

PHILIP HENRY VIVIAN TOWNSEND  
SIMON ROBERT DEARSLEY  
GORDON MAXWELL BRETSCHER

COURT OF APPEAL (The Vice-President) Lord Justice Rose, Mr Justice Keene and Judge Hyam): May  
7, 8, 1997

ABUSE OF PROCESS

**Implied undertaking not to prosecute**

*Accused initially treated as prosecution witness—Effect on accused of course taken by  
prosecution—Whether accused seriously prejudiced—Whether abuse of process of the court.*

INDICTMENT

**Joinder of charges**

*Some charges transferred to Crown Court and others committed—Whether prohibition on  
joinder—Administration of Justice (Miscellaneous Provisions) Act 1933 (23 & 24 Geo. 5, c. 36)  
s.2(2).*

The first and third appellants and a co-accused agreed to purchase a wholesale market business (H) which, although presented as of good standing, was close to insolvency. The first appellant and the co-accused were to provide the money and the third appellant was to run the company. The third appellant withdrew large amounts of cash from the company's bank account and when the business collapsed in January 1992 he was arrested. He claimed to have been misled when the company was purchased. He was released on bail and, having failed in the meantime to answer to his bail, he was interviewed again in January 1993 about a fraud in connection with another company (GW), in respect of which he subsequently gave evidence for the prosecution. After the collapse of H Co., the first appellant had taken over another wholesale produce business (F) into which he introduced the second appellant. Between August and September 1992 there was a shortfall of around £90,000 between cash received by the company and that paid into its bank account. The first appellant was arrested in December 1993. From October 1994 the third appellant was treated as a prosecution witness in connection with the H Co. fraud but by November 1995, after the first appellant had been interviewed and had cast the blame for that fraud on the third appellant, it was decided that the latter should be prosecuted. The first and third appellants were charged with conspiracy to defraud H Co. and the first and second appellants were charged with conspiracy to steal from F Co. The H Co. charges were transferred to the Crown Court under section 4 of the Criminal Justice Act 1987 and the F Co. charges were committed to the

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2 Cr.App.R.

## TOWNSEND, DEARSLEY AND BRETSCHER (C.A.)

Crown Court by the magistrates. Despite objection, the trial judge gave leave to prefer a single indictment containing both groups of counts. He rejected the third appellant's application that proceedings against him should be stayed as an abuse of process. The first and third appellants were convicted of conspiracy to defraud and the first and second appellants of conspiracy to steal. The first and third appellants appealed against conviction on the grounds that the judge's rulings were wrong. The second appellant appealed against sentence only.

**Held**, allowing the appeals against conviction, (1) that section 2(2)<sup>1</sup> of the Administration of Justice (Miscellaneous Provisions) Act 1933 imposed no prohibition on joinder of committed and transferred charges. It was permissible to join in one indictment counts founded on separate committals and transfers in respect of one or more defendants; but that in the present case the first appellant had in fact been prejudiced by the presence at the trial of the third appellant whose defence was hostile to the first appellant. Accordingly, his conviction on that count was unsafe. (2) That there could be cases of abuse of process outside the categories of fairness and prejudice where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible but that a breach of promise not to prosecute did not necessarily and, *ipso facto*, give rise to abuse; that since the third appellant had not changed his position in reliance on his treatment as a prosecution witness nor volunteered information potentially further incriminating himself in reliance on that status he had not been prejudiced thereby but that he had been seriously prejudiced by the service on the first appellant's advisors of his witness statements which led the first appellant to make a statement implicating the third appellant, and that, had the judge been aware of this prejudice, he would have been bound to conclude that a stay should have been ordered for abuse of process.

*Cairns* (1988) 87 Cr.App.R. 287 distinguished; *Groom* (1976) 62 Cr.App.R. 242 applied.

Appeal against sentence allowed; sentence varied.

(For abuse of process, see *Archbold* (1997) paras. 4-48 *et seq.* For section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 and joinder of offences in indictment, see *ibid.* paras. 1-204 *et seq.*)

Appeal against conviction and sentence.

On November 18, 1996, at the Crown Court at Portsmouth (Judge Selwood) the appellants were convicted, Townsend and Bretscher of conspiracy to defraud (count 1) and Townsend and Dearsley of conspiracy to steal (count 5). Townsend was sentenced to four years' imprisonment concurrent on counts 1 and 5 and disqualified for 10 years under the Company Directors Disqualification Act 1986. Bretscher was sentenced to three years' imprisonment on count 1 and similarly disqualified for 10

<sup>1</sup> See p. 553G.*post*

years. Dearsley was sentenced to 15 months' imprisonment on count 5 and similarly disqualified for five years. The facts and grounds of appeal appear in the judgment. The appellants Townsend and Bretscher appealed against conviction and Dearsley against sentence only. The appeals were argued on May 7 and 8, 1997, when the following additional case was cited: *Osieh* [1996] 2 Cr.App.R. 145.

- T. S. Culver* (assigned by the Registrar of Criminal Appeals) for the appellant Townsend.
- Zoë Johnson* (assigned by the Registrar of Criminal Appeals) for the appellant Dearsley.
- Desmond De Silva Q.C.* and *Mrs Kim Hollis* (assigned by the Registrar of Criminal Appeals) for the appellant Bretscher.
- Philip P. Shears Q.C.* and *Adam Weitzman* for the Crown.

**THE VICE-PRESIDENT (ROSE L.J.):** On November 18, 1996, at Portsmouth Crown Court, after a trial before his Honour Judge Selwood, the appellants were convicted of offences of conspiracy, Townsend and Bretscher of conspiracy to defraud on count 1, and Townsend and Dearsley of conspiracy to steal on count 5. No verdicts were taken on counts 2 and 3, which alleged respectively conspiracy to steal and trading with intent to defraud a creditor, against Townsend and Bretscher. On count 4, conspiracy to defraud, Townsend was acquitted by the jury and Dearsley on the direction of the judge. No verdict was taken on count 6, fraudulent trading, which was an alternative count against Townsend and Dearsley. Counts 1 to 3 related to the business of J. Harrop & Co. Ltd in Liverpool between May 1990 and March 1992. Counts 4 to 6 to the business of A.G. Fehrenbach Ltd in Portsmouth between July and September 1992. Townsend was sentenced to four years' imprisonment on each of counts 1 and 5 concurrently, and disqualified for 10 years under the Company Directors Disqualification Act 1986. Bretscher was sentenced to three years on count 1 and disqualified for 10 years. Dearsley was sentenced to 15 months' imprisonment and disqualified for five years. Townsend and Bretscher appeal against conviction by leave of the single judge, who referred their applications for leave to appeal against sentence to the full court. Dearsley appeals against sentence by leave of the single judge.

There were three co-accused, Burraway, Joanne Douglas Maitland and Craig Douglas Maitland, who all pleaded guilty to conspiracy to defraud on count 4. Burraway had been indicted but was not proceeded against on counts 1 and 2.

Burraway was sentenced to 18 months' imprisonment subsequently reduced by a differently constituted division of this Court to nine months', consecutively to a sentence of five years' which he was then serving in relation to other matters. Joanne Douglas Maitland was sentenced to 12 months' imprisonment, subsequently reduced on appeal to six months', consecutively to the sentence she was then serving of 12 months' in relation to other matters. Craig Douglas Maitland was sentenced to three years'

imprisonment, reduced on appeal to two years', consecutive to the sentence he was then serving for other matters and he was disqualified as a director for 10 years.

The three Harrop counts and the three Fehrenbach counts had originally been the subject of separate indictments. The Harrop charges had been the subject of transfer to the Crown Court under section 4 of the Criminal Justice Act 1987. The Fehrenbach charges had been committed to the Crown Court by the magistrates.

On March 18, 1996 the trial judge gave leave to prefer a single indictment containing both groups of counts. On April 25, and on August 2, 1996 he rejected applications made on behalf of Bretscher that he should stay the proceedings against him as an abuse of process. On August 13, he ruled against applications on behalf of Townsend and Bretscher that the indictment should be severed so that they be tried separately. Each of these matters gives rise to a ground of appeal, and we shall return to them later.

The prosecution case in essence, was that there were conspiracies in which the appellants took part in relation to two separate businesses, those of Harrop and Fehrenbach, which were well-established fruit and vegetable wholesale companies, whereby the companies and their creditors were defrauded by dissipation for personal benefit rather than use for proper company purposes of the company's assets, stock and banking facilities.

In outline, what occurred was this. In relation to the Harrop counts, in October and November 1991 the appellant Bretscher placed advertisements in the "Fresh Produce Journal" offering to buy a wholesale market business and giving an address in Gloucestershire where he could receive mail. In consequence Peter Moss, who was then managing director of Harrops, replied, and subsequently entered into negotiations with Bretscher, Townsend and Burraway, all of whom were using false names. There was eventually an agreement in December 1991 for the purchase of the company for the sum of £40,000 plus a further £15,000 for Moss' shares. Townsend and Burraway were to provide the money, though only some of it was actually paid, and Bretscher was to run the company.

Although, for the purpose of negotiations, Harrops was presented as a company in good standing, it was, in fact, close to insolvency. For example, cheques for invoices were being written but put in a cupboard and not sent, and although the bank accounts appeared to be in credit, the company was in dispute with the Liverpool Council over unpaid rent and service charges for pitches leased in Liverpool Market, and a sum in excess of £70,000 was owed to a man called Carr. The extent to which these matters were described to the purchasers was a matter of dispute in the course of the trial.

Following the purchase, the appellant Bretscher was able to, and did, withdraw large amounts of cash from the company's bank account. In particular, although suppliers were being favoured with increasing orders, they were being paid at roughly half the rate prior to the purchase. Over

£55,000 was paid to a company called CSS, incorporated in the Virgin Islands, of which the appellant Townsend was the beneficial owner and sole signatory on the bank accounts, and from where Townsend's funds for his contribution to the purchase had apparently come.

Bretscher's explanation to Mr Moss and others still involved in the running of the company, for the late payment of bills, was that a big customer had failed to pay, and there were expenses being incurred in setting up a depot in Leicester which would serve satellite tracking stations and thereby produce big business. Bretscher ordered £80,000 worth of produce, which was sent to Conecroft, a storage depot in Leicester, and thence on to Covent Garden. One importer who had supplied melons to Harrops and had not been paid for them was surprised to see them being sold from the back of a trailer in Covent Garden. In mid January 1992 the business collapsed with liabilities which exceeded assets by over £370,000. At the end of January 1992 Bretscher was arrested and interviewed in the name, at that time of "Gordon Lord". He claimed to have been misled at the time of the purchase of the company. He said he had a large contract to supply fruit and vegetables but he would not say to whom. He denied telling people that he was going to supply satellite tracking bases. The premises in Leicester, he said, were a distribution warehouse, though he would not say where the distribution was to. He claimed to have been set up by Mr Moss, and said that he intended to pay the company's creditors. He did not admit any dishonesty.

Twelve months later, in January 1993, having, in the intervening period, failed to answer his bail, he was interviewed again, this time in his correct name, about a fraud in connection with Greens Wine. He said that he had used the name Lord in relation to Harrops to avoid the mother of his children, and that Townsend had used a false name because a previous company of his called Greenleaves had gone into liquidation. He was re-interviewed about Harrops, and he said that that company had "gone bust", not because he was taking money, but because, as he put it, "of the timing". He reasserted that Mr Moss had set him up, and denied that Harrops in Leicester was anything to do with him and his associates. He had fled bail and gone to the U.S. in order to avoid maintenance proceedings against him by the mother of his children.

In circumstances to which we shall return later, Townsend was interviewed in November 1995 and read from a prepared statement. He said that he and Burraway had been approached by Bretscher to invest in Harrops, and although he had not been involved in the negotiations, he had invested £17,500. He was unaware that creditors were unpaid or that Bretscher had withdrawn substantial amounts of cash, and he made a variety of allegations against Bretscher, which it is unnecessary to itemise.

In the course of the trial Townsend gave evidence. He had apparently been a butler and, at the same time, a director of Greenleaves wholesalers in Covent Garden which went into liquidation in May 1991 because, he said, it had expanded too quickly. He and Burraway, with whom he had

been co-director of another company 10 years before, had agreed to invest £20,000 each in Harrops. The books shown to him disclosed losses by Harrops for the last two years, but this had not put him off. He knew nothing of Bretscher's cash withdrawals. He looked only for the repayment of his investment. He had drawn two £10,000 cheques on the CSS account in favour of Burraway, and he had paid some bills for Burraway. He played, he said, no part in the running of Harrops or Conecroft. It looked, he said, as though Bretscher was being used by Burraway.

Bretscher did not give evidence. His case was that Harrops was run lawfully, that he had been deceived by Burraway and Moss, and he had only used company money to pay legitimate expenses, and he still expected payment to be forthcoming from Leicester.

In relation to the Fehrenbach accounts, it was the prosecution case that after the collapse of Harrops, Townsend, Burraway and others took over Fehrenbachs, this time with Craig Douglas Maitland as the front man. He, in July 1992, placed an advertisement in the Fresh Produce Journal similar to that which had initiated the Harrops' enterprise. Mr Webb, who was chairman and company secretary of Fehrenbachs, replied, and met Douglas Maitland, who was using a false name and claiming to act for a Dutch company. He also met Douglas Maitland's wife, who took notes of the meeting. It was agreed that Douglas Maitland would replace Webb as chairman and he, Douglas Maitland, took over responsibility for the accounts and invoices of the company.

At the beginning of August 1992 Craig Douglas Maitland introduced to the company the appellant Dearsley, who was also using a false name. It was said that he was to boost the company's turnover and collect difficult debts. He, Dearsley, was in the office daily. Douglas Maitland failed to bank all the money that he was given. It was admitted that in August and September 1992 there was a shortfall of almost £19,000 between the cash received by the company and that paid into the bank accounts. Hotels were used, cars bought, offices rented and a chauffeur employed part-time for the two Douglas Maitlands and Dearsley. All these were paid for by Fehrenbach cheques which had not been discussed with Mr Webb. Douglas Maitland bought but did not pay for £60,000 worth of goods. They were delivered to Birmingham and Covent Garden where Burraway working for Townsend, went round the market. Dearsley was Douglas Maitland's right hand man. He took instructions for him and was less involved in the running of the company. He made some of the deliveries.

Townsend was in the background at Fehrenbachs. Together with Douglas Maitland and Burraway they leased offices, including one in New Kings Road in London for Quality Flowers, of which Townsend was chairman. Fehrenbachs paid cheques to Townsend's companies. Townsend also wrote a delivery note for bananas to Birmingham. He, Townsend, was arrested in relation to this matter in December 1993, and he made no comment at that time when he was interviewed.

At about the same time Dearsley was confronted by the police at home.

After initially denying who he was, he was arrested for conspiracy to steal from Fehrenbachs. He, too, made no comment in interview.

Townsend, as we have said, gave evidence in the course of the trial in relation to the Fehrenbach matters. He said that he had first met Douglas Maitland at a cash and carry, and he had told him that he and Burraway had been put into Fehrenbachs by Barclays Bank to sort out the business. He said he had met Dearsley at the London House offices of his company, Quality Flowers, which offices Burraway also used. He said that Burraway often used false names and gave him, Townsend, bills to pay, and he had signed the banana delivery note to Birmingham because Burraway was dyslexic. Townsend's off-licence company called Watersons received Fehrenbach money through Douglas Maitland.

On behalf of Bretscher Mr De Silva Q.C. submits that the judge wrongly exercised his discretion in refusing to stay the proceedings against Bretscher as an abuse of process. In order to understand that submission, it is necessary, first, to trace the chronology of material events as they are set out in an agreed schedule.

As we have said, Bretscher was first arrested as Lord in January 1992, and was then interviewed for the first time about Harrops. He was released on bail without charge, subsequently failed to answer his bail, and was then, on January 25, 1993, arrested, as we have said, in relation to the Greens Wine fraud in which Burraway was also a suspect, and at that time he made a witness statement against Burraway in relation to that matter.

On the following day, January 26, 1993, he was rearrested in relation to Harrops, and there was a very substantial second interview of him in relation to that. Again he was thereafter bailed and not charged.

In July 1993 Bretscher gave evidence for the Crown in committal proceedings against Burraway and others in relation to the Greens Wine fraud.

In December 1993, as we have said, Townsend was arrested, as Burraway, and the two Douglas Maitlands and Dearsley were all arrested and charged in relation to the Fehrenbach matters.

On December 16, 1993 Townsend was interviewed and made no comment in relation to Harrops. In January 1994 Bretscher gave evidence for the Crown at the Crown Court trial of the Greens Wine fraud matter.

A week or two later there was a conference between police officers, counsel and others where Bretscher's position was discussed, and the conclusion was reached that, even though he was the front man at Harrops, it was difficult to see how he could be prosecuted consistently with the view taken of him at the Greens trial. Given that there was little prospect of him being prosecuted, it was agreed that it would be useful to seek a witness statement from him in relation to both Harrops and Greenleaves. The decision at that time was to consider using Bretscher as an "accomplice" prosecution witness. On June 6, 1994, by which time the investigation of a variety of fruit and vegetable fraudulent conspiracies had been centralised and a considerable number of prosecution statements

in relation to these matters accumulated, a letter was written by the senior Crown prosecutor indicating that Bretscher was to be used "as a prosecution witness warts and all". A message to that effect was passed to the Merseyside Fraud Squad.

On September 5, 1994 the Fraud Investigation Group, which was by then seized of these matters, decided that the Harrop fraud should be prosecuted, as should other frauds involving Townsend and others, and in October 1994 statements from Harrops' staff, creditors and haulage contractors and from the police were sent to the Fraud Investigation Group.

On October 25, 1994 Bretscher was interviewed by police and the interview was taped. He was told that he was to be a prosecution witness and, as a result of that interview, on November 17, 1994 he approved a draft statement prepared from that interview in relation to Harrops implicating Townsend and Burraway as being behind that fraud.

In March 1995 there were committal proceedings in relation to Fehrenbach. Between April and October 1995 the two Douglas Maitlands and Dearsley were tried for mortgage frauds unrelated to the matters presently under consideration, and that trial finished on October 19. During the course of that trial statements in relation to the Harrops matter were, probably in June, sent to Mr Shears Q.C., counsel who appears for the prosecution before us.

In October 1995 the prosecution served on Townsend's lawyers the witness statements made by Bretscher as unused material, and on November 2, that material having been served on those advising him, Townsend made the statement to which we have earlier referred, based on a written statement which he had prepared in which he blamed Bretscher in relation to Harrops.

On November 14, Mr Shears took the view that it would be impossible to put Bretscher forward as a prosecution witness on whom the jury could rely at the Harrops trial, bearing in mind that, although he had made many admissions in relation to his role in the running of that company, he consistently denied dishonesty.

On December 14, 1995, Harrops' case was transferred to the Crown Court. Mr De Silva submits that there is a strong public interest in people giving evidence for the Crown, and if the prosecution renege on promises not to prosecute, such people will be reluctant to come forward. He says that in the present case, there was a blatant and flagrant abuse of process by breach of assurances and undertakings not to prosecute. The present case, he submits, is on all fours with *Croydon Justices, ex p. Dean* (1994) 98 Cr.App.R. 76, [1993] Q.B. 769, which was approved by all members of the House of Lords in *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42, see *per* Lord Griffiths, with whom others of the majority agreed at p. 124 and p. 61D to 61F, and Lord Oliver, who dissented, at p. 132 and p. 70F. The judge, submits Mr De Silva, was

wrong to distinguish *ex p. Dean* as having been decided on its own facts, because it disclosed a principle approved by the House of Lords.

In the light of the judge's findings that from mid-October 1994 until November 1995 Bretscher knew he was being treated by the Crown Prosecution Service as a prosecution witness and must have inferred that he would not be prosecuted in relation to Harrop and that his position was the same as if an express promise not to prosecute him had been made, the judge was wrong to conclude that there was no prejudice to Bretscher. Furthermore, submits Mr De Silva, although this aspect was not identified before the trial judge, there was serious prejudice to the defendant because his November 1994 witness statement having been served on Townsend's legal advisors in October, 1995, the consequence was that Townsend, on November 2, gave the interview in which, for the first time, he blamed Bretscher, and did so in terms which he subsequently, in evidence described as being "slanted" against Bretscher. The decision to prosecute Bretscher rapidly followed on November 14, Townsend's interview being on November 2.

In any event, submits Mr De Silva, as *Bennett*, particularly *per* Lord Lowry at p. 135 and p. 74G and *Schlesinger* [1995] Crim.L.R. 137, make plain there are two categories of abuse, namely as appears in *Schlesinger*, at p. 138:

"The first was where there had been prejudice to a defendant or a fair trial could not be had. The second was where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible."

The present case, submits Mr De Silva, is in the second category, in which prejudice to the defendant does not have to be shown. He referred also to *Bloomfield* [1997] 1 Cr.App.R. 135, at 139D, and 143A, and *Wyattm*, unreported, Court of Appeal Criminal Division transcript January 28, 1997, and Auld L.J.'s reference at p. 11G of the transcript to a defendant's "sense of grievance".

It is, submits Mr De Silva, in reliance on those words of Auld L.J., and on what Staughton L.J. said at p. 82 and p. 777 in *ex p. Dean*, the effect on the defendant of the course taken by the prosecution which has to be considered.

In summary, Mr De Silva advances three propositions. First, where a defendant has been induced to believe he will not be prosecuted, this is capable of founding a stay for abuse: see *Bloomfield*. Secondly, where, in addition, a defendant has been told he will be called for the prosecution, the longer he is left in that belief the more unjust it becomes for the prosecution to renege on their promise. Thirdly, where, as here, the defendant, cooperating as a potential prosecuting witness, was interviewed without caution and made a witness statement, and steps were then taken which resulted in manifest prejudice to him, it becomes inherently unfair to proceed against him.

For the Crown, Mr Shears Q.C. accepts, in the light of *ex p. Dean*, that breach of a promise not to prosecute is capable of being abuse, and that legitimate expectation of a defendant that he will not be prosecuted may be worthy of protection. However, the matter has to be decided on the facts of the particular case, to which the judge was not only entitled, but bound, to have regard. The investigations into Harrops and Fehrenbachs were part of a much wider nationwide investigation into seven or eight apparently fraudulent company activities in the fruit and vegetable market with common features and a changing team.

The decision to prosecute Bretscher in November 1995 must be set in this context. It then became apparent that, in the light of his denials of dishonesty and his claim to be an innocent dupe of Townsend and Burraway, he could not be placed before the jury as a witness of truth. The judge, says Mr Shears, was referred to the relevant authorities. These, he submits, disclose these principles. First, the court will stay a prosecution if it considers that acts or omissions of the Crown have either severely prejudiced a defendant or prevented a fair trial of the issues. Secondly, where a fair trial is still possible the court will stay a prosecution where it considers the actions of the prosecuting authority to be so unfair that, despite there being no prejudice, the proceedings should not continue: see *per* Lord Griffiths at p. 124 and p. 61E in *Bennett*. Thirdly, since the stay of proceedings is an exercise of judicial discretion, the court will consider each case on its own facts: see *Bennett*, *per* Lord Lowry at p. 138 and p. 77C and *Bloomfield* at p. 143B. Mr Shears distinguishes *Bloomfield*, which was a case in which the Court was much influenced by that which had occurred in the face of the Court. In giving the judgment of the Court in that case Staughton L.J., at p. 143C, pointed out that the Court was not seeking to establish any precedent or any general principle in regard to abuse of process, but found that in the exceptional circumstances of that case an injustice had been done to the appellant.

Mr Shears submits that there is no principle that if there has been a breach of a promise not to prosecute, this itself gives rise to an abuse. It all depends on the circumstances. Mr Shears also drew the Court's attention to the speech of Lord Steyn in *R. v. Latif and Shahzad* [1996] 2 Cr.App.R. 92, 100, [1996] 1 All E.R. 353 at 360H, where the following passage occurs, by reference to the legal framework of abuse of process:

"If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a

balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. 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."

Lord Steyn then refers to *Bennett*.

He goes on below at p. 101C and 361C:

"The speeches in *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."

Mr Shears submits that in *ex p. Dean*, Staughton L.J. made it plain at p. 84 that the facts of that case were "quite exceptional" and Mr Shears, as did the trial judge in the present case distinguished *ex p. Dean* from the present case on its facts.

Mr Shears further submits that the circumstances of the present case were not so exceptional as to amount to an abuse. The decision to make Bretscher a prosecution witness took place prior to the collection of the bulk of the prosecution evidence. The appellant's interview in October 1994 and witness statement in November 1994 took place either very shortly after, or at the same time, as the witness evidence from other sources was delivered to the Crown Prosecution Service by the police. The Crown Prosecution Service were not aware of the true extent of the central role that the appellant had played in the defrauding of Harrops, and there was no decision to take a statement from Bretscher when it was plain to the CPS and police that he would subsequently be prosecuted.

Bretscher made no clear admissions against interest in interview, and his interviews and witness statements were all substantially the same as those previously given although there were some additional matters later introduced in October 1994. There was no deliberate attempt by the prosecuting authority either to mislead the appellant or to prejudice his

position. He had, indeed, been offered legal advice prior to the October 1994 interview. No allegation of *mala fides* is made against the prosecution in this case. There had been no formal undertaking not to prosecute and no formal offer of immunity, and no indication given to the judge, as occurred in Bloomfield, though none of these matters, Mr Shears accepts, is in itself in any way decisive.

With regard to prejudice in relation to Bretscher, Mr Shears submits that none exists. So far as Townsend's November 2, interview is concerned, that dealt with many matters other than Bretscher's position at Harrops, and with matters with which, sooner or later, Townsend was going to have to deal. In any event, says Mr Shears, it would have been open to Bretscher's advisors at trial to seek to exclude the terms of Townsend's interview, having regard to the provisions of section 78 of the Police and Criminal Evidence Act 1984: (such an application seems unlikely to have merited success).

Mr Shears stresses that, in the course of the trial, no point was made by Mr De Silva on behalf of Bretscher in cross-examination of any witness, or in his submissions, which was not there to be made, and was made, in any event in the light of the evidence and documentation before the jury.

We accept Mr De Silva's three propositions. There is, as it seems to us, no difference, so far as the approach to the relevant principles is concerned, between Mr De Silva and Mr Shears. It is apparent to us that the trial judge found his task in relation to the stay for abuse application far from easy. In the light of the submissions made to him, we do not criticise the conclusion which he reached. On the contrary, he rightly directed himself that there can be cases of abuse outside the categories of fairness or prejudice, and that breach of a promise not to prosecute does not necessarily and, *ipso facto*, give rise to abuse, but may do if circumstances have changed. He was also entitled to conclude, having regard to the way in which the matter was presented to him, that Bretscher's case did not fall on the abuse side of the dividing line. Undoubtedly Bretscher knew, from October 1994 to November 1995, that he was being treated by the police and the CPS as a prosecution witness in relation to Harrops, and, as we have said he had earlier given evidence, apparently quite successfully, in relation to the Greens Wine fraud.

However, there was nothing improper or unfair in the prosecution interviewing Bretscher as a witness in October 1994, at a time when many other witness statements obtained in relation to Harrops had not been collated and considered, or in the mortgage fraud trial in relation to other Fehrenbach defendants being concluded on October 19, 1995 without any further decision being made about Bretscher, or in counsel's decision on November 14, 1995 that Bretscher could not be put before the jury as a prosecution witness or in the rapidity with which events subsequently moved, including the transfer of Harrops' case to the Crown Court on December 14, 1995. There was, as the judge found, and as it seems to us, nothing new of significance in relation to Bretscher's own position in his

November 1994 statement as compared with the contents of his 1992 and 1993 interviews. He had not changed his position in reliance on his treatment as a prosecution witness, nor, as the defendant had in *ex p. Dean*, volunteered information potentially further incriminating himself in reliance on that status.

However, although, as Mr De Silva frankly admits, he did not, at the time of trial, appreciate the significance of this or alert the judge to it, Bretscher's position was, it appears to us, seriously prejudiced by the service on Townsend's advisors of his witness statements in October 1995. For it was this which was a major factor, as is apparent from a part of the summing-up to which it is unnecessary specifically to refer, in leading Townsend, who had previously said nothing in interview to the police, making the statement implicating Bretscher and doing so, furthermore, if Townsend's evidence before the jury was correct, in a way which was excessively slanted against Bretscher.

If the judge's attention had been drawn to this prejudice, we have little doubt that it would have affected his decision, and he would have been bound to conclude that the prejudice to the defendant arising from his treatment as a prosecution witness, which effectively culminated in Townsend's allegations against him, was such that a stay should have been ordered for abuse of process. In consequence we allow Bretscher's appeal and quash his conviction.

Mr Culver, on behalf of Townsend, submits, first, that the judge exceeded his powers in ordering joinder of the Harrop and Fehrenbach counts. He referred us to *Cairns* (1988) 87 Cr.App.R. 287, where it was held that a circuit judge has no power under section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933 to authorise a voluntary bill. Secondly, submits Mr Culver, the judge was wrong in refusing to sever counts 1 to 3 from counts 4 to 6, and to sever Townsend's trial from Bretscher's. He accepts that it would be difficult to contend that the judge exercised his discretion improperly were it not for the question of abuse of process in relation to Bretscher.

As to joinder, it is apparent that the judge considered whether he had the appropriate power. He looked at the provisions of section 2(2) of the 1933 Act which, in so far as is material, is in these terms:

"Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—

- (a) the person charged has been committed for trial for the offence; or
- (aa) the offence is specified in a notice of transfer under section 4 of the Criminal Justice Act 1987. . . ."

The judge concluded, rightly in our judgment, that that provision imposes no prohibition on joinder of committed and transferred charges. It identifies the circumstances in which a bill of indictment may be preferred,

and limits the counts to those disclosed in the documents founding committal or transfer, but it does not deal with joinder.

We do not derive assistance in the present case from this Court's decision in *Cairns*. Mr Culver referred us to *Groom* (1976) 62 Cr.App.R. 242, [1977] Q.B. 6. In the *Practice Direction* arising from *Groom*, which is set out at (1976) 62 Cr.App.R. 251, in relation to different persons separately committed, it is said:

" . . . it is permissible to join in one indictment the counts founded upon the separate committals despite the fact that an indictment in respect of any one of those committals has already been signed."

In our judgment that practice must apply *a fortiori* in relation to one defendant who faces separate signed indictments in respect of separate committals and, by analogy, indictments based on separate committals and transfers. No possible prejudice could arise, nor did arise, to the defendants in this case from joinder. The judge was, in our view, correct to permit the joinder of the counts, some of which had been the subject of committal, and some of which had been the subject of transfer in a single indictment.

As to severance, the matter was essentially one for the judge's discretion. So far as the impact on Townsend of the judge's refusal to order a stay against Bretscher is concerned, the crucial question is whether Townsend was prejudiced so that the verdicts against him should be regarded by this Court as unsafe.

It is to be noted that Townsend made the admissions which he did at a time when it was anticipated that Bretscher would be a prosecution witness not a defendant. In fact, Bretscher gave no evidence in the trial, either as a prosecution witness or as a defendant. Therefore, to that extent, Townsend's position was better than it might have been, and the jury were, as one would expect, directed that the contents of Bretscher's witness statements were not evidence against Townsend.

However it seems to us that the presence at Townsend's trial of Mr De Silva, on behalf of Bretscher, cross-examining witnesses and Townsend himself, and making submissions to the jury in support of Bretscher's case, which were necessarily hostile to Townsend's case, cannot be ignored by us. Furthermore, had Bretscher been absent from the trial, Townsend would have had free reign to blame Bretscher in a manner which Bretscher's presence at least inhibited.

It is, in our view, impossible to conclude that the jury's verdict against Townsend on the Harrop case would have been the same had he been tried separately from Bretscher, as necessarily he would have been if the proceedings against Bretscher had been stayed. Accordingly Townsend's conviction on count 1 must be regarded as unsafe.

The next question is whether, despite the matters to which we have referred, Townsend's conviction on count 5, in relation to the quite separate Fehrenbach activities, can be regarded as safe. Not without some

hesitation, we conclude that it cannot. The similarities in the *modus operandi* of Harrops and Fehrenbach, which was one of the proper factors properly justifying the two groups of counts being tried together in the first place, and the unquantifiable impact which the Harrops' evidence against Townsend may have had on the jury's approach to the Fehrenbach counts against him, means that the verdict on count 5 in relation to Townsend cannot be regarded as safe.

The appeals against conviction of Bretscher and Townsend are accordingly allowed, and their convictions quashed.

There can be no question of Bretscher being retried. We will, in a moment, hear submissions as to the possibility of a retrial in relation to Townsend.

That leaves the appellant Dearsley who, as we indicated at the outset, appears by leave of the single judge against the sentence of 15 months' imprisonment imposed upon him.

Miss Johnson, in succinct written and oral grounds of appeal submits that having regard to the reductions in sentence accorded to Dearsley's co-accused in relation to the Fehrenbach activities, the sentence of 15 months on Dearsley must properly be regarded as excessive having regard to the comparatively minor role which he played in these matters.

To that submission this Court accedes. His sentence of 15 months will accordingly be quashed and there will be substituted a sentence of eight months' imprisonment.

[The Court ordered a re-trial in respect of the appellant Townsend.]

*Appeals against conviction of  
Townsend and Bretscher allowed.  
Appeal against sentence of Dearsley  
allowed. Sentence varied.*

*Solicitors: Crown Prosecution Service.*