



1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL DIVISION**  
3

4 **SCA 56 of 2023**

5  
6  
7 **JOSHUA KAYAN PARS**

8  
9 **V.**

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11 **R**  
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15 **Appearances:** **Ms. Amelia Fosuhene of Brady Law for the Applicant**

16  
17 **Mr. Orrett Brown, Crown Counsel, Office of the Director of Public**  
18 **Prosecutions for the Respondent**  
19

20  
21  
22 **Before:** **The Hon. Justice Cheryll Richards KC**

23  
24 **Submissions Heard:** **19<sup>th</sup> April 2024**  
25

26 **Further Written**  
27 **Submissions:** **1<sup>st</sup> May 2024 and 22<sup>nd</sup> May 2024**  
28

29 **Judgment:** **8<sup>th</sup> October 2024**  
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33 ***Criminal Law:*** - *Appeal by way of Case Stated pursuant to s.165 of the Criminal Procedure Code (2021*  
34 *Revision). No verdict on charges by Summary Court. Whether legislation provides for interlocutory*  
35 *appeals, or Judicial Review procedure appropriate. Exceptional circumstances, appeal treated as*  
36 *application for Judicial Review.*



## JUDGMENT

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4 1. This is an application for leave to appeal by way of Case Stated dated 3<sup>rd</sup> July 2023 but filed on  
5 the 1<sup>st</sup> September 2023. The Applicant (“the defendant”) seeks to appeal the decision of the  
6 Learned Magistrate (“the Magistrate”) not to stay proceedings as an abuse of process. The  
7 application is opposed by the Respondent (“the prosecution”).  
8
- 9 2. Relief is sought on the following grounds: -  
10
  - 11 i. “The Magistrate erred in her decision not to find that the Court’s process had been abused.
  - 12 ii. The prosecution had gone back on a promise made to the defendant that they would accept  
13 his guilty pleas which they had offered and he had entered.
  - 14 iii. The Court has allowed the prosecution by not granting the abuse application to abuse the  
15 Court’s process.”  
16

### 17 **THE CASE STATED**

- 18  
19 3. This matter was initially listed for hearing in this Court differently constituted on the 17<sup>th</sup>  
20 November 2023. The Court gave directions as to the proper procedure for an appeal by way of  
21 case stated and remitted the matter to the Summary Court.  
22
- 23 4. On the 3<sup>rd</sup> October 2023 and as amended on the 23<sup>rd</sup> November 2023, the Magistrate stated the  
24 questions of law for this Court as follows: -  
25
  - 26 i. Is the discovery of new information sufficient grounds for allowing the Crown to renege  
27 on a promise not to prosecute?  
28
  - 29 ii. Was the Summary Court correct to find on the *first application* that to continue the  
30 prosecution of the original more serious offence was not an abuse of process?  
31

- 1           iii.    Was the Summary Court correct to find on the *second application* that to continue the  
2           prosecution of the original more serious offence was not an abuse of process?  
3  
4           iv.    Should the Summary Court be considering the form of the new information (whether it is  
5           in admissible form yet) when considering whether to stay the proceedings (i.e., in advance  
6           of any hearing to review the sufficiency of evidence such as a preliminary inquiry or trial)?  
7

8   **THE FACTS**  
9

- 10          5.    The facts are taken from the ruling of the Magistrate dated the 27<sup>th</sup> June 2023 and may be  
11          summarised as follows.  
12  
13          6.    On the 15<sup>th</sup> October 2021, the Applicant appeared in the Summary Court charged with three  
14          counts of Possession of Firearm. Two counts were of Possession of Imitation Firearm with Intent  
15          to Commit an Offence.  
16  
17          7.    Charge 01812/21 – (1) related to an incident in the early hours of the morning of the 11<sup>th</sup> October  
18          2021 outside the Cotton Club in George Town. The prosecution’s case is that Closed Circuit  
19          Television (“CCTV”) footage appeared to show the Applicant in possession of a firearm which  
20          he discharged. The police who attended the scene shortly after 1:30 am that morning did not  
21          recover a weapon.  
22  
23          8.    Charge 01812/21- (2) related to Possession of an Imitation Firearm on the said day at West Bay  
24          Road in the vicinity of the Strand parking lot.  
25  
26          9.    Charge 01820/21 which was amended on the 21<sup>st</sup> October 2021 was for Possession of a Firearm  
27          with Intent to Commit an Offence outside the Cotton Club in George Town on the said date.  
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1 **THE CHRONOLOGY**  
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- 3 10. The Summary Court has provided a detailed chronology of the proceedings which is summarised  
4 in the following way.  
5
- 6 11. After about six months and multiple adjournments before the Summary Court the Applicant  
7 entered a plea on the 1<sup>st</sup> April 2022 to one charge of Possession of an Imitation Firearm at the  
8 Cotton Club.  
9
- 10 12. On the 25<sup>th</sup> March 2022, prior to the plea, the prosecution wrote to defence Counsel in the  
11 following terms: -  
12
- 13 “As discussed, in the event that Mr. Pars enters a guilty plea to charge 01812/21 (1) –  
14 imitation firearm Cotton Club, then the following charges will be withdrawn.”  
15
- 16 13. A sentencing hearing began on the 29<sup>th</sup> June 2022 about four months after the plea was entered.  
17 This was adjourned part heard with directions from the Court for the parties to provide a position  
18 statement on the facts of the case, a copy of the CCTV footage and a copy of a relevant judgment  
19 of the Court of Appeal. It was adjourned again on the 5<sup>th</sup> September 2022 because of the absence  
20 of the position statement.  
21
- 22 14. On the 13<sup>th</sup> September 2022 the prosecution received a ballistic report. Following review of this  
23 report, the prosecution sought to have the Applicant’s plea to the charge to which he had pleaded  
24 guilty vacated.  
25
- 26 15. The ballistics report referred to bullet cartridges found at the scene at the material time. There  
27 were also continuity statements. According to the prosecution, all of these appeared to connect  
28 those cartridges to a real firearm. This firearm had been recovered on the 15<sup>th</sup> July 2022, three  
29 months after the representation of acceptability of plea had been made to the Applicant in March  
30 2022.  
31
- 32 16. The Applicant applied for the proceedings to be stayed as an abuse of process. The application  
33 was opposed by the prosecution.

- 1  
2 17. The basis for the application was in essence that the prosecution had reneged on its promise to  
3 accept the plea to possession of an imitation firearm and thus that the continued prosecution  
4 would be an abuse of the process of the Court.  
5  
6 18. The defence argued that the Applicant was prejudiced by the fact that he had entered a guilty plea  
7 in reliance on the undertaking which had been given that the other charges would be discontinued.  
8 The further argument was that the prosecution could adduce the fact of the earlier guilty plea at  
9 the trial thus limiting the Applicant's ability to challenge the case against him such as on the issue  
10 of identification.  
11  
12 19. The prosecution responded that the new evidence came to light after the representation had been  
13 made, that there was now evidence that the Applicant had been in possession of a real firearm  
14 and there was a public interest in proceeding against him on the more serious charge.  
15  
16 20. In a detailed and careful ruling on the 27<sup>th</sup> January 2023, the Magistrate considered the leading  
17 cases on the issue of the prosecution reneging on a promise not to prosecute. These included *DPP*  
18 *v Edgar*<sup>1</sup>, *R v Abu Hamza*<sup>2</sup> and *R v Killick*<sup>3</sup>.  
19  
20 21. The Magistrate identified the competing interests to be the public interest in having those  
21 reasonably suspected of criminal conduct being brought to trial balanced against the public  
22 interest in preserving the integrity of the criminal justice system.  
23  
24 22. The Magistrate concluded that the new information in the form of the ballistic report is of the  
25 type of facts to which the Courts referred to in *Abu Hamza* and *Killick* that could justify  
26 proceeding with a prosecution despite an earlier representation.  
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<sup>1</sup> 2000 WL 191281

<sup>2</sup> [2006] EWCA Crim 2918

<sup>3</sup> [2012] Crim App. R. 10



1       23.    The Magistrate stated: -

2  
3                “In fact, not proceeding on a charge which is so serious in circumstances where there might  
4                be a prima facie case would be an affront to public conscience and would not in such  
5                circumstances, undermine the integrity of the administration of justice.”

6  
7       24.    Thereafter the defence sought to apply to vacate the Applicant’s plea. The prosecution indicated  
8                that it would oppose the application. The Court suggested that prosecuting Counsel should  
9                consult the Director of Public Prosecutions on the issue. The defence indicated that it would be  
10              applying for the proceedings to be stayed in light of this stance.

11  
12       25.    After having time to take instructions the prosecution advised by correspondence on the 20<sup>th</sup>  
13              February 2023 and confirmed in open Court on the 9<sup>th</sup> March 2023 that it would not oppose the  
14              Applicant’s application to vacate his guilty plea. Defence Counsel asked that the matter be listed  
15              nonetheless for a second abuse of process application to be heard. This was heard on the 13<sup>th</sup> June  
16              2023. The Magistrate issued a ruling on the 27<sup>th</sup> June 2023.

17  
18    **THE RULING ON THE SECOND APPLICATION**

19  
20       26.    The submissions on the second application are set out at paragraphs 16 to 21 of the ruling.  
21              Defence Counsel argued that the decision of the prosecution to oppose the application to vacate  
22              the plea constituted an abuse of process such that the entire conduct of the prosecution throughout  
23              the proceedings should be revisited. It was said that the defendant had suffered real prejudice as  
24              a result of the behaviour of the prosecution.

25  
26       27.    The basis of the prejudice was expressed as follows: -

27  
28              (i)     “The defendant entered a guilty plea on the expectation that he would be sentenced for an  
29              offence which attracts a significantly lower sentence than the more serious charge sought  
30              to be prosecuted now;

31  
32              (ii)    The guilty plea is an act to his detriment;



1  
2 (iii) The defendant has been awaiting sentence since April 2022 and the Crown’s position has  
3 caused significant delays and uncertainty to the defendant; and  
4

5 (iv) The Crown will be able to adduce evidence and cross-examine the defendant as to his  
6 guilty plea at the trial of the more serious offence.”  
7

8 28. Counsel for the defence submitted that the Court could not dismiss the prejudice caused although  
9 the prosecution had now accepted that the fairer course is not to oppose the application to vacate  
10 the plea. Counsel cited additional cases on the initial withdrawal of the promise including *R v*  
11 *Mulla*<sup>4</sup>.  
12

13 29. The prosecution opposed the application and sought to persuade the Court that consideration  
14 should be limited to the most recent development and not reopened on the entirety of the issues.  
15

16 30. The Magistrate concluded that it was appropriate given the further actions of the prosecution for  
17 the entirety of the prosecution’s behaviour to be reviewed. The Magistrate noted that the  
18 prosecution had acknowledged an error of judgement in seeking to oppose the application to  
19 vacate the plea. The prosecution had taken steps to remedy the unfairness, and it was the eventual  
20 result rather than the motive which was material. The Magistrate concluded that the remaining  
21 issue of whether the prosecution would or could in the course of the trial seek to adduce evidence  
22 of the guilty plea could properly be dealt with as part of the trial process pursuant to s.40 of the  
23 *Evidence Act*.  
24

25 31. As to the change in position of the prosecution, the Magistrate’s ruling was this: -  
26

27 “I am not persuaded that 18 days of believing that the Crown was opposing the application  
28 to vacate gives rise to a prejudice to the Defendant – the Defendant’s hopes were not raised  
29 and dashed in the manner that the authorities envisioned, in fact it is quite the opposite; he  
30 was led to believe that the Crown were seeking to gain an advantage that they later  
31 abandoned.”

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<sup>4</sup> 2004 1 Cr. App. R. 6



1 32. The Magistrate concluded that the defendant could still have a fair trial and that upon reviewing  
2 the conduct of the prosecution as a whole, where the withdrawal of an undertaking not to  
3 prosecute a particular charge is because of new facts coming to light, it is not an abuse of process.  
4

5 **THE APPEAL**  
6

7 33. In the course of this hearing, I raised the issue of the procedure being followed as this appeared  
8 to be an appeal from an interlocutory rather than terminatory ruling. I questioned whether the  
9 Applicant ought therefore to have proceeded by way of Judicial Review rather than an appeal.  
10

11 34. Counsel were afforded the opportunity to review and research the issue and to make further  
12 submissions.  
13

14 35. In summary both Counsel appeared to accept on the basis of the authorities cited following  
15 research that the provisions in the *Criminal Procedure Code* (2021 Revision) relative to appeals  
16 do not provide for interlocutory appeals from decisions of the Summary Court.  
17

18 36. Both Counsel nevertheless asked that the Court consider by way of an exceptional course, hearing  
19 the substance of the issue and giving a ruling in light of the delay to which the  
20 Applicant has already been subject.  
21

22 37. Section 165 of the *Code* provides for appeals from the Summary Court. It states that: -  
23

24 (1) “ Save as hereafter in this Code provided, any person who is dissatisfied with any judgment,  
25 sentence or order of the Summary Court in any criminal cause or matter to which that person  
26 is a party may appeal to the Grand Court against such judgment, sentence or order either by  
27 motion on matters of law or fact (or both) or by way of case stated on a point of law only as  
28 hereafter provided: Provided that in no case shall the complainant appeal from a decision  
29 dismissing a complaint except by way of a stated case on a point of law.  
30

31 (2) For the purposes of any appeal the Director of Public Prosecutions shall be deemed to be a  
32 party to any criminal cause or matter other than those in which the proceedings were  
33 instituted and carried on as a private prosecution and in which the conduct of such

1 proceedings has not been taken over by the Director of Public Prosecutions under section  
2 12(5).”

3  
4 38. In *Bush v R*<sup>5</sup>, the appellant sought to appeal a ruling of the Summary Court that charges had been  
5 brought within the statutory time limit. The Grand Court (Swift Ag. J.) held that: -  
6

7 “It had not been necessary for the magistrate to stay the Summary Court proceedings  
8 pending the resolution of the appeal. The only procedural provisions in the Criminal  
9 Procedure Code (2014 Revision) governing Summary Court appeals related to appeals by  
10 way of case stated and appeals on motion where a case had proceeded to conviction and/or  
11 sentence, or where there had been a terminating ruling. The magistrate’s interlocutory  
12 ruling in the present case was not such a ruling. The court doubted whether it was  
13 susceptible to appeal until the appellant was convicted and sentenced. Any challenge to  
14 the decision would then form part of the appeal following conviction and sentence. An  
15 acquittal on the charges subject to the present appeal would render the appeal otiose. The  
16 magistrate was entitled, if not obliged, to continue with the trial notwithstanding the oral  
17 notice of appeal against the interlocutory ruling, subject to any application for judicial  
18 review (paras. 5-7).”  
19

20 39. In doing so the Court applied the dicta in the case of *Miller v Summary Court Ex Parte Attorney*  
21 *General*<sup>6</sup>.  
22

23 40. Counsel for the Respondent in the instant case conducted detailed research which is set out in  
24 summary below.  
25

26 41. In *Streames v Copping*<sup>7</sup> the Divisional Court reviewed the application of s.111(1) of the  
27 *Magistrates Court Act* of 1980<sup>8</sup> which is in somewhat different terms.



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<sup>5</sup> [2016] 1 CILR 420

<sup>6</sup> [1994- 95] CILR 417

<sup>7</sup> [1985] QB 920

<sup>8</sup> The subsection provides: any person who was a party to any proceeding before a magistrate’s court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31 December 1879 is final.

1 42. The issue under consideration was whether a magistrate’s court had the power to state a case for  
2 the consideration of the Divisional Court before it reached a final determination on the matter  
3 before it. The Divisional Court concluded that the magistrate’s court did not possess such power.  
4 The Divisional Court also found that it had no jurisdiction to consider or determine a case stated  
5 in excess of the magistrate’s power.



6  
7 43. May LJ stated that: -

8  
9 “Apart from questions of jurisdiction, where justices are asked to, and do rule on a point  
10 of law in the course of a hearing before them, for instance, on a question of the admission  
11 of evidence, or the construction of a statute or document-they should not at that stage, with  
12 nothing more, accede to an application by the party against whom they have ruled for an  
13 adjournment and for them to state what I can describe as an “interlocutory” case. If they  
14 purport to do so, then for the reasons I have given I do not think this court has jurisdiction  
15 to hear it. The justices, having made their ruling, should complete the hearing and  
16 determination of the matter before them, and then state a case thereafter if they are asked  
17 to do so. In a very special instance, if the party aggrieved sought and obtained leave to  
18 apply for prohibition, then the justices might be wise to adjourn the matter pending the  
19 hearing of the application for judicial review, but they should not state a case under section  
20 111(1) until after their final determination of the information or complaint before them.”

21  
22 44. In *Downes and Another v RSPCA*<sup>9</sup> the Divisional Court in dismissing the appeal held *inter alia*  
23 that: -

24  
25 “ (1) that although the words “conviction, order, determination or other proceeding of the  
26 court” in s.111(1) of the Magistrates’ Courts Act 1980 were quite wide and would suggest  
27 that virtually any ruling by the magistrates’ court could be subject to a case stated appeal,  
28 that was not how the section had been interpreted. The principles to be applied were that:  
29 (a) where a jurisdictional point was taken before the magistrates’ court, then, if the court  
30 declined jurisdiction, that decision could be challenged either by judicial review \*26 or by  
31 way of case stated; (b) where such a point was taken and a court accepted that it had

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<sup>9</sup> [2018] 2 Cr. App. R. 3

1 jurisdiction then there was nothing to suggest that the magistrates' court had the power to  
2 state a case. The only remedy was for the aggrieved party to seek judicial review, and the  
3 magistrates in such an event should not adjourn unless there were particularly good reasons  
4 to do so. It would usually be better to carry on and complete the case, allowing for all  
5 matters to be raised on appeal at the conclusion of the case in the normal way; and (c) in  
6 all other cases there was no power to state a case in relation to an interlocutory ruling.”  
7

- 8 45. In *Highbury Poultry Farm Produce Limited v Crown Prosecution Service*<sup>10</sup> the Court reviewed  
9 the case of *Downes* as persuasive authority in considering whether it had jurisdiction to hear the  
10 appeal by way of case stated. Hay LJ said: -  
11

12 “ In the present case, District Judge Cadbury ruled on preliminary issues rather than made  
13 a determination that went to jurisdiction. The practical effect of his ruling, if upheld by this  
14 Court, may be that HPFPL has no defence to these charges; or, if HPFPL is right and  
15 Regulation 30(1)(g) requires proof of *mens rea*, the prosecution will be discontinued. In  
16 that sense, therefore, the rulings on the preliminary issues may be dispositive, whatever the  
17 outcome; but that is not the test. As Holroyde LJ has pointed out, if the effect of the ruling  
18 in question is that the proceedings remain extant, irrespective of whether they are contested  
19 on the issue of guilt or finally determined on a guilty plea, the case stated procedure is  
20 inappropriate.”<sup>11</sup>  
21

- 22 46. Counsel for the Respondent also drew to the Court’s attention the decision of Quin J in the Grand  
23 Court case of *Bush, Sanchez and Crawford v AG*<sup>12</sup>. The Grand Court considered whether it had  
24 jurisdiction to hear an appeal under section 165 of the *Criminal Procedure Code* where the  
25 appellants were dissatisfied with a witness anonymity order made by the Summary Court. The  
26 conclusion *inter alia* was that the appellants were not entitled to appeal to the Grand Court against  
27 the making of the orders whilst the proceedings in the Summary Court were ongoing.  
28 Additionally, the Court found that the legislature intended that section 165 applied to “a final  
29 judgment, sentence or order of the summary court” but not interlocutory rulings.

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<sup>10</sup> [2018] EWHC 3122 (Admin).

<sup>11</sup> Ibid paragraph 54

<sup>12</sup> [2010] (1) CILR 437].



1 47. In respect of the instant case, Counsel accept the jurisprudence cited, as does this Court. The  
2 import of this jurisprudence applied to the instant case is that the *Criminal Procedure Code* does  
3 not appear to provide for interlocutory appeals from decisions of the Summary Court by way of  
4 Case Stated.

5  
6 48. Counsel nevertheless invited the Court to consider the flexible approach taken by Treacy LJ in  
7 the case of *Platinum Crown Investments Ltd v North East Essex Magistrates' Court*<sup>13</sup>. The  
8 learned Judge therein stated that departure from the general rule is permissible in exceptional  
9 cases where “*a degree of flexibility would save time and cost.*”. It was stated: -

10  
11 “It seems clear to me from the consideration of those four authorities that notwithstanding  
12 the general rule that the court has no jurisdiction to deal with an interlocutory appeal from  
13 the Magistrates’ Court in a criminal matter by way of case stated, a degree of flexibility in  
14 dealing with the matter is available to this court in exceptional circumstances.”<sup>14</sup>

15  
16 49. In determining whether it was appropriate to apply a degree of flexibility in that case, the learned  
17 Judge stated: -

18  
19 “ ...The substantive point in issue has been clearly identified in the case stated. It is  
20 supported by clear factual findings in relation to the relevant evidence. Both parties have  
21 spent time and money in preparation for this hearing and are ready to proceed with the  
22 substantive point raised by the justices.

23  
24 I consider that all relevant materials are before this court. It seems to me that a strict  
25 application of *Streames v Copping* and a refusal to adjudicate upon the point in issue would  
26 be likely to cause delay, additional expense and might well result in the same point  
27 returning to this court on a later date if the magistrates were to convict on the informations.

28  
29 I can see no benefit to either party or to the administration of justice in declining to rule  
30 today on the point raised.

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<sup>13</sup> [2017] EWHC 2761 (Admin).

<sup>14</sup> Ibid, paragraph 18





1  
2 I consider it right to deal with the jurisdictional point by applying the degree of flexibility  
3 which the authorities cited permit.”  
4

5 50. The learned Judge therefore dispensed with the formalities and dealt with the appeal as a matter  
6 brought before the Court by way of judicial review.<sup>15</sup>  
7

8 51. In supportive submissions as to this course in the instant case, Counsel for the Applicant detailed  
9 the lengthy chronology of the case and the time that the Applicant has spent in custody. Counsel  
10 submitted that whilst it is accepted that in the normal course of events an interlocutory matter  
11 should not be brought before the High Court via an appeal by way of case stated, these are not  
12 the normal course of events.  
13

14 52. Counsel submitted that these are wholly exceptional circumstances which would bring this matter  
15 under the exception which was outlined in the cited case of *Platinum Crown Investments Ltd v*  
16 *North East Essex Magistrates Court*<sup>16</sup>. Counsel submitted that the learned Judge had dispensed  
17 with the formalities and determined the case on the merits before the Court. Counsel asked the  
18 Court to note the reasoning of the learned Judge in granting leave for this to be done. Counsel  
19 submitted that the exceptional circumstances to justify the grant of such leave were not limited  
20 to the facts of the case but included that there had been funds and time expended to bring the  
21 matter before the Court, albeit, by way of case stated and not by Judicial Review.  
22

23 53. Counsel submitted that in this case, Mr. Pars has been in custody since 2021, and it is now 2024.  
24 Counsel noted that had he received the maximum sentence after the appropriate reduction for his  
25 guilty plea he would have served his sentence for the offence of Possession of an Imitation  
26 Firearm. Alternatively, had he entered a guilty plea to the charge of Possession of a Firearm, he  
27 would be at the stage where he would be considering his Parole hearing. Counsel submitted that  
28 this is exactly the kind of case that their Lordships were referring to which would fall within the  
29 exception.

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<sup>15</sup> Jay LJ considered Treacy LJ's proposition at paragraph 51 of the *Highbury Poultry Farm Produce* case. It was said: "...in my view this case is not authority for the proposition that appeal by way of case stated is a possible or permissible route in these particular circumstances; indeed, it suggests that judicial review is the appropriate avenue for redress.

<sup>16</sup> [2017] EWHC 2761 (Admin) at paragraphs 18-21.

1 54. Counsel noted that the matter came before another tribunal of the Grand Court, and it was sent  
2 back to the Magistrate’s Court in order for the appeal by way of Case Stated to be placed by that  
3 Court in its proper format. At that stage there was no suggestion by the Grand Court that the  
4 appeal by way of Case Stated was not the correct forum for the appeal. Counsel said that if the  
5 matter were not to be heard and then the process of Judicial Review were to be commenced, Mr.  
6 Pars would be delayed even further.

7  
8 55. Counsel urged that both parties have made submissions in the case and are ready for the matter  
9 to be heard. It is submitted that in these circumstances the Court should revert to the preamble to  
10 the *Grand Court Rules* and the Overriding Objective and dispense with the formalities and hear  
11 and determine the case on its merits as though it were a Judicial Review.

12  
13 56. Having considered the authorities cited and the submissions I do find the circumstances in the  
14 instant case to be exceptional. I accede to the requests of Counsel, dispense with the formalities  
15 and grant leave so that the case proceeds on the material before the Court to a consideration of  
16 the substantive issue.

17  
18 **THE SUBMISSIONS OF THE APPLICANT**



19  
20 57. Counsel on behalf of the Applicant provided detailed submissions on this review hearing. I have  
21 considered all the submissions made although they are not set out in the same length in this ruling.  
22 Counsel submitted that the initial indication given to the Applicant was not equivocal and that it  
23 is essential that every defendant is able to rely on the word of every representative of the Office  
24 of the Director of Public Prosecutions. Counsel submitted that: -

25  
26 “Ultimately it would mean that no defendant can ever rely on the word of Crown Counsel  
27 in this Jurisdiction. No defendant can rest assured that his guilty plea, invited by Crown  
28 Counsel, then tendered and then reneged upon for whatever reason envisaged by crown  
29 counsel. It not only serves to undermine the court process but also the entire and previously  
30 long established integrity of the Office of the DPP.”  
31

1 58. Counsel said that this would mean that a defendant who entered an early guilty plea to a lesser  
2 offence would not have the security of knowing that his plea was the basis on which he would be  
3 sentenced.

4  
5 59. Counsel drew the Court's attention to paragraph 63 of the judgment of the Court in the case of  
6 *Abu Hamza* where it was stated by Lord Philips LCJ that: -

7  
8 "The courts, of course, have no power to apply direct discipline to the police or the  
9 prosecuting authorities, but they can refuse to allow them to take advantage of abuse of  
10 power by regarding their behaviour as an abuse of process and thus preventing a  
11 prosecution."

12  
13 60. Counsel said that by reference to the case *R v Mulla* all of the following apply to the instant case,  
14 that: -

- 15  
16 a. "Whether the prosecution has indicated an unequivocal commitment not to prosecute  
17 and has accepted something less, such as acceptance of plea to lesser charge or a failure  
18 to disabuse the defendant of a mistaken belief that the proceedings would be  
19 terminated; and in what form whether it is to offer no evidence or to withdraw the  
20 charge can amount to an abuse.
- 21 b. Where the undertaking not to proceed is delivered in open court by the prosecution.
- 22 c. Where the judge expressed a view (which the Chief Magistrate did when agreeing to  
23 accept the pleas).
- 24 d. Where there had been a significant time between the prosecution's change of view.
- 25 e. Where the defendant's hopes had been inappropriately raised and dashed.
- 26 f. Where the defendant relied to his detriment and suffered prejudice relying on the  
27 undertaking of the prosecution. (which he now does as the prosecution will be able to  
28 rely on his earlier plea and the time spent in custody awaiting the outcome of this)."  
29



1 61. Counsel placed reliance on the case of *R v Robert Thomas*<sup>17</sup>. Counsel asked the Court to note  
2 that in that case the trial was stayed on the basis that State officials were bound by promises that  
3 they had made. The defendant had made admissions relying on the representations which had  
4 been made to him that he would not be prosecuted for the more serious offence.

5  
6 62. Counsel submitted that entering a guilty plea in this case was obviously to the detriment of the  
7 Applicant. Counsel explained the detriment to him as being that the Courts could not prevent  
8 cross-examination as to the circumstances surrounding the guilty plea to the lesser offence. The  
9 position is made further unsatisfactory because the prosecution indicated that they wished to  
10 oppose the vacation of the plea. Counsel said that the Applicant would be placed at a significant  
11 disadvantage at trial.

12  
13 63. Counsel submitted that there is a distinction with the case of *Killick* in that the Court found in  
14 that case that no unequivocal assurance had been given to the defendant.

15  
16 64. Counsel said further that the conduct in the *Abu Hamza* case can be distinguished from the instant  
17 case where the representation was unequivocal and was to the detriment of the Applicant. Such  
18 conduct serves to undermine the Court's process.

19  
20 65. Counsel submitted that the answer to the first two questions stated are in favour of the defence  
21 and that whilst the Summary Court has a wide jurisdiction to pursue or allow applications, the  
22 exercise of its discretion was clearly not in circumstances where it gave proper regard to all of  
23 the learning available to it.

24  
25 66. Counsel submitted that even if this Court finds that the answers to the first two questions are not  
26 in favour of the defence the Court should go on to consider the final question. This is that: -

27  
28 "If evidence is presented to the court in a form other than [that which is] admissible, is the  
29 court bound to take it into consideration when reviewing the sufficiency of the evidence  
30 against the defendant. Moreover, is the discovery of new information not in evidential form

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<sup>17</sup> [1995] Crim L. R. 938





1 sufficient for the court to justify the ODPP reneging on an undertaking to the court not to  
2 prosecute a defendant, having made that promise to him.”

3  
4 67. Counsel submitted that the prosecution had originally filed a charge of possession of firearm and  
5 then taken the considered view that it would not proceed on this. The admissibility of the further  
6 evidence is a factor as well as the strength of that evidence.

7  
8 68. Counsel said that the prosecutions’ case was that there was an IBIS match between a firearm  
9 recovered by the Police on 16<sup>th</sup> July 2022 and the material previously recovered in the case. The  
10 IBIS lead notification is not accompanied by a formal witness statement or formal expert  
11 evidence. Counsel submitted that there are three important factors about which the prosecution  
12 had failed to notify the Court.

13  
14 i. “There is no statement which accompanies the IBIS lead Notification. The person  
15 creating it was a lady by the name of Leesa Mullings. She has provided no statement  
16 which confirms any kind of experience or expertise. Her evidence would not be  
17 admissible if it were to have been placed before the court at the relevant stage.

18  
19 ii. There is a flagged Caveat on the face of the IBIS matches which says IBIS leads cannot  
20 be utilised for any court related purposes until the evidence has been confirmed by  
21 microscopic comparison of the original linked evidence. This evidence would not be  
22 admissible if placed before the court at this stage.

23  
24 iii. The last comment on the document relied upon says “to be confirmed by a firearms  
25 examiner” There is no such expert evidence and therefore the workings would not be  
26 admissible.”

27  
28 69. Counsel makes the further argument that even if the evidence is in due form, it would be  
29 insufficient to change the circumstances and that in fact there is no substantive change. The  
30 weakness of the evidence received was highlighted. Counsel said that it is little more than an  
31 additional strand of circumstantial evidence. It is not capable of proving that the firearm which  
32 was seen in the video was operational at the material time. Anything expended appears to have

1           been collected by Mr. Pars who was seen on the CCTV footage bending down and retrieving  
2 something from the ground. Counsel said that the CCTV viewing log states that the firearm  
3 appears to have been jammed so no round was fired. Counsel submitted in summary that against  
4 this background, the additional evidence is not capable of leading to a charge of Possession of a  
5 Firearm.

- 6  
7       70. Counsel cited the case of *Phosphate Sewage Co. Ltd v Molleson*<sup>18</sup> and submitted that by the  
8 appropriate test for fairness on an abuse of process, the new evidence must be such as “entirely  
9 changes the aspect of the case.” The argument is that this is not the case here.

10  
11 **THE SUBMISSIONS OF THE RESPONDENT**

- 12  
13       71. Counsel for the Respondent submitted that the Magistrate had the power to stay proceedings as  
14 an abuse of process as considered by the Grand Court in the case of *R v Horek*<sup>19</sup>.

- 15  
16       72. Counsel submitted that in reliance on the cases of *Abu Hamza* and *Killick* the circumstances of  
17 this case do not amount to an abuse of process. Counsel said that it is accepted that an  
18 unequivocal representation had been made by the prosecution that it would withdraw charge  
19 1820/21 once the Applicant pleaded guilty to charge 1812/21- (1). The Applicant had pleaded  
20 guilty to this charge. Counsel submitted that notwithstanding this, the prosecution is justified in  
21 seeking to continue the prosecution of charge 1820/21 because new facts had come to light after  
22 the representation was made.

- 23  
24       73. Counsel said that the new facts suggest that the firearm was real and that in these circumstances  
25 the informed notional right-thinking person would not consider the change in the prosecution’s  
26 position an affront to justice. Thus, continuing the prosecution of charge 1820/21 would not bring  
27 the justice system into disrepute. Counsel submits that there is in this case no evidence of  
28 prosecutorial misconduct or bad faith.



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<sup>18</sup> [1879] UKHL 822 (8 July 1879)

<sup>19</sup> [2014] 2 CILR 168



1 74. It is also submitted that the Court through the application of s.40 of the *Evidence Act* can mitigate  
2 any residual unfairness to the Applicant by disallowing any reference to the guilty plea entered.  
3

#### 4 **THE APPLICABLE PRINCIPLES**

5

6 75. I have reviewed the cited authorities and set out below some of these in detail.  
7

8 76. In *R v Mulla*<sup>20</sup>, the English Appellate Court considered an appeal against a refusal of a stay on  
9 the basis of an abuse of process. On the morning of the 14<sup>th</sup> August 2002, the prosecution  
10 indicated that it would accept a plea to careless driving and not proceed on the charge of Causing  
11 Death by Dangerous Driving. The Judge invited the prosecution to revisit the decision. In the  
12 afternoon of the same day following review by a more senior Crown Prosecutor the prosecution  
13 indicated that it would proceed on the charge of Causing Death by Dangerous Driving. The  
14 defence argued before a different tribunal that it would be an abuse of process to do so and relied  
15 on the case of *R v Bloomfield* and the statement made therein as follows: -  
16

17 “The statement of the prosecution that they would offer no evidence at the next hearing  
18 was not merely a statement made to the defendant, or to his legal representative. It was  
19 made coram judice, in the presence of the judge. It seems to us that, whether or not there  
20 was prejudice, it would bring the administration of justice into disrepute if the Crown  
21 Prosecution Service were able to treat the court as if it were at its beck and call, free to tell  
22 it one day that it was not going to prosecute and another day that it was.”<sup>21</sup>  
23

24 77. The Appellate Court noted that each case has to be decided on its own facts. The Court concluded  
25 that it was not a case where the defendant’s hopes were raised and later dashed. The defendant  
26 knew from the beginning of the proceedings that on the 14<sup>th</sup> August the Judge did not approve of  
27 the course which the prosecution was proposing to take. Defence Counsel had not privately  
28 discussed the matter with him. The indication before the Court was the first that he had been  
29 apprised.  
30

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<sup>20</sup> [2004] 1 Cr. App. R. 6

<sup>21</sup> *R v Mulla*, page 74

1 78. The Appellate Court said that the indication to the court was only one of the factors to be  
2 considered in a case of this kind. Others included, the view expressed by the Judge when the  
3 indication was given, the period of time over which the prosecution reconsidered the matter  
4 before they changed their mind, whether or not the defendant's hopes had been inappropriately  
5 raised and whether there had been any prejudice to the defendant by reason of the change of  
6 course.

7  
8 79. In *Warren and Others v Attorney General for Jersey*<sup>22</sup>, the Privy Council referred to the  
9 judgment of the Court in the case of *R v Horseferry Road Magistrate's Court ex parte Bennett*<sup>23</sup>  
10 and to a number of cases. The Board was considering an appeal from an order refusing a stay of  
11 the prosecution as an abuse of process. Police officers had been found to engage in unlawful and  
12 reprehensible conduct. This included unlawful conduct in a foreign jurisdiction by the deceitful  
13 installation of recording devices in vehicles by which means they had secured evidence of the  
14 defendants' plans for the importation of drugs from the Netherlands to Jersey.

15  
16 80. It was held that the court has the power to stay proceedings in two categories of case,

- 17 1. Where it would be impossible to give the accused a fair trial; and
- 18 2. where it offended the court's sense of justice and propriety to be asked to try the accused in  
19 the particular circumstances of the case.

20  
21 81. The Board said that the two categories were distinct and had to be considered separately: -

22  
23 "In the first category of case, the focus was on fairness and no question of the balancing  
24 of competing interests arose. In the second category of case, the focus was on protecting  
25 the integrity of the criminal justice system and the balance had to be struck between the  
26 public interest in ensuring that those who were accused of serious crimes should be tried  
27 and the competing public interest in ensuring that executive misconduct did not  
28 undermine public confidence in the criminal justice system and bring it into disrepute."  
29

---

<sup>22</sup> [ 2012] 1 AC 22

<sup>23</sup> [1994] 1 A.C. 42



1 82. The Board held that while in the first category the question of balancing interests did not arise,  
2 in the second category fairness to the accused was not the proper focus of the court's attention.  
3 The court would consider the particular circumstances of the individual case and in exercising a  
4 broad discretion would strike a balance between the public interest in ensuring that: -

5  
6 "Those who were accused of serious crimes should be tried and the competing public  
7 interest in ensuring that executive misconduct did not undermine public confidence in the  
8 criminal justice system and bring it into disrepute."

9  
10 83. The Board noted that rigid classifications were inappropriate because of the variety of such cases  
11 which could arise and since the proper exercise of the discretion to order a stay would depend on  
12 the circumstances. The power to order a stay was not of a disciplinary character and was not to  
13 be used to punish or mark the court's disapproval of the misconduct.

14  
15 84. The conclusion was that although there had been grave prosecutorial misconduct and the case for  
16 a stay was of considerable weight, the exercise of the discretion not to order a stay was not  
17 perverse or irrational given that there were counter-balancing factors of cumulative weight.  
18 These included that the defendants were charged with a serious offence, the ringleader had a long  
19 record of offending, the advice of the senior prosecutor had been sought by the police, there had  
20 been no attempt to mislead the Jersey Court and there had been real urgency to secure the  
21 evidence.

22  
23 85. It was stated: -



24  
25 "23 In *Latif* at 101 and 112, Lord Steyn said that the law in relation to the second category  
26 of case was "settled". As he put it, at 101 and 112–113: "The law is settled. Weighing  
27 countervailing considerations of policy and justice, it is for the judge in the exercise of his  
28 discretion to decide whether there has been an abuse of process, which amounts to an  
29 affront to the public conscience and requires the criminal proceedings to be stayed: *R. v*  
30 *Horseferry Road Magistrates' Court Ex p Bennett* (1994) 98 Cr. App. R. 114; [1994] 1 A.C.  
31 42. *Ex p. Bennett* was a case where a stay was appropriate because a defendant had been  
32 forcibly abducted and brought to this country to face trial in disregard of extradition laws.

1 The speeches in *Ex. p Bennett* conclusively establish that proceedings may be stayed in the  
2 exercise of the judge's discretion not only where a fair trial is impossible but also where it  
3 would be contrary to the public interest in the integrity of the criminal justice system that  
4 a trial should take place. An infinite variety of cases could arise. General guidance as to  
5 how the discretion should be exercised in particular circumstances will not be useful. But  
6 it is possible to say that in a case such as the present the judge must weigh in the balance  
7 the public interest in ensuring that those that are charged with grave crimes should be tried  
8 and the competing public interest in not conveying the impression that the court will adopt  
9 the approach that the end justifies any means.”

10  
11 35 ... The second category of case where the court has the power to stay proceedings as an  
12 abuse of process is, as already stated, one where the court's sense of justice and propriety  
13 is offended if it is asked to try the accused in the particular circumstances of the case. It is  
14 unhelpful and confusing to say that this category is founded on the imperative of avoiding  
15 unfairness to the accused. It is unhelpful because it focuses attention on what is fair to the  
16 accused, rather than on whether the court's sense of justice and propriety is offended or  
17 public confidence in the criminal justice system would be undermined by the trial. It is  
18 confusing because fairness to the accused should be the focus of the first category of case.  
19 The two categories are distinct and should be considered separately.”

20  
21 86. In *R v Abu Hamza*<sup>24</sup>, the defendant had been convicted of *inter alia*, soliciting to murder by way  
22 of public speeches at a mosque in London. He appealed his conviction on a number of grounds  
23 including the delay in prosecuting him and adverse media publicity. On appeal the English Court  
24 of Appeal held that unless the consequences of delay amounted to the fact that there could no  
25 longer be a fair hearing or it would otherwise be unfair to try a defendant it would not be  
26 appropriate to stay or dismiss the proceedings.

27  
28 87. The grounds of appeal included that the agents of the State acted in such a way as to make it  
29 unfair to try the appellant and there was thus an abuse of process. In support of this ground, it  
30 was submitted that they had allowed an excessive period of delay between the alleged offending

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<sup>24</sup> [2006] EWCA Crim 2918



1 and the commencement of the prosecution. In March 1999 the appellant had been arrested on  
2 suspicion of involvement following a terrorist incident in Yemen. The police had seized written  
3 material and audio and video cassettes from his home. The police kept this material for about  
4 nine months until the 30<sup>th</sup> December 1999. Upon returning the material to the appellant, he was  
5 informed that there would be no further action taken against him. The audio and video cassettes  
6 contained recordings which were later to form the basis of some of the charges against him.

7  
8 88. The submissions on behalf of the appellant on appeal included that it was an abuse of process  
9 five years later to prosecute him for their possession. This was stated to be on the basis that the  
10 actions of the police in returning the material after review reasonably created in the appellant the  
11 clear impression that the contents of the returned videos and written material were not criminal.  
12 It was said that the appellant had been given a legitimate expectation that he would not be  
13 prosecuted for possession of these.

14  
15 89. The Court expressed reservation as to the extent to which the common law principle of legitimate  
16 expectation can be applied in this field. The Court said: -

17  
18 “[50] As the judge held, circumstances can exist where it will be an abuse of process to  
19 prosecute a man for conduct in respect of which he has been given an assurance that no  
20 prosecution will be brought. It is by no means easy to define a test for those circumstances,  
21 other than to say that **they must be such as to render the proposed prosecution an**  
22 **affront to justice.**” (Emphasis added.)

23  
24 90. The Court noted the public interest which attaches to the decision to prosecute and said this:-

25  
26 “The duty to prosecute offenders cannot be treated as an administrative discretion, for it  
27 is usually in the public interest that those who are reasonably suspected of criminal  
28 conduct should be brought to trial. **Only in rare circumstances will it be offensive to**  
29 **justice to give effect to this public interest.**” (Emphasis added.)



1 91. The Court referred with approval to the decision in the case of *Horseferry Road Magistrates’*  
2 *Court Ex p Bennett* and reviewed the decisions in a number of cases including the cases of *R v*  
3 *Croydon Justices, ex parte Dean*<sup>25</sup>, *R v Townsend, Dearsley and Bretscher*<sup>26</sup> and *R v*  
4 *Bloomfield*<sup>27</sup>. All these cases involved representations by police or prosecuting authorities that a  
5 defendant would not be prosecuted.

6  
7 92. The Court concluded that proceeding with a prosecution is not likely to constitute an abuse of  
8 process unless there has been an unequivocal representation that the defendant will not be  
9 prosecuted and the defendant has acted on that representation to his detriment. The Court  
10 qualified this by saying that: -

11  
12 “Even then, if facts come to light which were not known when the representation was made,  
13 these may justify proceeding with the prosecution despite the representation.” (Emphasis  
14 added.)

15  
16 93. It was noted that in the case of *Bloomfield* there had been no change of circumstances which  
17 might have justified a departure from the unequivocal statement of Counsel for the Crown that  
18 no evidence would be tendered.

19  
20 94. In *R v Croydon Justices, ex parte Dean*, the defendant who was seventeen years old had been  
21 assured by the police that if he assisted to provide evidence for a murder he would not be  
22 prosecuted for it. The defendant provided this evidence and in so doing implicated himself. It  
23 was held that his prosecution for the murder was an abuse of process.

24  
25 95. In *R v Townsend, Dearsley and Bretscher* it was held that it would be unfair to proceed against  
26 a defendant who had been led to believe that if he cooperated with the prosecution he would not  
27 be prosecuted and who in the course of that cooperation had brought prejudice on himself. Rose  
28 LJ added that “*a breach of a promise not to prosecute does not inevitably give rise to abuse but*  
29 *may do so if it has led to a change of circumstances.*”



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<sup>25</sup> [1994] 98 Cr. App. R. 76

<sup>26</sup> [1997] 2 Cr App R 540

<sup>27</sup> [1997] 1 Cr App R 135

1 96. As to the facts of the case on appeal the Court held that the return of the material “fell a long  
2 way short of an unequivocal assurance.”  
3

4 97. An additional ground of appeal was that in relation to the appellants’ speeches the authorities had  
5 acted in such a way as to lead him to conclude that he would not be prosecuted for them. In  
6 support of this there was reliance on notes of six meetings between the appellant and the Security  
7 Service and the Metropolitan police.  
8

9 98. The trial judge was said to have identified the correct question to be:  
10

11 “Whether there had been given to the defendant such an assurance of non-prosecution,  
12 expressed or implied, that it would be an affront to the public conscience and to the integrity  
13 of the administration of justice to permit the case to come to trial.”  
14

15 99. In *Killick*, the defendant had been arrested in 2006. In July 2007 a decision had been  
16 communicated to him through his solicitors that the matter would be discontinued. The police  
17 and complainants sought review of the decision of the Crown Prosecution Service (“CPS”). In  
18 the process of the conduct of various reviews, the defendant was advised in May 2009 by the  
19 police through his member of parliament from whom he had sought assistance, that the  
20 investigation had been closed. The complainants indicated judicial review by way of pre action  
21 protocol letter. A third-tier review led to charges being brought against the defendant in February  
22 2010.  
23

24 100. The Appellate Court said that: -  
25

26 “It is, in our judgment, plain on the authorities that if a clear unequivocal representation  
27 has been made and upon which the defendant relies to his detriment, it will be open to a  
28 court to find that to proceed against him will be an abuse of process. We do not think it  
29 necessary to go further, because we agree with the observation of the court in *Abu Hamza*  
30 that there can be circumstances where even in that situation, it would not be an abuse of  
31 process to proceed.”  
32



1 101. The Appellate Court considered the review policy of the CPS and the positive duty to review a  
2 decision not to prosecute. The Court noted that in the circumstances of that case no representation  
3 had been made that there would be no further prosecution. The evidence of the strain on the  
4 appellant caused from the delay was accepted but the court did not consider that the delay in itself  
5 amounted to an abuse of process.

6  
7 102. The Court considered whether even if a representation had in fact been made there was good  
8 reason to depart from it and stated: -

9  
10 “Thus, even on the assumption, contrary to our decision, a representation was made, *there*  
11 *was good reason why the prosecution had to review the matter*; the delay arising out of  
12 the review caused no prejudice. There was no abuse of process. In all the circumstances,  
13 the judge was right to dismiss the application on this basis.”

14  
15 103. The Respondent also relies on the case of *R v Dowty*<sup>28</sup> a decision of the English Court of Appeal.  
16 On 18<sup>th</sup> August 2019, a Crown prosecutor had advised the defendant’s solicitors that if he entered  
17 pleas to two of four charges the other two would be withdrawn. A senior Crown advocate on the  
18 11<sup>th</sup> October 2019 advised that the Crown would be proceeding to a contested trial on all four  
19 counts. This was known to the defendant before he entered his plea.

20  
21 104. The Appellate Court noted that the absence of detriment was not fatal to the application for a stay.  
22 The Court stated that the most important consideration is the reason for the change of position of  
23 the Crown. This was a question which had not been answered in the cases of *Bloomfield* and  
24 *Smith*. The primary fact on the appeal was that the decision which had been made by previous  
25 Counsel was wrong given the strength of the evidence.

26  
27 105. The Court said this: -

28  
29 “14... The test was set out in Hunter v Chief Constable West Midlands Police [1982] AC  
30 529; whilst the Crown's conduct had disappointed the applicant, it had not made it unfair



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<sup>28</sup> [2011] EWCA Crim 3138

1 to try him. The judge thus asked himself whether the Crown's conduct would bring the  
2 administration of justice into disrepute in the eyes of right-thinking people as posed  
3 in Hunter. On the face of it he accepted that it would. The promise could not be plainer: it  
4 stood for 2 months and was twice communicated to the magistrates' legal adviser. However,  
5 addressing the impact upon the notional right-thinking person, the judge would assume that  
6 such a person was fully acquainted with the Hunter landscape, the most important fact  
7 emerging from which was why the Crown had changed its position.

8  
9 15. By contrast with this case, in Bloomfield and in Smith, the Crown had been unable to  
10 answer that question. Here, however, counsel who appeared finally for the Crown, said that  
11 the evidence in counts 1 and 2 made the original decision not to proceed manifestly wrong.  
12 The evidence was very strong. The judge agreed, especially in relation to count 1, where,  
13 as he put it, most of the alleged criminality resided. Though the court had not heard from  
14 the original decision maker, Mr. O'Toole, it was difficult to see how his proposal could be  
15 justified. Counsel for the Crown had submitted that if the O'Toole course of action had  
16 stood, most right- thinking people would see it as an affront to justice. The court agreed. It  
17 was referred to the Code for Crown Prosecutors 2010 (paragraph 12), which indicated that  
18 a decision not to prosecute could be overturned particularly were the case serious. One  
19 reason for so doing was to maintain confidence in the Criminal Justice System. That code  
20 was an echo of comment in Bloomfield. True it was that the court had not been told the  
21 genesis of O'Toole's decision but that was not fatal to the court's reasoning.”  
22

## 23 DISCUSSION

24  
25 106. The focus of this appeal or review must be on the decision of the Magistrate. It is for the  
26 Applicant to show that the Magistrate’s decision was not one that was reasonably open to the  
27 Magistrate or that the Magistrate failed to take into account material factors.

28  
29 107. I have considered the submissions made in the instant case in light of the cited authorities and the  
30 particular factual circumstances.  
31



1 108. The Respondent accepts that an unequivocal representation was made prosecution that if the  
2 Applicant pleaded to the charge of Possession of Imitation Firearm, the charge of Possession of  
3 Firearm would not proceed.

4  
5 109. The Applicant entered his plea on that basis and the plea remained effective for a considerable  
6 period through to the start of a sentence hearing. His expectation and hope would have been to  
7 be sentenced on this lesser charge. The extent of time over which he would have had this  
8 expectation and the stage which the matter had reached is a concern. However, this is not a case  
9 where the defendant acted to his detriment in any other way. For example, as discussed in some  
10 of the cases, this is not a case of co-operation with the police to his prejudice. He asserted no  
11 facts. Indeed, it appears from the detailed history provided by the Magistrate, that he did not  
12 provide a basis of plea or a position statement.

13  
14 110. Defence Counsel points only to the fact of the plea being raised against him should there be any  
15 future trial. The Court would have the discretion under s. 40 of the *Evidence Act* to disallow any  
16 questions with respect to this. I am satisfied that if this was an issue with respect to the first limb  
17 of the jurisdiction to stay proceedings for an abuse of process that it would be reasonable to  
18 conclude that the defendant could still receive a fair trial.

19  
20 111. In this regard, the Magistrate said this: -



21  
22 “It must not be forgotten that the Court will accede to an application to vacate a guilty plea  
23 if it finds that the Defendant entered his plea under a material misapprehension about the  
24 facts or law. Consequently, permission to vacate the plea can neutralise the prejudicial  
25 effect of the initial guilty plea. Also, I disagree with Miss Fosuhene with respect to the  
26 effectiveness of section 40 of the Evidence Act. The Crown has not expressly stated  
27 whether it now intends to adduce evidence of the guilty plea in the proceedings for the  
28 more serious offence. If it does, then the Defendant may make an application under section  
29 40 of to exclude such evidence. It is only proper to assume that a judge, whomever that  
30 may be, will apply section 40 in a fair and just manner and that counsel with conduct of  
31 the case will act candidly and ensure that all relevant facts are before the court. I cannot  
32 speculate as to whether Miss Fosuhene’s future absence may in and of itself cause a  
33 prejudice to the Defendant. I do, however, believe it to be highly likely that a trial judge

1 would disallow any evidence or cross-examination of the Defendant of a guilty plea which  
2 was subsequently vacated on proper grounds. Consequently, unless this Court refuses the  
3 application to vacate the guilty plea, there is no real risk of prejudice as the trial process is  
4 equipped to deal with the potential prejudice should the Crown later seek to adduce  
5 evidence of the initial plea.”<sup>29</sup>  
6

7 112. The Magistrate also concluded that the period of time over which the defendant believed that the  
8 prosecution was opposing the application to vacate his plea did not give rise to prejudice and  
9 stated: -  
10

11 “I am not persuaded that 18 days of believing that the Crown was opposing the application  
12 to vacate gives rise to a prejudice to the Defendant – the Defendant’s hopes were not raised  
13 and dashed in the manner that the authorities envisioned, in fact it is quite the opposite: he  
14 was led to believe that the Crown were seeking to gain an advantage which they later  
15 abandoned.”<sup>30</sup>  
16

17 113. Counsel for the Applicant submitted that all the cases are in one direction except for *Abu Hamza*,  
18 however a number of cases espouse the general and applicable principle. Consideration of the  
19 second limb of the jurisdiction is a balancing exercise. It is balancing the public interest in the  
20 prosecution of serious crime and the competing interest in ensuring that executive misconduct  
21 did not bring the system into disrepute. The authorities indicate that an important question where  
22 there is a change in an indication given to a defendant is the reason for the change. They state  
23 that new facts coming to light is an accepted reason for a change. In one decision which held that  
24 there was not an abuse of process, the earlier indication was simply wrong based on the strength  
25 of the evidence in the case.  
26

27 114. In the instant case, there was new material received after the representation had been made.  
28 According to the prosecution that material pointed to there being possession of a real rather than  
29 imitation firearm. This is a serious allegation. It thus would be open to the Magistrate to consider

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<sup>29</sup> Ruling dated 27<sup>th</sup> June 2023, paragraph 24

<sup>30</sup> Ruling dated 27<sup>th</sup> June 2023, paragraph 25



1 in balancing the competing interests that the public interest in the prosecution of serious offences  
2 weighed in favour of allowing the trial on that serious offence to proceed.

3  
4 115. As to the points made about admissibility and the nature of the circumstantial evidence, I have  
5 considered them to the extent possible, but I do not think that it would be wise as the Applicant's  
6 Counsel's submissions may encourage, to in effect embark upon weighing the evidence. This  
7 would be part and parcel of the trial process and for a tribunal of fact. None of the cases refer to  
8 evidence, the cases refer to new facts. There must surely be a positive duty on the prosecution to  
9 raise the issue as soon as new facts emerge rather than to further delay matters.

10  
11 116. Had this been an appeal I would have answered the first three questions in the affirmative and  
12 the fourth in the negative. The Magistrate had to make a judgment based on an assessment of the  
13 competing considerations which were identified. The conclusion was one which the Magistrate  
14 was entitled to reach and is in my view, the right one for the reasons given by the Magistrate. In  
15 my judgment there is no basis on which it could be argued that the Magistrate's decision not to  
16 stay the proceedings was wrong.

17  
18 117. As I have treated this as a judicial review, the conclusion is that the very clear rulings of the  
19 Magistrate show that the Magistrate applied the correct legal principles and took into account all  
20 relevant factors. Applying the *Wednesbury* test, the decision to refuse the applications took into  
21 account all relevant considerations and was reasonable. There is no ground for disturbing the  
22 decision.

23  
24 118. The application before this Court is refused. The Order made is as follows:

- 25  
26 1. Leave is granted to treat this appeal as an application for Judicial Review.  
27  
28 2. The application for Judicial Review of the decisions of the Magistrate dated 27<sup>th</sup> January  
29 2023 and 27<sup>th</sup> June 2023 is refused.



1                   3. The case is remitted to the Summary Court for trial on the first available date within 60 days  
2                   from the 15<sup>th</sup> October 2024.

3  
4   **Dated this the 8<sup>th</sup> October 2024**



5  
6   **The Hon. Justice Cheryll Richards KC**  
7   **Judge of the Grand Court**