IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2006 No. 327

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF REBECCA MIDDLETON DECEASED

AND IN THE MATTER OF A DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS DATED 30TH MARCH 2006

BETWEEN:

DAVID MIDDLETON

Applicant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Cherie Booth QC, Kelvin Hastings-Smith and John Riihiluoma for the Applicant;
James Guthrie QC and Melvin Douglas for the Respondent;
Charles Richardson for Mundy; and
Elizabeth Christopher for Smith.

Date of Hearing: 16th and 17th April 2007
Date of Judgment: 4th May 2007

JUDGMENT

Introduction

1. This matter comes before me on an application for judicial review of a decision of the Director of Public Prosecutions ('the DPP'), dated 30th March 2006, not to institute a prosecution for the offence of sexual assault against Justis Smith and Kirk Mundy. The matter has a long history, and arises out of the brutal rape and murder of the applicant's 17 year old daughter, Rebecca, in July 1996.

2. In July 1996 Rebecca, a Canadian citizen, was staying with a young female friend in Bermuda. On 2nd July they went out for the night, and, at the end of the evening they had trouble getting a taxi to bring them home. As a result, at some time after 2 a.m. in the early hours of 3rd July 1996, Rebecca accepted a lift from two men, later identified as Smith and Mundy, on a motor-bike. About an hour later she was discovered by passers-by on a remote road, her clothes cut off her, bleeding from multiple stab wounds and near to death. She had been sexually assaulted. She died before the ambulance arrived, and before she could say anything to identify her attackers.

3. Smith and Mundy were subsequently arrested on the 10th July and questioned. From early on Mundy admitted that he had had sex with Rebecca, but asserted that it was consensual. He offered to plead to the offence of being an accessory after the fact to murder, and to turn Crown's evidence against Smith. Astonishingly, given the circumstances, this offer was accepted, and on 13th July 1996 Mundy was charged accordingly. The matter was then run through the normal process: on 11th October he was committed for trial; the indictment was preferred on 14th October; and on 16th October 1996 he appeared in the Supreme Court, pleaded guilty, and received a sentence of five years' immediate imprisonment.

4. The case against Smith took a different course. On 13th July 1996 he was charged with premeditated murder. On 21st October 2006, he was committed to the Supreme Court for trial, and the indictment was preferred on 12th November. The matter then sat there for a year. It may be that during this period further forensic evidence was obtained, which cast doubt on Mundy's version, but for whatever reason on 9th January 1998 the Crown charged both men jointly with the murder. Mundy immediately applied to quash the charge against him, but on 6th February 1998 I dismissed that application. Consent was then given by another Judge for a voluntary bill of indictment against the two of them, thus dispensing with the need for a Preliminary Inquiry. Mundy appealed the refusal to quash the new charge, and on 26th March 1998 the Court of Appeal allowed his appeal and made an order prohibiting the Attorney General from pursuing the prosecution against him. An attempt to appeal the matter to the Privy Council failed when the Privy Council refused the necessary permission to appeal on 6th July 1998.

5. The case against Smith alone then came on for trial on 23rd November 1998. However, at the close of the prosecution's case the judge upheld a defence submission of no case to answer, and directed the jury to return a verdict of not guilty, which they did. This was appealed by the prosecution, and on 9th April 1999 the Court of Appeal allowed that appeal and ordered a retrial. Smith then appealed that decision to the Privy Council, and on 28th February 2000 the Privy Council allowed his appeal and restored the decision of the trial Judge. Although the Privy Council described the Judge's conclusion on the no-case submission as "no doubt a surprising view" and as "perhaps an astonishing one," they held that in Bermuda there was no right of appeal by the prosecution against an acquittal following a finding of no case to answer on the facts.

6. The effect of that was that the Judge's decision acquitting Smith stood, and that means that, under the law as it stands, he can never be prosecuted again for the murder. This is because of section 6(5) of the Constitution[1], which I deal with further in paragraph 16 below. It would take legislation to change that, either by allowing an appeal from an acquittal on the facts, or by allowing the Court of Appeal to order a retrial in certain

[1] i.e. The Constitution of Bermuda as set out in Schedule 2 to the Bermuda Constitution Order 1968.

circumstances. That has been done in England, where the law has been changed so that the DPP can apply to the Court of Appeal for a retrial of a serious offence if compelling new evidence emerges. The law has not been changed that way in Bermuda.

7. The outcome was, therefore, that no-one was convicted for this appalling crime. The matter did not rest there, as there was an inquiry, although its terms of reference were not limited to this matter, and there have been recurrent expressions of pubic outrage both here and abroad, particularly in Canada. In addition, Rebecca's father persisted with a request that the authorities consider further charges against the two men, and in particular charges of sexual assault[2]. When the current DPP took up her post in July 2004 he made that request to her, and she undertook to review the matter, which she did, although it took her nearly two years to do so. Eventually, in March 2006, she came to a decision not to prefer further charges, and she gave short reasons for that decision. It is that decision, and those reasons, which this court is now asked to review.

The DPP's Decision

8. The DPP gave short reasons for her decision. She was not obliged to do so, but it is regarded as good practice. She considered that it is "a well established rule of law that a man should not be punished twice for an offence arising out of the same or substantially the same set of facts". As a statement of the law that is broadly correct. However, she went on to say that to do so would offend against the principle "that there should be no sequential trials for offences on an ascending scale of gravity" and that to institute fresh proceedings would infringe the common law principles enshrined in section 6(5) of the Constitution. She therefore considered that it would be an abuse of process to institute fresh proceedings. In addition, she also considered that, given the passage of time and the extensive publicity which this case has received, both men could mount a serious challenge that any new prosecution would be an abuse of process, which the Crown would be hard-pressed to surmount.

The Application for Judicial Review

9. The nominal respondent to this application is the DPP. However, I also ordered it to be served on the two men concerned, Mundy and Smith, pursuant to RSC Ord. 53, r. 5(3), which requires that the proceedings must be served on "all persons directly affected". I took the view that Mundy and Smith were directly affected, as the application concerned a decision not to prosecute them. Both appeared by counsel at the hearing, although only Mr. Richardson for Mundy chose to address the court.

10. What I am being asked to do on this review is quash the DPP's decision not to prosecute, and to declare that, as a matter of law, it would not be unlawful for her to

[2] The Criminal Code (Sexual Offences) Amendment Act 1993 did away with the old offence of rape, and replaced it with a broader offence known as 'sexual assault', which carries a maximum penalty of 20 years imprisonment. If it is accompanied by aggravating circumstances, such as the use of a weapon or bodily harm to the victim, it is called 'serious sexual assault', for which the maximum is 30 years imprisonment.

institute new proceedings for any offence other than murder. I am also asked to order her to reinvestigate the matter, including obtaining an up-to-date forensic evaluation of the evidence. I am then asked to order her to reconsider her decision on the basis of any new evidence and of the law as I have declared it to be[3].

11. No point was taken on the reviewability of the DPP's decisions, it being accepted that the DPP's decision not to prosecute was amenable to judicial review[4]. The approach to such a review is that, although the power should be sparingly exercised, where the decision is one against prosecution "the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied[5]". The grounds for such a review are the usual public law grounds of illegality (including mistake of law), procedural unfairness and irrationality.

12. In considering all of this it must be remembered that the DPP enjoys a special status under the Constitution. It is an important constitutional principle that the office of DPP should be free from outside interference or influence, and should not be subject to the direction or control of any other person or authority: See sections 71(6), as applied by section 71A, of the Constitution. That means that no-one, not even the courts, can tell her how to exercise the discretion whether or not to prosecute. Similarly it is not the function of the courts to decide whether or not people should be prosecuted[6]. The courts can only intervene if the DPP gets the law wrong or acts in a way which is so unreasonable as to be irrational, and then only to say what the law is and to identify the unreasonableness. Having done so, the most the court can then do is order her to reconsider, which is why the application is framed as it is.

The Issues

13. The applicant says that the DPP, when making her decision not to prosecute, got the law wrong. It is also said that it was unreasonable of her not to have the existing physical evidence re-examined using modern scientific techniques. The primary error of law is said to be a misinterpretation and misapplication of the rule than no-one can be tried

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[3] The actual application asks for:
(1) An order of certiorari in respect of the decision of the DPP dated 30th March 2006 not to prosecute Smith and Mundy for sexual assault in respect of the incidents involving Rebecca Middleton on 3rd July 1996;
(2) A declaration that the prosecution of Smith and Mundy for any offences against Rebecca Middleton, other than the offence of murder or any offences for which they could have been convicted as a result of the original charges against them, would not be unlawful;
(3) An order of mandamus requiring the DPP to reinvestigate the matter, including but not limited to obtaining up-to-date forensic evidence;
(4) An order of mandamus requiring the DPP to reconsider her decision on the basis of that evidence and the finding of this court, including a consideration of all potential charges arising on the facts;
(5) Such further or other order as the Court deems just and appropriate.

[4] For the law on that proposition, see Mohit v DPP [2006] UKPC 20; and see also R v DPP ex p. Manning [2000] 3 WLR 463.

[5] Per Lord Bingham in R v DPP ex p. Manning [2000] 3 WLR 463 at 474.

[6] See e.g. Viscount Dilhorne in R v Humphrys [1977] AC 1 at 26E: "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred."

twice for the same offence. It is then said that she was in error in considering that charging Mundy and Smith with sexual assault would amount to an abuse of process, and that in any event she was wrong to take it upon herself to determine what would be an abuse of process, and misdirected herself in doing so. It is also said that the DPP failed to have regard to the constitutional rights of the victim and her family, and failed properly to balance Mundy and Smith's constitutional fair trial rights against those rights (and this includes failing to look for and consider any new evidence). Finally it is said that she improperly limited herself by only considering potential charges of sexual assault and not other charges which could arise on the facts of this case.

14. In response, Mr. Guthrie for the DPP concedes that the applicant and Rebecca have suffered an injustice, and that, with the benefit of hindsight, the decision to accept Mundy's plea to a lesser charge was wrong. He also accepts that the decision of the trial judge on Smith's no case submission was "surprising" and "perhaps astonishing", as the Privy Council said. He concedes that the applicant is entitled to say that each of these decisions should not have been made. He argues, however, that it is now too late to put those injustices right, and that it became too late in the case of Mundy when the Privy Council refused permission to appeal the Court of Appeal's decision, and, in the case of Smith, when the Privy Council allowed his appeal.

15. Mr. Guthrie's primary contention in support of the DPP's decision is that, notwithstanding various errors in her expression of the law, the DPP essentially comprehended the heart of the matter, which is that there is a common law rule against double jeopardy which prohibits sequential trials arising out of the same facts, save in exceptional circumstances. He argues that the DPP was entitled to take that into account in arriving at her decision, and that in doing so she applied the principles correctly. Although he does not put it so bluntly, once that is accepted all the other points fall away.

The Alleged Errors of Law

(i) The Narrow 'Autrefois' Rule

16. The primary point that the DPP is said to have got wrong is that she predicated her decision upon the proposition that to charge Smith and Mundy with sexual assault would breach their rights under section 6(5) of the Constitution, which says:

> "(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

In line with this, the Criminal Code Act 1907 ('the Criminal Code') contains provisions enabling a defendant to raise a previous conviction or acquittal by way of a special plea[7]. Such a plea is known[8] by the old law French terms of "autrefois convict" and "autrefois acquit" and hence the rule is sometimes referred to by the legal shorthand of "the autrefois rule".

17. To the extent that the DPP referred to Smith and Mundy's constitutional rights in the reasons for her decision, she did indeed get it wrong. It would not contravene section 6(5) to charge them now with sexual assault, because they could not have been convicted of that on their previous trials. This is explained at length in the leading case on the subject, the decision of the House of Lords in Connelly v DPP [1964] AC 1254 (to which I will have to return). The point is quite clear, was conceded at the outset by Mr. Guthrie and there is no argument about it.

18. If that were the end of the matter I would have thought it appropriate to identify the mistake of law and require the DPP to reconsider, applying the correct principles. However, that is not the end of the matter, because section 6(5) of the Constitution does not embody the whole of the law on the subject. There is a wider common-law principle against double jeopardy, which the DPP also identified and purported to rely upon (although at times she did indeed confuse it with the stricter rule). If that wider principle applies to the circumstances of this case, and if the prosecution could not bring itself within any exception to that principle, then I would have no grounds for interfering with the DPP's decision, either because she in fact got the law right, or because, even if she muddled the law, an application of the correct principles would produce the same result. I turn, therefore, to consider the wider principle and the exceptions to it.

(ii) The Wider Principle

19. It has long been recognized that the strict autrefois rule does not contain the whole of the law on the subject of double jeopardy. This is because, in a case where a number of different offences were committed at or about the same time, it would be easy to circumvent the rule by splitting up the case into a series of separate charges, and then trying them sequentially. If the defendant was acquitted on the first charge, the prosecutor could move on to the second, with a different judge and jury, and have another go. This

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[7] See sections ss. 506(2)(c) and (d) of the Criminal Code which provide:

> "506 (1) If the accused person does not apply to quash the indictment, he must either plead to it, or demur to it on the ground that it does not disclose any offence cognizable by the Supreme Court.
>
> (2) If the accused person pleads, he may plead—
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> . . .
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> (c) that he has already been convicted upon an indictment on which he might have been convicted of the offence with which he is charged, or has already been convicted of an offence of which he might be convicted upon the indictment;
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> (d) that he has already been acquitted upon an indictment on which he might have been convicted of the offence with which he is charged, or has already been acquitted upon indictment of an offence of which he might be convicted upon the indictment;"

[8] See for example the side-note to section 507 of the Criminal Code.

was perceived as oppressive, and the common law gradually evolved various principles to deal with it. These principles received their modern statement in the decision of the House of Lords in Connelly v DPP (*supra*).

20. In Connelly the appellant was charged on two separate indictments arising out of an office robbery in which an employee was killed. One indictment charged murder alone. The other charged robbery with aggravation. The charges were split up in this way because at that time in England there was a rule of practice that charges for other offences should not be included in, or tried at the same time as, an indictment for murder[9]. The appellant was convicted at his trial for murder, but acquitted on appeal on the basis of a misdirection as to his defence of alibi. The prosecution then sought to proceed on the second indictment for robbery with aggravation, and the issue arose whether they were precluded from doing so by the *autrefois* rule.

21. Connelly is a difficult case. The report runs to 114 pages, and contains a lengthy consideration of the pre-existing law. There are five distinct judgments, one from each of the law lords involved, and they differ in important details, even when agreeing on the broad principles. The House of Lords was unanimous in deciding that the appellant could not avail himself of a plea of *autrefois acquit* because he could not have been convicted of the robbery on the trial of the indictment for murder. The question then became whether there was some other doctrine which would prevent his subsequent trial for robbery? Again, their Lordships were unanimous that there was not, but for different reasons. The majority (Lords Reid, Devlin and Pearce) held that there was a wider doctrine of abuse of process which prohibited sequential trials arising out of the same circumstances, but that in the exceptional circumstances of that case it did not apply[10]. The minority (Lords Morris and Hodson) did not think that there was such a doctrine, although they would have been prepared to address the problem of sequential trials by way of a different doctrine, that of issue estoppel. I do not need to consider that further, because in the subsequent decision of Humphreys [1977] AC 1, a differently constituted House of Lords rejected the concept of issue estoppel in the criminal law, but endorsed the majority approach in Connelly, which thus authoritatively represents the law.

22. The simplest statement of the rule in Connelly is that in the short speech of Lord Reid:

> "I would think that the Indictments Act, 1915, was designed to ensure that all charges arising out of the same facts are combined in one indictment and thus to prevent there being a series of indictments and trials on substantially the same facts. . . . I realise that there are cases where, for one reason or another, it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all the charges which he intends to prefer. But in a case where it would have been

[9] The rule dated back to the case of R v Jones [1918] 1 KB 416, but was abolished by the decision in Connelly.
[10] The exceptional circumstance was the rule which forbade other charges being joined in an indictment or trial for murder.

> improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general question as to the extent of the discretion of the court to prevent a trial from taking place."

The reason for the final sentence in that quotation is that there was dissension among their Lordships as to the existence and extent of a general discretion to stay criminal proceedings on the grounds of abuse of process. It is plain that Lord Reid did not want to get to drawn into a wider consideration of the extent of that discretion, and intended to avoid that contentious issue by stating the rule as he did[11].

23. If that were the end of it, the answer to this application would be clear. The prosecutors having failed to charge Smith and Mundy at the time with sexual assault (or with any other additional offences), and there being no good reason for them having not done so, they would be precluded from doing so now. But Lord Reid's succinct statement of the rule is not the only one. Lord Devlin ventured a more detailed analysis and justification of the rule, and when he came to formulate it he did so in slightly different terms. The essence of Lord Devlin's formulation is that the general rule is: (i) a prosecutor must join all charges arising out of the same set of facts in the same indictment; and (ii) a judge should stay a subsequent indictment where that rule has not been followed. The basis of this is that it is oppressive not to join the charges where it is otherwise proper to do so, and as result Lord Devlin recognises that there will be occasions where it is not oppressive, and which will therefore constitute exceptions to the rule. He refers to such cases as "special circumstances", and he gives a list, which does not purport to be exclusive. The importance of that to the present case is that it opens the door to the applicant to argue that there are "special circumstances" here, so as to disapply the general rule. That is the crux of this case. It is necessary therefore to consider in some detail what Lord Devlin in fact meant by "special circumstances".

24. First, at pp. 1358 – 59, Lord Devlin established the general rule that all the charges should be joined in one indictment:

> "Accordingly, my Lords I would hold that the general rule to be observed in criminal cases . . . is that set out in rule 3[12]. This rule is in form permissive. So, of course, is the rule relating to joinder in civil cases originally introduced by the Common Law Procedure Act, 1852, s.41. Both must, in my opinion, be read subject to the principle stated by Wigram V.-C. that "the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject to litigation in respect of matter which might have been brought forward as part of the subject in contest." I think it is right to say that for many years past, in

[11] Having stated the rule, Lord Reid went on to cast his vote with those in favour of a broader power to prevent abuse of process by saying: "But I think there must always be a residual discretion to prevent anything which savours of abuse of process." The fact that he did so, however, should not distract from the clarity of the rule as he framed it.

[12] i.e. rule 3 of the English Indictment Rules 1915, which said:

> "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

response to the observations of the Court of Criminal Appeal, Rule 3 has in practice been treated in this way. . .”

25. Having established the rule that, where it was permissible, joinder was also mandatory, Lord Devlin then turned to consider the consequences of a breach of that rule:

> “The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 where it can properly be used.”

26. To digress for a moment, the formulation of the rule by Lord Devlin is based upon the wording of rule 3 of the English Indictment Rules 1915. The equivalent provision in Bermuda is section 480 of the Criminal Code[13], and it is not framed in exactly the same way. In particular it does not use the words “founded on the same facts”. However, in my judgment the real rule is as formulated by Lord Reid, namely that where he can “the prosecutor should combine in one indictment all the charges which he intends to prefer”. In this case, section 480(1)(b) of the Criminal Code was apt to permit charges of sexual assault to have been joined in an indictment with the murder charge, and therefore the rationale of the wider rule in Connelly applies to the facts of this case notwithstanding the differences in legislative form.

27. Having established that a failure to bring all the available charges in one indictment is, without more, to be treated as oppressive and require a stay, Lord Devlin then goes on to consider the possible exceptions to that rule:

> “But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of thing that would, I think, clearly amount to a special circumstance. Under section 5 (3)[14] of the Act a judge has a complete discretion to order separate trials of offences charged in one indictment. It must, therefore, follow that where the case is one in which, if the offences in the second indictment has been included in the first, the judge would have ordered a separate trial of them, he will in his discretion allow the second indictment to be proceeded with. A fortiori, where the accused has himself obtained an order for a separate

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[13] Section 480 of the Criminal Code, provides:

> “480 (1) A charge or charges for any indictable offence may be joined in the same indictment with any other such charge or charges . . . —
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> (a) if those charges are founded on the same act or omission; or
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> (b) if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or
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> (c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character,
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> but shall not otherwise be so joined:”.

[14] In Bermuda the equivalent power is contained in section 480(2)(b) of the Criminal Code, and it is predicated upon prejudice to the accused.

> trial under section 5 (3). Moreover, I do not think that it is obligatory on the prosecution, in order to be on the safe side, to put into an indictment all the charges that might conceivably come within rule 3, leaving it to the defence to apply for separation. If the prosecution considers that there ought to be two or more trials, it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantage that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order in the form made by Glyn-Jones J. in *Reg. v. Smith*."

28. It is important to note that Lord Devlin's examples of special circumstances are simply an expansion of Lord Reid's more succinct statement of when a second indictment is allowable – i.e. they are all cases where "it would have been improper to combine the charges . . . or where the accused has accepted without demur the prosecutor's failure to combine the charges". None of them are examples of a broader discretion based on extraneous factors. It is also important to note that it is "special" and not "exceptional" circumstances.

29. I consider, therefore, that the real rule is not that there have to be exceptional circumstances which might justify the bringing of the later charge, but rather that there have to be special circumstances, or good reason, for not joining them together at the outset. That is implicit in Lord Devlin's arguments justifying the existence of the rule, for instance his statement at p. 1353: ". . . it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time." That is also how Lord Reid expressed the rule, and that is how it was understood by Lord Dilhorne in R v Humphreys (*supra*) at p. 26, in which Connelly was considered at length:

> "If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should be exercised in the most exceptional circumstances. In cases where there could be one trial for more than one offence and it is sought *without good reason* to have two trials on the same facts, it may be right it exercise it . . . ". [My emphasis]

(iii) Application of the Wider Principle to This Case

30. Ms. Booth argues that this case is not within the wider rule in Connelly, or, if it is, in considering whether there are special circumstances, the court can take into account broader factors unrelated to the narrow question of whether or not it would have been proper to join the charges in one indictment. In considering this, it is important to understand that if the Connelly principle applies, the applicant can only succeed if he can bring the case within the meaning of "special circumstances" as used by Lord Devlin. Otherwise the application must fail. In my judgment, for the reasons which follow, none of the things relied upon by Ms. Booth are capable of constituting special circumstances.

(a) Not Within the Principle

31. Ms. Booth contends that the wider rule in Connelly is predicated upon prosecutorial misconduct, and she points to the speech of Lord Devlin at p. 1353.

> "In my opinion, if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be grave danger of abuse and of injustice to defendants. The Crown might, for example, begin with a minor accusation so as to have a trial run and test the strength of the defence. Or, as a way of getting round the impotence of the Court of Criminal Appeal to order a new trial when, as in this case, it quashes a conviction, the Crown might keep a count up its sleeve. Or a private prosecutor might seek to harass a defendant by multiplicity of process in the different courts."

32. Ms. Booth argues that that demonstrates that the principle is aimed at preventing the prosecution deliberately and cynically manipulating the system, and asserts that that is not the case here. But in that passage Lord Devlin is explaining part of the rationale of the rule, not stating it. When he comes to state the rule, beginning at the bottom of p. 1358, it contains no such qualification. I doubt that this was an oversight. He gave other reasons for the rule in the next paragraph. Perhaps more importantly the rule has to be capable of clear application, or it opens the door to an uncertain inquiry into the prosecutor's motives, and to the risk of subjective assessment by the Judge. What one Judge considers fair game, may seem abhorrent to another. In Connelly all their Lordships wished to avoid that sort of inquiry, as the formulation of the rule by Lord Reid (*supra*) indicates.

33. I think, therefore, that the *ratio decidendi* of Connelly is that it is, without more, oppressive to bring repetitive prosecutions, and that it does not turn upon the prosecutor's motives. That is, in fact, how it has been understood ever since: see e.g. Barry J in R v Riebold [1967] 1 WLR 674 at p. 678[15]:

> "Therefore, it does seem to me to be entirely clear that not only have the accused been in substance tried on these other charges, but also any re-trial of them would amount to a complete reproduction of the previous trial. *I am quite satisfied here that the prosecution do not desire to be oppressive, but I have to look at the matter in the light of the results which would accrue if I were to grant the application of the prosecution.* It seems to me that I would be granting here a complete re-trial of the Staffordshire case, that there would be no different issues of fact at all, and that in those circumstances, in my judgment, *it would in fact be bad and oppressive to the accused to allow such a re-trial*; in those circumstances I propose to apply what Lord Devlin has said is the general rule, that is, that indictments should be stayed when the judge is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment." [My emphasis]

[15] This passage was cited with approval by Lord Edmund-Davies in Humphreys at p 50.

34. In R v Humphreys (*supra*), which was concerned with when an acquitted defendant could be charged with perjury in respect of the testimony which secured his acquittal, Lord Salmon[16] was also of a similar view at p. 47:

> "A charge of perjury after a full trial in respect of another offence, in which the prosecution has failed to persuade a jury that the accused was lying and that he was guilty, could in some circumstances smack of an attempt by a disappointed prosecution to find what it considered to be a more perspicacious jury or tougher judge. This would in reality be putting the accused on double jeopardy. Although the form of charge would be different from that of the charge upon which he had already been tried and acquitted, the true substance of the charge would be the same. It is of great importance that in such a case, if it arose, the courts *should not hesitate to exercise their inherent powers in relation to prosecutions which are oppressive and an abuse of the process of the court*." [My emphasis]

35. Lord Salmon's speech in Humphreys also contains a telling indication of how he might have applied the Connelly principles to this case. Lord Salmon was considering the Australian case of Mraz, in which a doctrine of issue estoppel in criminal matters had been propounded as a way of dealing with repetitive prosecutions. In rejecting the concept of issue estoppel, Lord Salmon was concerned to say that in England a similar result would have been reached applying the wider principle in Connelly:

> *"Mraz v The Queen (No. 2)* 96 C.L.R. 62 is a complicated case in which the judgment in the High Court was also given by Dixon C.J. The Crown had prosecuted the accused for the murder of a girl committed in the course of or immediately after an act of rape. There was no doubt that the accused had caused the girl's death. Had she been killed in the course of or immediately after rape the verdict must have been murder. The jury returned a verdict of manslaughter. This conviction was quashed on appeal. The prosecution then indicted the accused for rape. I am inclined to think there would have been much to say for the view that these proceedings *could have been dealt with on the ground that they were oppressive and an abuse of the process of the court* (a topic about which I shall say a word in a moment). Undoubtedly the verdict of not guilty of murder had implicit in it a verdict of not guilty of rape. In such circumstances, to charge the accused with rape might well be said to be putting him in double jeopardy." [My emphasis]

36. I think, therefore, that the present case is clearly within the wider rule in Connelly, and it is not necessary to demonstrate bad faith or improper motives on the part of the prosecution. The law regards repetitive trials without more as an abuse of process and oppressive.

(b) Special Circumstances

37. Ms. Booth then argues that, if this case is caught by the rule, it demonstrates special circumstances. Her argument essentially is that the jurisprudence has evolved since 1963, when Connelly was decided, and that the incorporation of the European Convention on Human Rights ('ECHR') into the English domestic law by the Human Rights Act 1998 would mean that the rights of the victim and her family must also now be taken into

[16] I should note that Viscount Dilhorne did not agree with Lord Salmon on the application of these principles to subsequent prosecutions for perjury (see p. 22 E – H). However, he said nothing to detract from the principles themselves. Indeed, at p. 23 he referred to Lord Devlin's formulation of the rule in Connelly and stated "I do not dissent from these views". The question for him was how wide the principles went.

account when considering whether there are special circumstances. The same principle would apply in Bermuda because of the Constitution, which embodies similar principles. While I accept that the Constitution in Bermuda is to like effect as the ECHR in this respect, I do not think that the argument is right for either jurisdiction, because it distorts the rule in Connelly and opens the door to precisely the sort of broad ranging discretion that the whole court was at pains to avoid and disavow.

38. The question (albeit without the explicit Human Rights argument) was considered by the English Court of Appeal in R v Beedie [1998] QB 356 at 365. In that case the appellant was a landlord responsible for the maintenance of a gas fire in premises let by him. The fire became dangerous, due to his neglect to maintain it, and as a result a young woman died of carbon monoxide poisoning. The appellant was first charged before the Magistrates with a breach of statutory duty in relation to the maintenance of the fire, to which he pleaded guilty. He was subsequently indicted for manslaughter in respect of the same incident. The trial judge refused to stay the proceedings but that decision was overturned by the Court of Appeal, who applied Connelly:

> "In our judgment, Mr. Smith's submissions in relation to the judge's exercise of discretion are all well founded. Although the judge carefully and, in our judgment, accurately analysed the effect of the speeches in *Connelly v Director of Public Prosecutions* [1964] A.C. 1254 (which, if we may say so, is no mean feat), in applying those principles to the exercise of his discretion he fell into error. First, he failed to consider whether there were special circumstances, and in our judgment there were none. The public interest in a prosecution for manslaughter and the understandable concerns of the victim's family were, no doubt, good reasons for allowing the prosecution to proceed. They did not, however, give rise to special circumstances. In *Connelly's* case, at p. 1360, Lord Devlin, without attempting a comprehensive definition, gave, as examples of a special circumstance, where a judge would have ordered separate trials if the offences in the second indictment had been included in the first and where the prosecution, instead of joining all possible charges in one indictment, preferred two or more indictments, and the defence accepted this without complaint. Nothing remotely akin to those situations arose in the present case, in which we can see no special circumstances of any kind. Secondly, he carried out a balancing exercise when this was inappropriate; although it has to be said that prosecution counsel's submissions appear to have misled him in this respect."

39. In my judgment it comes back to what I said in paragraph 29 above. "Special circumstances" really refers to reasons for not joining all the charges in one indictment, and does not confer some broader discretion, or allow the court to take into account other matters, such as those relied upon by the applicant. No explanation is put forward for why the prosecutors in this case failed to join charges of sexual assault at the outset. I can only assume it was oversight or error, neither of which is a good reason for not doing so.

40. It is also an important distinction between the facts of this case and Connelly itself, that in Connelly the robbery charge had been laid at the outset, at the same time as the murder charge. That illustrates how narrow the exceptions to the general rule are. Had there been any such separate indictment preferred at the time in this case we would not be in the position we are now, because either the defence would have required a joinder or,

by failing to do so, would be taken to have acquiesced in sequential trials. Either way the matter would have been disposed of long ago. In the case of Mundy it would also have meant that he could have applied to stay any such indictment on the grounds of his promise of immunity, and that could have been dealt with at the same time as his similar challenge to his indictment for murder.

41. In the case of Mundy, it was also said in argument by Ms. Booth that it was his deceit which brought about the circumstances where no other charges were laid against him, and that that was a good reason or a special circumstance which justified the prosecutors not laying all the possible charges against him from the start. That is wrong for two reasons. First, it is demonstrable that the prosecutors never considered charging him with anything else, because, even when they regarded the agreement not to prosecute him as voided and laid the charge of murder, they did not include any other charges. Second, as the Court of Appeal found on his appeal, his deceit should have been obvious from the outset. There is also the further difficulty in respect of Mundy, namely that the agreement not to prosecute him still applies, and I have dealt with that further below.

(iv) Other Alleged Errors of Law

42. There is another way in which the applicant says that the DPP got the law wrong. She referred in her reasons to "the established principle that there should be no sequential trials for offences on an ascending scale of gravity", and she cites Connelly and the 19th Century case of R v Elrington 1 B & S 688. On the face of it such a principle would apply to Mundy, but not to Smith. It would not apply to Smith because sexual assault is not more serious than murder, and so in his case the proposed charge does not represent an ascending scale of gravity.

43. The rule itself derives from dicta of Cockburn CJ in R v Elrington 1 B & S 688 at 696:

> "We must bear in mind the well-established principle in our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

The reason why the rule is stated in that way is illustrated by the facts of Elrington itself. The defendants had first been charged with common assault before the Justices and acquitted. They were then charged on an indictment for wounding and causing grievous bodily harm. The strict *autrefois* rule did not apply, because the defendants could not have been convicted of the aggravated offences on a trial for assault. Had it been the other way around, it would have been a clear case of *autrefois acquit*. As Lord Devlin observed in Connelly at p. 1358, "In my opinion, therefore, the principle stated by Cockburn CJ . . . necessarily goes beyond the principle of autrefois."

44. Lord Devlin then went on "I prefer the modern development of this principle which justifies it by the power to stop vexatious process." In other words, Lord Cockburn's principle is but one step in the evolution of the modern rule. It was framed as it was because of the issue then before the court, and because of various features of 19th century practice which I do not need to go into. Lord Devlin took the view that, when properly considered, the rule is not limited to sequential charges of ascending gravity. The true principle is simply that "a series of charges shall not be preferred". I do not think, therefore, that the DPP was wrong to refer to it as applying to both Smith and Mundy.

(v) Wrong for the DPP to Consider Abuse of Process

45. Having decided that it was oppressive to bring sequential charges when there was no good reason for not bringing them all at once, the majority of the House of Lords in Connelly also needed to identify a mechanism to give effect to that principle. They did so by saying that it was an abuse of the process of the court to bring sequential prosecutions, and they then invoked the inherent jurisdiction of the court to protect its procedures from abuse. In this case the applicant picks up on that and argues that it was wrong for the DPP to take into account the question of abuse of process, that being a matter for the court to defend itself against, not for the DPP to concern herself with. This argument was advanced both in respect of the principles derived from Connelly, and also in respect of the effect of delay and publicity on the possibility of a fair trial.

46. In respect of the Connelly principle, given that it exists, and given that there are, properly considered, no "exceptional circumstances" the DPP was not wrong to take it into account. The argument that she should have left it to the court, when presented with the new indictment, to take the decision seems to me to be quite untenable. It would indeed have been a breach of her constitutional responsibility for the DPP to undertake a prosecution which she believed on reasonable grounds to be oppressive and an abuse of process.

47. Similarly in respect of delay and publicity: I think that these were matters which the DPP, in the exercise of her discretion, was entitled to take into account. I do not need to decide whether she correctly assessed those factors, given my primary finding that a further prosecution would be precluded by the rule against double jeopardy.

(vi) Failure to Re-examine the Evidence

48. Part of the request made to the DPP was that she have the physical evidence re-tested, to see if modern forensic techniques, including enhanced abilities to detect and amplify tiny amounts of DNA, would reveal new evidence. The DPP's position on that is that she is of the view that there already exists sufficient evidence to institute further proceedings against Mundy and Smith, and that it is the law against double jeopardy, not any want of evidence, which debars further proceedings. In those circumstances there would, essentially, be no point in searching for further evidence. I think, with respect,

that she is right. The position is quite different from that where modern forensic techniques are capable of identifying *for the first time* the previously unknown perpetrator of an offence committed years ago. There have been several such cases in the United States and the United Kingdom recently, and they have been widely reported, but that is very different from the circumstances of this case, where those believed to have been involved were identified and prosecuted at the time.

49. Nor do I think that the wider principle in Connelly is subject to a further exception that a fresh prosecution can be brought if compelling new evidence is discovered which could not by reasonable diligence have been discovered before[17]. A version of that test is embodied in the modern English legislation which modifies the rule against double jeopardy[18], but any provision along those lines would require legislation. In the absence of such legislation I do not think that the discovery of new evidence would change the position, and that the DPP was not wrong, therefore, in the circumstances of this case, in failing to search for it.

(vii) Failure to Consider Other Charges

50. Finally, it is also said that the DPP fettered her discretion because she limited herself to considering only charges of sexual assault, and not other charges which could arise from the facts of this case. Had the matter been proceeding, it may well be right that the DPP should consider all other possible charges, least she fall into the error of the original prosecutors. But in the circumstances as they stand, the DPP argues that it is implicit in her reasoning that she would have reached the same conclusion with regard to any other offences, and I think that that is right.

Mundy Alone

51. In respect of Mundy, there is a further issue which was not relied upon by the DPP, but which was raised by Mr. Richardson who appeared for Mundy. He argued that the arrangement that the prosecution entered into with Mundy in respect of his plea would also debar all further charges against him arising out of Rebecca's murder and the events leading up to it. I think that must be right. When I considered the matter in 1998 I found as follows[19]:

> "I have no doubt that the proper construction of the undisputed primary facts is that there was an implicit agreement that if the Applicant agreed to give evidence against Smith at his trial for murder, then he himself would only be prosecuted on the accessory charge."

52. That finding of fact was accepted by the Court of Appeal[20]:

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[17] That is the rule for issue estoppel in civil cases, but the subsequent case of Humphreys (*supra*) did away with the misconception that issue estoppel might also apply in criminal cases.
[18] See Part 10 of the Criminal Justice Act 2003.
[19] [1998] Bda LR 24 at p. 4
[20] [1998] Bda LR 4 at p. 2

> "The learned trial judge held that there was an implicit agreement that if the appellant agreed to give evidence against Smith at his trial for murder, then he himself would only be prosecuted on the accessory charge.
>
> There is no evidence that the appellant reneged on his agreement to give evidence for the Crown against Justis Smith.
>
> The Court will stay a prosecution where there has been an implied agreement not to prosecute"

53. Against that, the applicant argues that any agreement only amounted to an immunity in respect of murder, and that, therefore, its effect is limited to offences of which Mundy could have been found guilty on the trial of indictment for murder. I think that is precluded by my findings at the time, namely that the agreement was that if he agreed to give evidence he would *only* be prosecuted on the accessory charge. In any event, no other arrangement makes sense – there can be little doubt what Mundy's response would have been if he had been told that he would not be prosecuted for murder but that he could be prosecuted for serious sexual assault for which he could go to prison for 30 years. I think, therefore, that the agreement precludes all other charges which could have been laid in respect of the facts as they were known at the time, and sexual assault was plainly such a charge, the sexual nature of the attack being obvious and Mundy having admitted intercourse. I accept and understand that he alleged that it was consensual, but the Crown were not bound to accept that qualification at the time, and had they thought about it for a moment would have realized its extreme improbability.

54. The Crown, therefore, remains bound by its original agreement. It was repeatedly said to me in argument that Mundy should not be able to benefit from his own fraud in this respect, but that was really the issue back in 1998, when the Crown sought to indict him for murder. On that occasion the Court of Appeal found in effect that there were no grounds for going behind that agreement[21]:

> "In our view the additional evidence to support such a charge of murder is extremely weak to enable the Attorney General to void the agreement between the appellant and the police."

There is no new evidence now available that would change that, and it is hard to imagine any further evidence which would be capable of doing so. In particular, because Mundy always admitted presence at the scene and intercourse, further DNA evidence which now links him to the crime would add nothing.

SUMMARY

55. Before I can interfere with the DPP's decision I have to find that she was wrong in law. For the reasons set out above, she was not wrong. There is a general principle against double jeopardy, and one aspect of that is a rule of law that all charges arising out of the same circumstances must be joined in the same indictment, unless there is good reason for not doing so. A judge is obliged to stay a second or subsequent indictment

[21] Ibid. at p. 7.

where this rule is not observed. A good reason for not joining all the charges in one indictment would be where the law or established practice forbade it. Prosecutorial error or oversight is not a good reason. Nor does an unjustifiable failure to comply with the rule as to joinder open the door to a balancing of the potential defendant's rights against those of the victim or others affected by the crime.

56. The rule is well-established and straightforward. Despite the eloquent arguments advanced to the contrary, it is not permissible for me to ignore or modify it. It would require legislation, or possibly the intervention of a higher court, to change it. In the absence of that, any judge faced with a prosecution of the sort demanded by the applicant would, whatever he personally thought about the merits of the case or the justice of the cause, be obliged to stay that prosecution as a breach of the rule and an abuse of process. The DPP was, therefore, right in her assessment, although she expressed herself incorrectly. That means that there are no grounds on which I can interfere with the exercise of her discretion, and accordingly I dismiss this application. I appreciate that that will be a bitter disappointment to the applicant and other members of Rebecca's family, for whom I feel great personal sympathy, but I have to declare the law as it is.

Dated this 4th day of May 2007

Richard Ground
Chief Justice