the Law Officers' Department thereafter, but, with one exception, the Commissioner made no specific findings about any of it and the Board considers it unnecessary to do so either. The one exception is the letter written by the Attorney General to the Dutch authorities on 7 September. In this letter, he told them that it had only just been brought to his attention that the audio device had been used, notwithstanding that he had directed the Jersey police that it should be switched off

when the suspect entered a jurisdiction which had refused permission for its use. He wrote that he was conscious that the police had obtained evidence "contrary to the instructions of the competent Dutch Authorities and contrary also to my direction" and he apologised. In a letter dated 7 January 2008, the Head of the Office of International Legal Assistance in Criminal Matters for the Minister of Justice explained that, if the Dutch national prosecutor had had sufficient time to make an application to examining magistrates, authorisation would have been given.

20. At the hearing before the Commissioner, the defence criticised the Attorney General in relation to the letter of 7 September. At para 20 of his judgment, the Commissioner acquitted both the Attorney General and the Chief Officer of wrongful conduct and deception.

The Law

21. Some of the leading authorities on the abuse of process jurisdiction in cases of prosecutorial misconduct were reviewed by the Supreme Court of the United Kingdom in *R v Maxwell* [2010] UKSC 48. That was a case about a decision by the Court of Appeal of England and Wales to order a retrial following the quashing of a conviction on the grounds of serious misconduct by the police. Although the judgments (which were given on 17 November 2010) will not be reported until the retrial has been completed later this year, they were circulated to the parties in the present case on a confidential basis. It is possible to refer to certain parts of the judgments without risking any prejudice to the retrial.

22. Sir John Dyson SCJ said:

> "13. It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) 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. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112F)."

23. In *Latif*, at p 112G, Lord Steyn said that the law in relation to the second category of case was "settled". As he put it, at pp 112G-113B:

> "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 an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42. *Ex p Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex p Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. 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 that 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."

24. In his dissenting judgment, Lord Brown referred to what Professor A L-T Choo said in *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed (2008), at p 132 where he summarised the approach of the courts of England and Wales to the second category of case:

> "The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged."

25. The Board considers that this is a useful summary of some of the factors that are frequently taken into account by the courts when carrying out the balancing

exercise referred to by Lord Steyn in *R v Latif*. But it is also necessary to keep in mind his salutary words that an infinite variety of cases can arise and how the discretion should be exercised will depend on the particular circumstances of the case. Mr Farrer QC suggested that it is possible to identify categories of cases where the court will always grant a stay. He gave as examples the unlawful abduction cases (such as *Ex p Bennett* [1994] 1 AC 42 and *R v Mullen* [2000] QB 520); entrapment cases (such as *R v Looseley* [2001] 1 WLR 2060); and cases which involve the breach of an assurance that there will be no prosecution in circumstances such as those that occurred in *R v Croydon Justices, Ex p Dean* [1993] QB 769.

26. The Board recognises that, at any rate in abduction and entrapment cases, the court will generally conclude that the balance favours a stay. But rigid classifications are undesirable. It is clear from *Latif* and *Mullen* that the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. It is true that in *Bennett* the need for a balancing exercise was not mentioned, but that is no doubt because the House of Lords considered that the balance obviously came down in favour of a stay on the facts of that case (the kidnapping of a New Zealand citizen to face trial in England).

27. In *Panday v Virgil (Senior Superindendent of Police)* [2008] AC 1386, when giving the judgment of the Board, Lord Brown said at para 28 that the factor common to the second category of abuse of process cases and the central consideration underlying the whole principle is that

> "the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the court at all."

28. The significance of the "but for" factor was considered by the Supreme Court in *R v Maxwell*. In that case, the majority considered that the fact that the confessions on which the retrial would be based would not have been made but for the prosecutorial misconduct was not determinative of the question whether there should be a retrial. This was no more than a relevant factor. Lord Brown, dissenting, thought that this feature of the case meant that it "[could] be seen to come within the same category of 'but for' situations as the wrongful extradition and entrapment cases" (para 102). Having set out the passage in Professor Choo's book referred to at para 24 above, he said at para 108 that in the "but for" cases, even though it would be possible to try (or retry) the defendant fairly, it would "usually" be inappropriate to do so. It would be inappropriate

> "essentially because, but for the executive misconduct, either there would never have been a trial at all (as in the wrongful extradition and entrapment cases) or (as in the present case) because the situation would never have arisen whereby the all important incriminating evidence came into existence (which is not, of course, to say that the 'fruit of the poison tree' is invariably inadmissible). Obviously this is not an exhaustive definition of the 'but for' category of cases and, as the word 'usually' is intended to denote, whether in any particular case a trial (or retrial) has in fact become inappropriate may still depend in part on other considerations too. Essentially, however, it is the executive misconduct involved in this category of cases which, I suggest, most obviously threatens the integrity of the criminal justice system and where a trial (or retrial) would be most likely to represent an affront to the public conscience."

29. And a little later, Lord Brown said: "...only exceptionally will the court regard the system to be morally compromised by a fair trial (retrial) in a case which cannot be slotted into any 'but for' categorisation".

30. The Board does not consider that the "but for" test will always or even in most cases necessarily determine whether a stay should be granted on the grounds of abuse of process. The facts of the present case demonstrate the dangers of attempting a classification of cases in this area of the law and of disregarding the salutary words of Lord Steyn. For reasons which will appear, it is the Board's view that the Commissioner reached the right conclusion in this case, or at least a conclusion which he was entitled to reach. And yet it was accepted at all times by the prosecution that *but for* the unlawful and misleading misconduct of the Jersey police in relation to the installation and use of the audio device, the prosecution in this case could not have succeeded and there would have been no trial unless the police were able to obtain the necessary evidence by other (lawful) means.

31. The decision of the Court of Appeal in England and Wales in *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60 was considered by both the Commissioner and the Court of Appeal in the present case. In *Grant*, the defendant was charged with conspiracy to murder. An application to stay the proceedings as an abuse of process was based on the fact that the police had deliberately eavesdropped on, and tape recorded, privileged conversations which took place in the police station exercise yard between the defendant and his solicitor following his arrest and in parallel with the interview process. This was one of three cases in which the same police force had placed covert listening devices in the exercise yard of the police station. But nothing was recovered from the illicit intercepts that was of any value to the prosecution of Grant. The police misconduct, therefore, caused him no prejudice.

32. The trial judge dismissed the application and the defendant was convicted. His appeal against conviction was allowed by the Court of Appeal (Laws LJ, Dame Heather Steel and Judge Martin Stephens QC). At para 54, the court said:

> "But we are in no doubt but that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected person's right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court."

33. The court acknowledged that it was necessary to conduct the balancing exercise identified by Lord Steyn in *Latif* and said at para 56 that where illegal conduct by the police occurs "which is so grave as to threaten or undermine the rule of law itself, the court may readily conclude that it will not tolerate, far less endorse, such a state of affairs and so hold that its duty is to stop the case". At para 57, the court said:

> "We are quite clear that the deliberate interference with a suspect's right to the confidence of privileged communications with his solicitor, such as we have found here, seriously undermines the rule of law and justifies a stay on the grounds of abuse of process, notwithstanding the absence of prejudice consisting in evidence gathered by the Crown as the fruit of police officers' unlawful conduct."

34. In the present case, the Court of Appeal (one of whose members was Dame Heather Steel who was also party to *Grant*) criticised paras 54 and 56 of the judgment in *Grant.* They said at para 39 of their judgment that there was no warrant for the proposition that

> "the jurisdiction to stay proceedings as an abuse of process extends to circumstances in which there has been no unfairness to the accused. Such unfairness was the context in which the nature and extent of the jurisdiction to stay were discussed in *Bennett* and the speeches, in our view, should be read in that context. The same is true of Lord Steyn's speech in *Latif*".

35. The Board does not accept this criticism of *Grant.* The second category of case where the court has the power to stay proceedings as an abuse of process is, as already stated, one where the court's sense of justice and propriety is offended if it is asked to try the accused in the particular circumstances of the case. It is unhelpful and confusing to say that this category is founded on the imperative of avoiding unfairness

to the accused. It is unhelpful because it focuses attention on what is fair to the accused, rather than on whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined by the trial. It is confusing because fairness to the accused should be the focus of the first category of case. The two categories are distinct and should be considered separately.

36. Nevertheless, the Board respectfully considers that the decision in *Grant* was wrong. The statement at para 54 suggests that the deliberate invasion of a suspected person's right to legal professional privilege is to be assimilated to the abduction and entrapment cases where the balancing exercise will generally lead to a stay of the proceedings. The Board agrees that the deliberate invasion by the police of a suspect's right to legal professional privilege is a serious affront to the integrity of the justice system which may often lead to the conclusion that the proceedings should be stayed. But the particular circumstances of each case must be considered and carefully weighed in the balance. It was obviously right to hold on the facts in *Grant* that the gravity of the misconduct was a factor which militated in favour of a stay. But as against that, the accused was charged with a most serious crime and, crucially, the misconduct caused no prejudice to the accused. This was not even a case where the "but for" factor had a part to play. The misconduct had no influence on the proceedings at all. In these circumstances, surely the trial judge was entitled to decide in the exercise of his discretion to refuse a stay and the Court of Appeal should not have held that his decision was wrong.

37. The Court of Appeal in *Grant* recognised at para 55 that it is "not in general the function of criminal courts to discipline the police". That was a reflection of the words of Lord Lowry in *Bennett* at p 74H: "the discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct....'pour encourager les autres'". It may not always be easy to distinguish between (impermissibly) granting a stay "in order to express the court's disapproval of official conduct pour encourager les autres" and (permissibly) granting a stay because it offends the court's sense of justice and propriety. But it is difficult to avoid the conclusion that in *Grant* the proceedings were stayed in order to express the court's disapproval of the police misconduct and to discipline the police.

The Commissioner's decision

38. Having referred to the fact that on 18 July the French authorities were misled as to the true nature of the operation and that PC Hart had been instructed, if necessary, to lie to the French police, the Commissioner said at para 15: "This was of course most reprehensible conduct which was unlawful, and to say the least most regrettable. The Court wishes to express its disapproval of what took place."

39. He then considered the role of Crown Advocate Jowitt and said that he found him to be an honest witness who was a man of integrity. Referring to the advice that he had given on 11 July, he said: "I have no doubt that his advice was honest and well intentioned and I acquit Crown Advocate Jowitt of any impropriety or criminality or of acting recklessly or in disregard of the law." He agreed with the defence suggestion that the Chief Officer of Police and the Attorney General were people of integrity and referred to the detailed submissions made on behalf of the defence that they had been misled by the police, which suggested that neither of them was being accused of complicity in any unlawfulness. The Commissioner reviewed the evidence of Superintendent Du Val, DCI Minty and Howard Sharp from the Law Officers' Department, but made no findings about them.

40. He then reviewed some of the leading authorities in this area of the law. At para 35, he referred to the decision of Curtis J in *R v Glennon* (Nottingham Crown Court, 16 September 1998. In that case, the judge stayed proceedings on the grounds of abuse where the prosecuting authorities had misled the Dutch court into making an order for the handing over of material which it would not otherwise have made, a matter which the judge said went "to the root of this matter". At para 36, the Commissioner said that whatever other criticisms could be made of the prosecuting authorities in the present case, it did not "involve a deception on the court". At para 37 he said: "I now consider how I should carry out the balancing exercise which I am required to undertake." He continued:

> "38. I start with the admitted facts that the prosecuting authorities acted unlawfully in the jurisdiction of three foreign states and also of Jersey. That this was done knowingly and over a period of time and that the States of Jersey Police deliberately deceived their French counterparts. I find that this course of conduct was known to, and approved of, by police officers of at least inspector level and probably higher and was known or should have been discovered in the Law Officers Department. The evidence does not persuade me that there was any deliberate or knowing wrongful conduct or deception at the highest level, as is alleged, and I take the view that some of the Defence submissions were couched in extravagant terms and are unfounded. I have already exculpated Crown Advocate Jowitt. I take the same view of the part played by the Attorney General. I think it was unfortunate that the offending letter [7 September 2007] was written in the way it was, but the evidence does not persuade me that it was a deliberate attempt to deceive the Dutch authorities. The Chief Officer has not been expressly criticised.
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> 39. In my opinion this case falls into an entirely different category from the other cases to which I have been referred, where the

> courts were persuaded to stay the prosecution. Here there is no suggestion of torture, coercion, procurement or entrapment or any breach of legal professional privilege or deception of a foreign court or of the defendants themselves. There has been no suggestion of prejudice or unfairness to the defendants or that a fair trial cannot take place. The Crown submit that the case concerns a serious and organised international drug trafficking conspiracy which was focused on the small Island of Jersey. If evidence was to be gained it had to be obtained quickly. The unlawful actions which directly resulted in the gathering of the crucial evidence were a short lived infringement of Welsh's right to privacy, approximately half an hour's conversation was recorded in total. They were not disproportionate.
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> 40. In these circumstances I have no doubt where the balance lies. It would not be an affront to justice to allow this prosecution to continue, quite the reverse."

41. At para 42, he said that he was conscious that he had not dealt with "every detail or nuance of the arguments on either side", but that did not mean that he had not considered them.

The Court of Appeal

42. Having reviewed the authorities, the Court of Appeal concluded at para 43 that what underlies the jurisdiction to stay proceedings as an abuse of process is the "court's inescapable duty to secure fair treatment for those who come or are brought before it". It has jurisdiction to stay proceedings which have been made possible by executive action "done in breach of the rule of law and where, as a result of such action, it would be unfair to try the accused at all". Having considered the criticisms of the Commissioner's decision (many of which have been repeated to the Board), the court concluded that he was entitled to make the findings that he did and that his conduct of the balancing exercise was unimpeachable.

The appellants' challenge

43. Mr Orlando Pownall QC acknowledges that the focus of the appeal must be on the decision of the Commissioner. He recognises that the appeal must fail unless he can show that the Commissioner's decision was not one that was reasonably open to him or that he failed to take into account material factors. Mr Pownall does not contend that the Commissioner took into account immaterial factors.

44. He submits that the Commissioner failed to have sufficient regard to the fact that the investigative strategy adopted by the police in this case was calculated to ignore the laws of Jersey and foreign states and to mislead the Attorney General, Crown Advocate Jowitt and the Chief of Jersey Police as well as the foreign authorities, thereby seeking to admit in evidence the product of the audio monitoring device. It is also submitted that the Commissioner failed to take into account a number of points some of which are referred to at para 53 below.

Discussion

45. The police were unquestionably guilty of grave prosecutorial misconduct in this case. They acted in the knowledge that the Attorney General and the Chief of Jersey Police had not given authority to install the audio device without the consent of the relevant foreign authorities and would not do so; and that the foreign authorities had refused their consent. To some extent, they no doubt felt encouraged to take the approach that they took by the unwise advice given by Crown Advocate Jowitt on 11 July. But nothing can detract from the seriousness of the misconduct. The Commissioner was right to characterise it as "most reprehensible". It is a matter of concern to the Board that in his witness statement of 21 January 2008, DCI Minty said: "Given identical circumstances again I believe that we would respond in the same way". It is to be hoped that, having read the strictures of the Commissioner as well as those of the Board, he no longer adheres to this view.

46. So the case for a stay in this case was of considerable weight. The misconduct was very serious. It involved misleading the Attorney General and the Chief of Police and the authorities of three foreign states. Furthermore, unlike in the case of *Grant*, without the product of the unlawfulness, there would have been no trial. This was truly a "but for" case.

47. But as against that, there were factors which, taken cumulatively, the Commissioner was entitled to conclude weighed heavily against a stay. First, the offence with which the appellants were charged was very serious. Secondly, the ringleader Mr Warren, was a professional drug dealer of the first order. He had committed the index offence only a few weeks after his release from prison following a 13 year sentence. He had previously been sentenced in The Netherlands to sentences totalling 16 years' imprisonment for leading an organised group concerned in 1996 in the importation of large amounts of cocaine and the manslaughter of a fellow inmate thereafter.

48. Thirdly, to some extent the unwise advice of Crown Advocate Jowitt mitigated the gravity of the misconduct of the police. The officers must have felt encouraged and heartened by that advice.

49. Fourthly, there was no attempt to mislead the Jersey court. It was always understood by the police that the circumstances in which the evidence was obtained would be revealed to the appellants and that the court would be required to decide whether to refuse to admit the evidence under article 76(1) of the 2003 Law. The police knew that the court would decide whether to refuse to admit the evidence on the grounds that "having regard to all the circumstances, *including the circumstances in which the evidence was obtained*, the admission of the evidence would so adversely affect the fairness of the proceedings that the court ought not to admit it" (emphasis added). The court would be the arbiter on the fairness of admitting the fruits of the misconduct.

50. Fifthly, there was real urgency in this case. It was only on 11 July that the police obtained information that Mr Welsh intended to drive through France, Belgium and The Netherlands and that he intended to leave Jersey on 13 or 14 July. The French and Dutch authorities communicated their refusal of consent on 12 July. But as became clear from the letter of 7 January 2008 (see para 19 above), if there had been sufficient time, it would have been possible to obtain authorisation from the examining magistrates to install and use an audio device in The Netherlands. It was only early on 18 July that the police discovered that Mr Welsh was intending now to hire a car and drive to Amsterdam the following day. There was no time to make any further requests or applications. This was a fast moving situation. The Jersey police were understandably anxious to secure the evidence as to the nature of the drugs. They were dealing with experienced and sophisticated criminals, who could be expected to second guess the police tactics. It was in these circumstances that the police cut corners and acted unlawfully.

51. The Commissioner had to undertake a difficult balancing exercise. Some judges might have granted a stay; others, like the Commissioner, would have refused one. The Board finds it impossible to characterise the decision to refuse a stay in this case as perverse or one which no reasonable judge could have reached.

52. There was some discussion before the Board on the question whether the Commissioner was right to say, as he did at para 39, that there was no deception of a foreign court in this case. It is true that the amended Letter of Request sent to the French authorities on 13 July 2007 requested that a French judge grant permission for the installation and use of a tracking device (when it was known by the police that it was also intended to install and use an audio device). The Commissioner was right to say that there was no deception of a foreign court such as was practised on the Dutch court in *Glennon*, the case to which he referred in para 35. In *Glennon*, the deception achieved its object of obtaining a court order for the production of documents. In the present case, no French court was deceived. Consent for an audio device was never obtained.

53. The remaining question is whether the Commissioner failed to take into account any material factors. Mr Pownall has identified a number of points to which the Commissioner did not specifically refer in his judgment. These include (i) the email that was sent on 12 July to the Attorney General by Rebecca Boxall (Assistant Legal Adviser in the Law Officers' Department) saying that the police officers were "content with the position" since they would still be able to track the vehicle and have surveillance assistance; (ii) Crown Advocate Jowitt was not told on 18 July of the plan to install an audio device in the hire car; (iii) the first witness statement of DC Courtness in which he falsely said that he was "aware that authorisation had been granted for this procedure"; (iv) the email from DCI Minty to Chief Officer Power referred to at para 15 above; and (v) the false impression created by para 14 of the Chief Officer's Review referred to at para 18 above.

54. Only some of the detailed points now made were relied on before the Commissioner. At the end of para 20 of his judgment, he referred to the detailed defence submissions which contained references to the Attorney General and the Chief Officer being deceived or misled. At para 42, he acknowledged that he had not "dealt with every detail or nuance of the arguments on either side", but that did not mean that he had not considered them. He was not obliged to deal with every point of detail. He did deal with the main thrust of the appellants' case which was that the foreign authorities had been deliberately misled by the unlawful conduct of the Jersey police (below the level of the Chief Officer of Police). The appellants' case against Crown Advocate Jowitt and the Attorney General was less clear. It seems that it was being said that they were guilty of unlawfulness to some extent, but that they too were deceived and misled by the police. In these circumstances, it is hardly surprising that the Commissioner did not dwell on the detail of the alleged deception of the Attorney General and Crown Advocate Jowitt.

55. Before the Board, Mr Pownall has not sought to interfere with the Commissioner's findings exonerating both the Attorney General and Crown Advocate Jowitt. His case before the Board is that the misconduct was by the police (excluding the Chief Officer) and that the French and Dutch authorities, the Attorney General and Crown Advocate Jowitt were all misled.

56. The Board has no hesitation in rejecting the submission that the Commissioner left out of account any material factors. His failure to deal specifically with some of the points which it is now said he should have dealt with is explained by the simple fact that the focus of the argument before the Commissioner was on the deception of the French and Dutch authorities. The Commissioner did refer in terms to the case, in so far as it was developed in the detailed defence submissions, that the Attorney General and Crown Advocate Jowitt were the victims of the deception by the police. There is no reason to think that he did not take these matters into account in conducting the balancing exercise.

57. In any event, the deception of the Attorney General and Crown Advocate Jowitt was part of the overall deception that the police practised in order to conceal the fact that the necessary consents had not been obtained for the audio device. It was merely one aspect of that deception. Even if the Commissioner had not considered the effect of the deception on the Attorney General and Crown Advocate Jowitt, it is difficult to conceive that, if he had done so, he would have reached a different conclusion.

58. The short answer to this part of the challenge is that there is no reason to suppose that the Commissioner failed to have regard to the points to which he did not specifically refer; or that if he did fail to have regard to them, they would have made any difference to the outcome.

Conclusion

59. For all these reasons, the Board will therefore humbly advise Her Majesty that these appeals should be dismissed.

LORD HOPE:

60. I wish to add just a few words of my own to Lord Dyson's judgment, with which I am in full agreement.

61. First, it must be stressed that the States of Jersey Police cannot be allowed to escape censure for the illegality that they resorted to in this case on the view that it was just an operational decision for the police. The line between effective policing and illegal conduct may be a fine one, and in some cases it may be necessary for the police to work very close to the margin that divides what is legitimate from what is illegitimate. But in this case the officers concerned knew perfectly well that they did not have the necessary authority for the use in France, Holland or Belgium of the audio device in the car that was to be provided to Welsh by the French hire company. So they tricked the French police into thinking that the only device that they were installing was a tracking device. The junior officers who went to France were told that by their superiors that if any questions were asked by the French police they were to lie to them. The margin between what was legitimate and what was illegitimate was well known, and it was crossed deliberately in defiance of the laws of the foreign states.

62. There seems to be no doubt that this attitude was encouraged by Crown Advocate Jowitt's unwise advice to Detective Inspector Pashley that no court on the

Island would be likely to exclude the evidence but that it was an operational decision for him to take. But the range of operational decisions that the police may take does not include deliberate law-breaking, either at home or abroad. The police cannot take the law into their own hands. If conduct of that kind were to be permitted it would undermine the rule of law itself. That is why any abuse of state, or police, power must always be taken very seriously. It may lead the court to conclude that, however strong the evidence may appear to be against him, the defendant cannot have a fair trial or that, even if he can, it would be an affront to the public conscience to allow the proceedings to continue.

63. The Commissioner in this case, having carried out the balancing exercise identified by Lord Steyn in *R v Latif* [1996] 1 WLR 104, 113, said that he had no doubt where the balance lay. He said that it would not be an affront to justice to allow the prosecution to continue, quite the reverse: para 40. I would not, for my part, have come down so firmly in favour of that result as he appears to have done. In my opinion the issue was much more finely balanced, and I think that it would have been open to him to have decided the case the other way. There was no question in this case of the evidence having been obtained by torture, coercion, procurement or entrapment. And the Commissioner was right to describe the situation with which the police were confronted as a serious and organised international drug trafficking conspiracy. But this was not just a minor infringement of the law, resorted to in a situation of acute emergency. It was a sustained, deliberate and, one might say, cynical act of law-breaking. I am not persuaded that the decision which the Commissioner took was not one that was open to him. But the result of this appeal must not be taken as an indication that conduct of this kind will always lead to the same conclusion.

64. One further point. The leading case on what is to be taken to be an affront to the public conscience which requires the criminal proceedings to be stayed is *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42. Paul James Bennett, a citizen of New Zealand, was being deported from South Africa to New Zealand in 1991 as an illegal immigrant. There were at that time no direct flights between New Zealand and South Africa, so another route had to be chosen. Following an unsuccessful attempt to deport him by way of Taiwan it was decided to return him to New Zealand by way of London instead. He was arrested by a detective sergeant of the Metropolitan Police when he arrived at Heathrow Airport on 22 February 1991. The case is usually presented as one where Bennett was brought to this country by unlawful means and there was an undoubted abuse of process by the prosecuting authorities. In *R v Latif* [1996] 1 WLR 104, 112, for example, Lord Steyn said that Bennett had been forcibly abducted and brought to this country to face trial in disregard of extradition laws: see also *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, para 8, per Lord Bingham of Cornhill. Jones JA in the Court of Appeal in this case was right however to point out that the case was decided by the House of Lords on the assumption that Bennett's claims were true: see para 23.

65. On 10 March 1994 the Divisional Court, to which the case was remitted by the House of Lords, did indeed hold that the assumption on which the House of Lords had proceeded was established by the evidence, and the order for Bennett's committal was quashed: *R v Horseferry Road Magistrates' Court, Ex p Bennett (No 3)* [1995] 1 Cr App R 147. Mann LJ said that Bennett, who gave evidence, was not a person to whom any credit could be attached and that his belief in the gullibility of the court was remarkable. Nevertheless, he said that there was one document which was decisive in Bennett's favour as showing that he came to be in this country in defiance of extradition procedures in consequence of collusion between the English police and the South African authorities. This was an internal Crown Prosecution Service memorandum dated 4 February 1991 indicating that the Metropolitan Police had been told that the South African police were putting Bennett on the flight to New Zealand by way of London. As Mann LJ saw it, this memorandum contradicted the detective sergeant's evidence that he did not know that Bennett was being deported by that route. He said that the suggestion for a flight to London did not come from him, and that he was surprised to learn about this on the evening of 20 February 1991.

66. Legal historians might like to note however that, when Bennett brought proceedings to challenge a warrant which a sheriff had granted for his arrest to face two charges of having committed fraud in Scotland, the High Court of Justiciary was presented by the Solicitor General for Scotland with an account of the events which cast an entirely different light on the memorandum to which Mann LJ attached such importance: see *Bennett v H M Advocate* 1995 SLT 510. According to that account, the decisions as to the route by which Bennett was to be deported were taken by the South African police alone. They decided, after the date of the memorandum of 4 February 1991, that it was too expensive to repatriate him to New Zealand by way of London as they had originally intended. It was Bennett's own attempts to thwart his repatriation to New Zealand by way of Taiwan from South Africa by destroying his passport during the flight to Taiwan that led to his being sent to New Zealand by way of London instead as the Taiwan route was no longer available. The police had to be informed about the date and time of his arrival, as arrangements had to be made for his transfer from Heathrow to Gatwick Airport for the connecting flight to New Zealand. That information was passed to the Metropolitan Police on 20 February 1991. There was nothing illegal or improper about the decision to arrest Bennett when he arrived in London.

67. Having failed in his attempt to persuade the High Court of Justiciary to set aside the Scottish warrant, he was arrested and admitted to bail. But, in breach of his bail conditions, he left the United Kingdom before he could be put on trial. He then went to Australia, where he was again arrested and charged with six counts of fraud. Once again he managed to elude the authorities, and that case too did not go to trial. It is ironic that such a conspicuous lawbreaker should have given his name to the leading authority on the court's power to ensure that executive action is exercised responsibly.

68. The fact that the case was decided on assumed facts does not, of course, deprive the decision of the House of Lords in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 of any of its authority. But the account that was given in *Bennett v H M Advocate* may serve as a warning, if one is needed, that not everything that a defendant may allege against the authorities in an attempt to escape the ends of justice can be assumed to be true. Unfortunately there is no question in this case of the allegation that the States of Jersey Police engaged in an illegal activity to obtain the evidence on which the defendants were to be prosecuted resting on a mere assumption. That is why the message that such conduct cannot be condoned whatever the circumstances is so important and cannot be stressed too strongly even if, as in this case, the competing public interest in ensuring that those charged with grave crimes should be tried is held to predominate.

LORD RODGER:

69. I agree that, for the reasons given by Lord Dyson, the appeal should be dismissed.

70. Given the size of Jersey, its geographical position near France and its close contacts with the United Kingdom, investigations frequently have to be carried on, in part at least, outside the Bailiwick. Therefore the States police often have to co-operate – as in this case – with other police forces which are subject to different laws. Especially when time is short, it may be difficult to obtain all the necessary authorisations to pursue an effective investigation. As this case shows all too clearly, in such circumstances the States police may be tempted to cut corners and to proceed in defiance of the requirements of the relevant foreign legal systems. Not only is such conduct utterly wrong in principle, but in the long run it is liable to damage relations with other police forces and law enforcement agencies and to make them less willing to co-operate with the Jersey police.

71. It is therefore imperative that the States police do not take the outcome of this appeal as any kind of signal that they can repeat this kind of conduct with impunity and, more especially, without running the risk of any subsequent criminal proceedings being stayed as an abuse of the process of the court. On the contrary, the fact that the Board has warned the States police not to repeat such conduct would be a factor to be taken into account when the Commissioner had to decide whether some future proceedings should be stayed in comparable circumstances.

LORD BROWN

72. I too would dismiss this appeal but rather than merely agree with the Board's judgment I am anxious to explain, first, why I take a rather different view about this case on its facts from that which I took in *R v Maxwell* [2010] UKSC 48 and, secondly, what I believe to be the overriding principle now to be derived from the majority judgments in *Maxwell* and from the present case. Having read the judgments to be given on this appeal by Lord Dyson for the Board and by Lord Hope, I can do this really quite shortly.

73. *Maxwell* concerned a conviction for murder and two robberies procured, as later investigations and a reference by the Criminal Cases Review Commission were to show, by prosecutorial misconduct of the gravest kind. On a second appeal some twelve years after conviction, there was accordingly no dispute but that the conviction had to be quashed. The only issue for the Court of Appeal was whether Maxwell should be retried, this time not on the basis of the irredeemably tainted evidence given at his original trial but rather based on a series of post-conviction admissions of guilt. The Court of Appeal decided that he should be retried, a decision upheld by the majority of the Supreme Court (Lord Rodger, Lord Mance and Sir John Dyson, myself and Lord Collins dissenting) – thus the need for delay in reporting the detailed judgments.

74. I took the view that *Maxwell* was a "but for" case – in the same sense as wrongful extradition and entrapment cases are generally regarded as "but for" cases – because "but for the prosecutorial misconduct which initially secured the appellant's conviction and then ensured the failure of his appeal, he would never have made the series of admissions upon the basis of which it is now sought to prosecute him afresh" (para 102). And (at para 108) I suggested that in such cases it would usually be inappropriate to try (or re-try) the defendant because "but for the executive misconduct, either there would never have been a trial at all (as in the wrongful extradition and entrapment cases) or (as in the present case) because the situation would never have arisen whereby the all important incriminating evidence came into existence (which is not, of course, to say that the 'fruit of the poison tree' is invariably inadmissible)."

75. Lord Collins and I thought that, on the facts of that particular case, there was really only one decision properly open to the Court of Appeal, namely not to order a retrial. As Lord Collins simply put it: "the interests of justice demand the application of the integrity principle". The majority, however, took a broader view of the nature and scope of the discretion open to the Court of Appeal. Sir John Dyson, giving the leading judgment, held that: "The court was right to consider that the 'but for' factor was no more than a relevant factor and that it was not determinative of the question whether a retrial was required in the interests of justice" (para 26). Lord Rodger and

Lord Mance similarly held (respectively at paras 47 and 59) that the Court of Appeal had been entitled to reach its decision to order a retrial. That and that alone, I think it fair to say, was the essential difference between the majority and minority judgments in the case. (One thing they had in common it may be noted, was grave doubts as to the correctness of the Court of Appeal's decision in *R v Grant* [2006] QB 60 – see my judgment at para 96 and Sir John Dyson's at para 28. As, moreover, Lord Dyson now points out at para 34, one of the members of the Court of Appeal in *Grant* dissociated herself from it in the Jersey Court of Appeal in the present case and, strikingly, leading counsel for the appellants felt unable to support the decision before us.)

76. In the Board's judgment in the present case (para 46**)** Lord Dyson notes that, without the product of the unlawfulness here, there would have been no trial and adds: "This was truly a 'but for' case." Naturally I see what he means. I should explain, however, that it was not in this sense that I was using the expression in *Maxwell* or suggesting that *Maxwell* fell into the "but for" category. The distinction between the two cases is this: the defendant in *Maxwell*, but for the police's misconduct, would never have made the confessions that were to form the basis of his retrial; it was accordingly the misconduct itself which induced Maxwell to act to his detriment. By contrast the misconduct here had no effect whatever upon the appellants' conduct. The present case is a "but for" case only in the sense that, but for the unlawfully obtained evidence, the appellants would not have been prosecuted or convicted: the Crown would not have had sufficient evidence. This, in short, is a "fruit of the poison tree" case – the very distinction I made in para 108 of my judgment in *Maxwell* – see para 74 above.

77. The admission of unlawfully obtained evidence raises, of course, distinct, albeit to some extent related, considerations to those arising on abuse of process applications. Article 76(1) of the Jersey Law (set out in para 2 of the Board's judgment), in terms identical to those of section 78(1) of the Police and Criminal Evidence Act 1984 (PACE), confers upon the court a discretion whether or not to admit evidence, having regard inter alia to "the circumstances in which the evidence was obtained". Unlawfully obtained evidence comes, of course, in many shapes and sizes. Notable, however, amongst the situations in which it has been regarded by the House of Lords as admissible are where evidence was obtained from a covert electronic listening device installed in apparent breach of article 8 of the European Convention on Human Rights (*R v Khan (Sultan)* [1997] AC 558); and where use was made of a DNA sample which should have been destroyed under section 64 of PACE (before that section's amendment) (*Attorney General's Reference (No 3)* of 1999) [2001] 2 AC 91) – where the House clearly contemplated that the judge could properly have exercised his section 78 discretion in favour of admitting the relevant evidence.

78. That said, the law-breaking in the present case was, as Lord Hope observes at para 63 of his judgment, "sustained, deliberate and, one might say, cynical", and, like

him, I regard the judgments which the Commissioner had to reach here (the judgments, as it seems to me, both on the abuse of process application and on the related article 76 application) as very finely balanced indeed. It would certainly have been open to the Commissioner to decide one or other of these closely related applications in favour of the defendants and, were the Jersey Police to act in this sort of fashion in future, realistically the court might have no alternative but to strike the balance decisively in favour of indicating the rule of law, however undeserving the accused.

79. That, however, is not the position in the present case. It is not here suggested that the police had acted similarly in the past and clearly – looking at some of the relevant considerations identified by Professor Choo (see para 24 of the Board's judgment) – the police were not acting maliciously; their misconduct was committed in circumstances of obvious urgency; and the defendants were charged with offences of real gravity (the statement of facts and issues recording that Warren alone is currently assessed to have benefitted down the years from drug trafficking activity in excess of £142m, although he disputes this).

80. In short, the essential principle for which in turn *Maxwell* and now this case should be seen to stand is that the court seised of the question whether proceedings should be stayed as an abuse of process (or the analogous question whether a retrial should be ordered) has a very broad discretion indeed. I concur in the Board's conclusion that the limits of this discretion were not exceeded in the present case.

LORD KERR:

81. In agreeing, as I do, with the disposal of this appeal that Lord Dyson has proposed, I too wish to make unequivocally clear my condemnation of the behaviour of the police officers who perpetrated the deceptions which have been so graphically described in Lord Dyson's judgment and in the judgments of the courts in Jersey. The decision of the Board in this appeal should not be seen – nor should it be represented – as the condoning or overlooking of such behaviour.

82. In a statement made on 21 January 2008 Detective Chief Inspector Minty said that "given identical circumstances again I believe that we would respond in the same way". Lord Dyson has expressed the hope that, given the strictures of the Commissioner and the Board, the detective chief inspector will no longer adhere to this view. I would go further. Such a view is not in any circumstances tenable. It is entirely incompatible with the proper discharge of the duties of a police officer. It has now been found that the police in Jersey deceived not only foreign authorities but also

their own Chief of Police and the Attorney General. The repetition of such behaviour should not be countenanced.

83. In *R v Latif* [1996] 1 WLR 104, 112H Lord Steyn suggested that the law was settled in relation to what has been described as the second category of cases in which an abuse of process application may be made. That may have been an optimistic forecast, as this case and the recent decision of the Supreme Court in *R v Maxwell* [2010] UKSC 48 demonstrate. Be that as it may, it appears to me that a number of principles have emerged from recent jurisprudence. These may be stated as follows: -

(i) the principal purpose of the examination, in the second category of cases, of the question whether proceedings should be stayed is to determine whether this is necessary in order to protect the integrity of the criminal justice system – see *R v Maxwell* at para 13. This principle has been expressed in various, slightly differing ways in a number of judgments on the subject. Thus, in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 at 74G Lord Lowry said that a stay will be granted where a trial would "offend the court's sense of justice and propriety". In *Latif* Lord Steyn stated, at p 112F, that a stay should be granted where to allow the trial to proceed would "undermine public confidence in the criminal justice system and bring it into disrepute". In *R v Mullen* [2000] QB 520 Rose LJ said, at p 534C-D, that a stay should be granted notwithstanding the certainty of an accused's guilt where to refuse it would lead to "the degradation of the lawful administration of justice". I consider that it should now be recognised that the best way to describe this basis for a stay is that chosen by Lord Dyson in *R v Maxwell* – that it should be granted where necessary to protect the integrity of the criminal justice system.

(ii) A balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose. As Lord Steyn observed in *Latif*, the various factors that might arise in the range of cases in which this issue may have to be considered are potentially extensive and it is unwise to attempt to list these exhaustively or, as Lord Dyson has said in para 26 of his judgment in this appeal, to rigidly categorise those cases in which a stay will be granted. But where a stay is being considered in order to protect the integrity of the criminal justice system, "the public interest in ensuring that those that are charged with grave crimes should be tried" will always weigh in the balance - Lord Steyn in *Latif* at 113A-B. Lord Steyn mentioned that a possible countervailing factor was that the impression should not be created that the court is giving its sanction to an approach that the end justifies any means. With the emphasis that is given in this and other cases to statements that prosecutorial or police misbehaviour will never be condoned, this may not be as significant a consideration as heretofore. Other factors that will commonly call for evaluation are those referred to in the passage from the book by Professor Choo, *Abuse of*

Process and Judicial Stays of Criminal Proceedings, 2nd ed (2008), quoted by Lord Dyson in para 24 of his judgment but, again, these should not be regarded as exhaustive.

(iii) The "but for" factor (i e where it can be shown that the defendant would not have stood trial but for executive abuse of power) is merely one of various matters that will influence the outcome of the inquiry as to whether a stay should be granted. It is not necessarily determinative of that issue.

(iv) A stay should not be ordered for the purpose of punishing or disciplining prosecutorial or police misconduct. The focus should always be on whether the stay is required in order to safeguard the integrity of the criminal justice system.

84. Professor Choo, in the book referred to above, has discussed the possible uncertainty that could arise where in the second category of cases the question has been framed as an inquiry as to whether it would be "fair" to try the accused person. This, he has said, risks possible confusion with the first category stay cases *viz* where it has been determined that a fair trial is not possible. For my part, I think that there is much to be said for discarding the notion of fairness when considering the second category of stay cases. Fairness to the accused, although not irrelevant in the assessment of whether it is fair to allow the trial to continue, is subsumed in the decision whether to grant a stay in second category cases based on the primary consideration of whether the stay is necessary to protect the integrity of the criminal justice system.

85. Ashworth and Redmayne in *The Criminal Process*, 3rd ed (2005), p 323 also refer to the possible confusion that can arise from discussion of fairness in second category cases:

> "A defendant can have a fair trial so long as he is not exposed to an inappropriate risk of false conviction … but it may not be fair to try a defendant where the authorities have acted unjustly towards him … it is easy to get confused by moving between the fair trial/ fair to try questions …"

86. If, as I believe should now be the case, the issue whether a stay should be granted in second category cases should be determined primarily on the basis that a stay is or is not necessary to protect the integrity of the criminal justice system, this confusion can be avoided.