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Abuse of Process: Time for Change?

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INTRODUCTION

The doctrine of abuse of process is used by the courts to control criminal proceedings. It is the discretionary power of the court to stay proceedings which it deems would be an abuse of the process of the English criminal courts. The doctrine has been developed to establish circumstances where it would be appropriate for the court to stay proceedings on the grounds of an abuse of court proceedings. Nevertheless, the current rules on what constitutes an abuse of process have not been specifically defined, and are in some ways unclear.[1] Generally these circumstances are limited to the most serious of issues and are narrowly interpreted. For example, a prosecution of several counts of sexual assaults that occurred 15–30 years after the alleged acts did not result in a stay of proceedings on the grounds of abuse of process. It was held that a fair trial could still go ahead despite the lengthy delay.[2]

The generally narrow interpretation of the doctrine has been brought into question by the decision of the Court of Appeal (Criminal Division) in *R v Antoine*,[3] a decision which focussed on the issue of a second trial for a more serious charge based on the same set of facts. The controversy surrounding the decision in this case was that what amounted to a mistake on the part of the Crown Prosecution Service (CPS) was held to be a reasonable cause for a second trial. There was no abuse of process in allowing the defendant to be tried on the second charges.

This article critically evaluates the decision in *Antoine* with reference to decisions of other Commonwealth jurisdictions and with regards to the effect

[1] Currently the rules on criminal procedure are defined in the Criminal Procedure Rules 2014. The Rules make reference to abuse of process in that they allow for an application to stay a case for an abuse of process, but do not make reference to the relevant grounds for such an application.
[2] *R v Telford Justices, ex p Badhan* [1991] 2 QB 78 (QBD).
[3] [2014] EWCA Crim 1971, [2015] 1 Cr App R 8.

of the European Convention on Human Rights (ECHR). It also briefly considers the rules on double jeopardy and the significance of the changes to this area of law. Perhaps most importantly, it will be shown that the principles of fairness and public interest lie firmly within the doctrine of abuse of process and that reform is needed in order to clarify the law and maintain faith in the criminal justice system.

PART 1: ABUSE OF PROCESS

Abuse of process was defined as having two categories in *R v Beckford*[4]:

i. cases where the court concludes that the defendant cannot receive a fair trial; and
ii. cases where the court concludes that it would be unfair for the defendant to be tried.

Since then, it has been established that the second category now incorporates either of these circumstances:

i. that a fair trial is impossible; and
ii. that the continued prosecution offends the court's sense of justice and propriety or public confidence in the criminal justice system would be undermined by the trial.[5]

Clearly this is a fact sensitive issue. Lord Dyson in *Warren v HM Attorney General of the Bailiwick of Jersey*[6] spoke of "the infinite variety of cases that can arise" within this second category, and so it is necessary to examine each case carefully.

That being said, in those cases where the CPS has made a move from one set of charges to another on the basis of an error, are the facts relevant? As I will explore in more detail, it is only those "special circumstances", a phrase which originated in the speech of Lord Devlin in *Connelly v Director of Public*

[4] [1996] 1 Cr App R 94.
[5] *Warren v HM Attorney General of the Bailiwick of Jersey* [2011] 2 Cr App R 29.
[6] [2011] UKPC 10, [2012] 1 AC 22.

Prosecutions,[7] where it would be appropriate to retry an individual on the same facts. This is exactly what as was at issue in *R v Antoine*. Regardless of the facts of any particular case, can it ever truly be said that human error on the part of the CPS amounts to circumstances special enough to try someone twice on the same set of facts?

The starting point for any such case of abuse of process would be the statement of Lord Cockburn CJ in *R v Elrington*: "whether a party accused of a minor offence is acquitted or convicted he should not be charged again on the same facts in a more aggravated form".[8] What is argued in *R v Antoine* is that it is "prima facie oppressive to put a person in these circumstances on trial a second time".[9] This is a fundamental principle regarding stays of prosecution to prevent an abuse of process, and it is only in those special circumstances mentioned by Lord Devlin that this principle will be negated.

This principle was later developed in *Connelly v Director of Public Prosecutions* by Lord Devlin:

> *"There is another factor to be considered, and that is the courts' duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose 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. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may not guarantee that every judgment is right, but it can and should do its best to secure that there are not conflicting judgments in the same matter. Suppose that in the present case the appellant had first been acquitted of robbery*

[7] [1964] AC 1254 (HL).
[8] (1861) 1 B & S 688, 688.
[9] *Antoine* (n. 3) [21].

> *and then convicted of murder. Inevitably doubts would be felt about the soundness of the conviction. That is why every system of justice is bound to insist upon the finality of the judgment arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to re-open again and again what is in effect the same matter."*[10]

The question of public policy and the integrity of the justice system is highly relevant to the case at hand. As will later be shown, the public policy argument is somewhat a double-edged sword. Lord Devlin has pointed out that the soundness of the conviction may be brought into question by allowing an individual to be tried again for a more serious crime. However, it is also necessary to evaluate the issues which might be raised should an individual be allowed to stay a prosecution for an abuse of process, thus receiving a far lighter sentence than is rightfully deserved in such circumstances.

How then did the Court of Appeal in *Antoine* come to a decision that what can only be described as a blunder on the part of the CPS amounted to special circumstances?

In *R v Antoine*, Thirwall J stated that the court had:

> *"no hesitation in concluding that the judge was justified in finding that there were special circumstances here which required that the prosecution continue. The court's sense of justice and propriety was not offended nor was public confidence in the criminal justice system undermined. On the contrary, a stay would have brought the criminal justice system into disrepute."*[11]

[10] *Connelly* (n. 7) 87 (Lord Devlin).
[11] *Antione* (n. 3) [33].

The court applied the decision of the Privy Council in *Warren v HM Attorney General of the Bailiwick of Jersey*[12] in order to make this decision. The Privy Council held that a stay for an abuse of process may be imposed when the continued prosecution offends the "court's sense of justice and propriety or public confidence in the criminal justice system would be undermined by the trial".[13]

Clearly it is necessary for the court to act in a way which is fair and just in order to maintain public confidence in the criminal justice system. And so the question must be put, fairness to whom? The defendant? The prosecution? The entirety of the criminal justice system? It was said by Openshaw J in *Director of Public Prosecutions v Meakin* that "the concept of a fair trial involves fairness to the prosecution and to the public, as well as fairness to the defendant". [14] I would agree with this statement. The criminal law is preventative and protective. If the concept of a fair trial was based only on what is fair to the defendant, then it is possible that in many circumstances the outcome will be entirely the opposite of fair and just in the eyes of the public. For example, in *Antoine*, it would have been entirely unjust to the public to allow a man capable of walking the streets with firearms to return to the streets of Luton after serving a mere few months in prison. He would not have served what the courts would deem an appropriate time of rehabilitation for such an offence and as such posed a threat to the public. While the arguments against the outcome of *Antoine* have their merits in that it is potentially unfair to allow someone to be tried twice for the same set of circumstances, it seems entirely unfair to allow them to avoid those second charges due to a technicality. There cannot be any real justice done where a violent offender is allowed to avoid the charges most appropriate to them, and this is entirely unfair and also potentially damaging to the public and to the reputation of the criminal justice system. To therefore understand the implications of *Antoine* on the overall area of law, the next part will consider the case in detail.

[12] [2011] UKPC 10 [2012], 1 AC 22.
[13] Ibid [35].
[14] [2006] EWHC 1067 (QB) [23].

PART 2: *R v ANTOINE*

On the 30 July 2013, Mr Antoine pleaded guilty in the Magistrates Court to possession of a firearm without a certificate contrary to s 1(1)(a) of the Firearms Act 1968 and possession of ammunition without a certificate contrary to s 1(1)(b) and was sentenced to eight months imprisonment. This charge was significantly less severe than would be expected in such circumstances. This was highlighted in a review of the case by the CPS some days later. At this point they sought to bring charges which were more appropriate but more serious. He was charged with possession of a muzzle loading gun while on probation, contrary to s 5(1)(aba) and s 21(2) of the Firearms Act 1968. There was no dispute that all charges arose from the same set of facts; his possession of a loaded gun. In Luton Crown Court autrefois convict and abuse of process arguments were rejected. Mr Antoine then pleaded guilty and was sentenced to 56 months for the s 5(1) offence and 24 months for s 21(2).

The sentence and conviction for the second set of charges was then appealed to the Court of Appeal. It was submitted that the judge had been wrong to find that there were special circumstances which justified the new charges and he should have stayed the case as an abuse of process.

However, the appeal against conviction was dismissed. The general rule is that a judge should stay an indictment when the counts are founded on the same facts as those in a previous indictment on which the defendant has been convicted. However, following the judgment of Lord Devlin in *Connelly v DPP*, where the prosecution satisfies a judge that special circumstances arise, the judge can exercise his discretion as to whether the general rule should apply; the judge can decide that the special circumstances mean that to try the defendant on the new indictment would not be oppressive or unjust. Special circumstances existed in the present case. Mr Antoine knew the risk of carrying a loaded revolver and he expected to go to the Crown Court to receive a long custodial sentence. He had received an unexpected windfall in receiving a much shorter sentence.

The court also held that this was not simply an escalation of minor charges to more serious charges and that the CPS brought the second set of charges because the first set were misconceived. The court seemed to place great importance on this particular distinction for the reason that the appellant argued that a move from minor to more serious charges would constitute an abuse of process. The respondents argued that this was not the case, and that it was a change from misconceived to correct charges which in their minds was enough to negate the abuse of process argument. It could be argued that this was irrelevant. Regardless of whether the first set of charges were misconceived, there can be no doubt that the new charges were more serious than the original. It is argued that the relevant question should be whether it was just and reasonable to bring those second set of charges.

The decision in *Antoine* has been somewhat controversial. It is not inconceivable that there could be circumstances where it would be just to retry an individual for a more serious charge on the same set of facts. The controversy here is sparked by the seemingly mundane nature of the circumstances in the *Antoine* case. The argument put forward by the prosecution was that "special circumstances" would apply to just that – extreme and irregular circumstances. It was argued that it was insufficient to conclude that a mistake on the part of the CPS fits that criterion. Yet this is exactly what happened in *Antoine*. As a decision of the Court of Appeal this is not the end of the story of the law on abuse of process. A case of this type is yet to come before the Supreme Court, and it is possible that the law would be reversed. It does, in my opinion, call for further exploration into the law and whether reform is necessary. As the law is rather uncertain and has only been decided in the Court of Appeal, it is useful to look at the approach of the courts in other jurisdictions. Canada and Australia, both Commonwealth jurisdictions, seem to have taken a similar, albeit more direct approach to the issue.

PART 3: DECISIONS OF THE COMMONWEALTH COURTS

The High Court of Australia in *R v Moti*[15] held that two of the key concerns to be taken into account when deciding on a stay of proceedings for an abuse of process were a) public interest and b) public confidence in the judicial system. The judgment of Justice French states that:

> *"Two fundamental policy considerations affect abuse of process in criminal proceedings. First, the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. Second, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements."*[16]

The court found that public policy considerations were more than just a factor to be taken into account when deciding on stays of prosecution for an abuse of process. Instead, Justice Finch describes them as "fundamental requirements".

The Canadian courts have had a similar approach, although it is based on a wider conception of fairness than their Australian counterparts. In *Toronto City v CUPE*, Justice Arbour stated that:

> *"…the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts … the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that*

[15] [2011] HCA 50, [2012] 4 LRC 235.
[16] Ibid [259].

> *compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle."*[17]

In contrast, Justice Finch, discussed the doctrine of abuse of process in the Supreme Court case *British Columbia (Minister of Forests) v Bugbusters Pest Management Inc.*, where he stated that "the doctrine inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case". [18]

As can be seen, both the High Court of Australia and the Supreme Court of Canada take quite a broad approach to what will constitute an abuse of process. The "special circumstances" can, in my view, be widely interpreted. There was a deliberate decision by Lord Devlin in the *Connelly* case not to define that list of special circumstances where a stay for an abuse of process will be allowed. In discussing the circumstances where it will be reasonable to retry an accused on the same set of facts, he stated:

> *"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. 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.*

[17] 2003 SCC 63, [2003] 3 RCS 77 [43].
[18] 1998, 159 DLR (4th), [32].

> *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."*[19]

Lord Devlin does not make any attempt in his definition to give a definite list of what those special circumstances might be. Neither does he make it clear just how restrictive the term "special circumstances" is. I would submit that this was because the judge felt that there was a wide interpretation of "special circumstances" and that it was unnecessary to try to define them. Given the wide approach we have seen from the Canadian and Australian *dicta*, this would appear to be the most logical reason.

If we consider the principle of fairness as the overarching principle governing the rules where a stay of proceedings should be allowed for an abuse of process, then this gives a clearer picture of what the rules will be. True, it will always be at the discretion of the judge what is fair in all the given circumstances of any case, but this would be a simpler approach than trying to define a list of "special circumstances" which have proven to be somewhat unclear and give the impression of something quite different from the way the courts actually approach this subject. Taking into account this principle of fairness along with the need to maintain public faith in the integrity of the criminal justice system, we can now evaluate the decision in *Antoine*.

PART 4: EVALUATION OF *R V ANTOINE*

Mr Antoine was convicted of serious firearm offences under the Firearms Act 1968 and sentenced to a total of six years and eight months in prison. Given that he was carrying a loaded gun in a residential area of Luton, it would seem justified to say that this conviction was just. Had the court decided to stay the prosecution for an abuse of process, Mr Antoine would have been sentenced to just eight months imprisonment. Given the serious nature of the offence it is submitted that the fairest outcome was to allow him to be tried on the second charges and convicted of the more serious offences. While there is an argument

[19] *Connelly* (n. 7) 1359–1360.

that being tried again is unfair on the person who has already been convicted, there is in my opinion a much stronger argument that it would be wholly unfair on the public to allow a violent offender to walk free in as little as eight months.

Another consideration, one which was in part the reason for the decision in *R v Antoine*, is that Antoine himself expected to be handed a long custodial sentence, his original eight months detention being "an unexpected, astonishing and undeserved windfall".[20] How can it then be said that this was a true abuse of process when it can be reasoned that the public would have expected this same result as the defendant himself? It is easy to conclude then that the integrity of the criminal justice system would be at risk if there were to be any other outcome in *Antoine*.

PART 5: DOUBLE JEOPARDY

The striking similarity between cases on abuse of process and double jeopardy calls for some exploration into whether it can provide some foundation for reform to abuse of process. The recent changes in 2003 on the law allow for a retrial of a case where new and compelling evidence has emerged, usually because of advancements in scientific research in for example, DNA evidence.[21] In 2005 the law was further expanded to allow for a retrial of an offence on the grounds of public interest and the interest of justice.[22] This section calls on the court to have regards to whether a fair trial is possible, the length of time since the alleged offence and whether the prosecutor has acted with due diligence and expedition. Each of these considerations are equally relevant to a request for a stay of proceedings for an abuse of process, and the question of a fair trial is one of the key considerations in any case of abuse of process to have come from the case law after *R v Beckford*. The question of time and expediency was not an issue in *Antoine*, so it was given no

[20] *Antoine* (n. 3) [32] (Thirlwall J).
[21] Criminal Justice Act 2003, s 78.
[22] Ibid, s 79.

consideration by the court. It is of course relevant in cases where a retrial is brought much later.

In *Antoine* there were a matter of days between the first conviction and the second charges being brought. What if it had been months, or years? Would it still be fair to bring a second more serious charge if Mr Antoine had served his time for the first conviction? The changes in the double jeopardy rules seem to answer this in the affirmative. In circumstances where the court believes it to be in the interests of justice they will order a retrial despite many years having passed since the alleged offence.

One of the most famous double jeopardy cases was the conviction of Gary Dobson for the murder of Stephen Lawrence some twelve years after the original trial.[23] This of course was based not only on the interests of justice but also on new evidence. The changes in the law have not come without contest. There have been arguments that the rules are unfair to the defendant and do not allow for adequate protection. I would disagree with this on the basis that there must be a balance in such circumstances, and to allow someone to go unpunished for violent crimes is not in the public interest and indeed puts the public at risk. I would therefore submit that given the law on double jeopardy has changed to acknowledge those circumstances where it is in the public interest to retry a person for the same crime, that it is also appropriate to allow for a second, more serious set of charges to be brought after an error of the CPS. The considerations in both double jeopardy cases and cases of abuse of process are so similar that in my opinion deserve to be treated alike. The violent nature of Mr Antoine's offences means that despite the mistake of the CPS, it would be contrary to the interests of justice to prevent the CPS from prosecuting him to the full extent of his crime.

[23] *R v Dobson (Gary)* [2011] EWCA Crim 1256, [2011] 1 WLR 3230.

PART 6: EFFECT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The final consideration which I will consider is the effect of the ECHR, brought into English law by the Human Rights Act 1998.

Article 6 of the ECHR enshrines the right to a fair trial for the accused. As already discussed, fairness is the overarching principle for the courts when deciding whether to stay proceedings for an abuse of process. Is it possible then that the decision in *Antoine* is contrary to Article 6? I would submit that it is not. The rights given to the accused by the ECHR still apply to circumstances such as those in *Antoine*. In both trials Mr Antoine was presumed innocent until proven guilty, given adequate time and facilities for the preparation of his defence, given access to legal assistance and given the opportunity to examine witnesses and have them attend the trial as prescribed by Article 6. It was wholly fair for him to be tried on the second charges given the nature of his offence. As long as the second trial was carried out in a manner which is compatible with the ECHR then there should be no infringement of Mr Antoine's rights. However, in my opinion, fairness in these circumstances should be extended to all parties involved, not merely to the accused but also to the prosecution, the criminal justice system as a whole and to the public.

CONCLUSION

To conclude, the case of *R v Antoine* brought a controversial decision with regards to a stay of proceedings for an abuse of process. While it is not disputed that mistakes were made on the part of the CPS it is submitted that the decision of the court was an acceptable one. The overarching principle as regards the doctrine of abuse of process is the principle of fairness. It is suggested that the principle applies not just to the accused but fairness to the prosecution, the criminal justice system as a whole and (possibly most importantly) the public. While there is an argument that it is unfair to allow the CPS to retry someone for more serious charges on the basis that the CPS themselves made an error, I would submit that the opposing argument is the

stronger of the two. It is crucial that the public be protected from those who commit serious offences that have the potential to put people in danger, such as those in *Antoine*. It is also crucial that faith in the integrity of the criminal justice system be maintained. It is also important that the accused receive a fair trial, as was reinforced in the passing of the Human Rights Act 1998, which embedded the ECHR into English law, including Article 6, the right to a fair trial.

However, Mr Antoine himself expected to be handed a long, and just, sentence for his offences. It follows that the public would expect the same, and therefore it is important that this outcome be allowed to prevail. The term "special circumstances" has been misleading in the previous case law. It is simpler and more practical to follow the persuasive approach of courts from the commonwealth jurisdictions. Paramount to this is the concept of fairness to all parties as well as the integrity of the criminal justice system. Human error is not a satisfactory reason to negate these overarching principles. For this reason, I submit that the decision in *Antoine* was correct. However, with no decision as yet from the Supreme Court on this issue, I would suggest that the rules on the doctrine of abuse of process remain fragile and uncertain. I would suggest that issue be decided on formally by the government, and that the laws on abuse of process be codified in the Criminal Procedure Rules, as have the rules on double jeopardy in the Criminal Justice Act, so as to give effect to the principles of fairness in order to maintain faith in the criminal justice system.