



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

3
4
5 **Neutral Citation Number: [2025] CIGC (Crim) 8**

6
7 **IND. No. 59 & 78/23**
8

9
10 **THE KING**

11 **V**

12 **DEVON WRIGHT**

13 **&**

14 **JAMES MCLEAN**
15

16 **Appearances:** **Ms. Shauna-Kaye James, Crown Counsel for the Prosecution**

17 **Ms. Amelia Fosuhene for Defendant, James McLean**

18 **Mr. Jonathon Hughes for Defendant, Devon Wright**

19
20 **Before:** **Hon. Justice Emma Peters**

21
22 **Heard:** **17 February 2025**

23
24 **Ruling:** **21 February 2025**
25

26
27 ***Criminal Law - Application to stay of proceedings as an abuse of process. Exclusion of evidence***
28 ***of main witness under section 40 due to circumstances of pre trial interview.***
29



RULING

Introduction

1. An application was made by the defence (Mr. Hughes for DW and Ms. Fosuhene for JM) for this matter to be stayed as an Abuse of the Process of the Court or, in the alternative, for the evidence of Romario Brown to be excluded under s40 of the Evidence Act (2021 Revision). The fact that Mr. Brown's evidence is so crucial in the case (as has already been acknowledged in previous legal submissions and rulings) meant that acceding to either limb of the argument would be to bring an end to this trial. Counsel agreed that if I decided to refuse the application then we would proceed to complete the evidence of the main witness with my reasons to follow later.

History

2. The chronology of this case is relevant and the history of the way in which the proceedings have developed merits close consideration. The indictment alleges 3 burglaries (one aggravated, two basic) in January/February of 2022. Devon Wright (DW) is charged with all 3 counts, James McLean (JM) is charged with the second and third counts. The witness Romario Brown (RB) has already pleaded guilty to all 3 counts and has been sentenced – a sentence that he is still now serving.
3. When RB was first arrested and interviewed in Feb 2022 he denied involvement in these allegations. He was interviewed on two further occasions in Feb 2022 and in those interviews, he implicated DW and JM, explaining that they had all committed the offences together. He then later in 2022 made two witness statements further implicating the two defendants.
4. In September 2024 at the first trial of these matters, the trial was aborted when RB told the jury that he had met the defendants in HMP and that being so the Hon Justice Carter ruled that the trial must be aborted. In October 2024 at a further trial in front of the same Justice, the same thing in effect happened.



1
2 5. That being so Romario Brown has now given a number of accounts of events in various
3 circumstances.

4
5 6. On 14 Feb 2025 (the Friday before this case was listed for a third trial) Ms. James (Crown
6 counsel) and Ms. McNiven (witness care officer) visited RB in HMP to conduct a pretrial
7 interview (PTI). It is the content and circumstances of that PTI that has led to this
8 application about which I heard submissions on the morning of day 3 of the trial.

9
10 7. RB completed his evidence in chief on day 2 (18.2.25) and in the afternoon I was asked to
11 postpone cross examination given that defence counsel both expressed their surprise at the
12 apparent improvement in the cogency and cohesiveness of RB's evidence and asked for
13 further information. That led to questions being asked about what had happened at the PTI
14 on 14.2.2025. Overnight, a note was provided by Ms. McNiven about her recollection of
15 events and I decided on 19.2.25 to require Ms. James to do the same. I had, at first, not
16 wanted to ask Ms. James for such information in order that there could be no argument that
17 she had become a witness but given Ms. McNiven's note was silent as to what, if anything,
18 RB had said at that PTI it became necessary to require Ms. James' note too. In any event I
19 concluded based upon the principles set out in the Carter case cited by Mr. Hughes (see
20 citation below) that there was a good argument that she was not a witness.

21
22 **The application for a stay as an abuse of process**

23
24 8. In Mr. Hughes' written submissions provided to me on 19.2.2025 (the document being
25 entitled "defence note on recent developments") he asserts that the alleged improvement
26 in the cogency of RB's evidence at this trial (trial 3) creates a suspicion that the content of
27 the PTI may have effectively coached him. He submits (at para 4) that this is the first
28 occasion upon which RB has given evidence consistent in its timelines with the indictment.
29 He submits that there was apparent coaching given the content of Ms. McNiven's note
30 provided on 18.2.25 saying:



1 *"I do recall that Counsel reminded the witness to recall the dates and the sequence of*
2 *events whilst he was reading his statement as it wasn't in order".*

3
4 9. He notes that in her note of that same interview (provided on 19.2.2025), Ms. James says
5 that she did not recall reminding him of the sequence of events whilst reading the statement
6 and she cannot say exactly what was said to him.

7
8 10. Mr. Hughes says that, in the absence of a proper note of that meeting especially when the
9 witness has already given evidence at two previous trials, to urge him to pay attention to
10 any particular aspect of his evidence amounts in effect to coaching which, under the well-
11 known principles as set out in *R v Momodou* 2005 EWCA Crim 177 (where the (then)
12 Judge LJ pointed out the dramatic distinction between witness coaching and witness
13 familiarization) is prohibited.

14
15 11. Mr. Hughes for DW and Ms. Fosuhene for JM both expressly accept that they make no
16 suggestion of any *mala fides* on the part of Ms. James but they do say that the visit and the
17 content of that meeting could have even subconsciously caused RB to appreciate which
18 parts of his evidence required improvement.

19
20 12. That being so, Mr. Hughes suggests that I should stay the proceedings as an abuse both on
21 the basis of the assertion that a fair trial is no longer possible and on the basis that a stay is
22 necessary to protect the integrity of the criminal justice system both in perception and in
23 reality.

24
25 13. Ms. Fosuhene adopted Mr. Hughes submissions but also made the point that Ms. James
26 was present at a conversation where she (Ms. James) knew what was said by the witness
27 but no one else in the trial does. That comes about as, unfortunately, the note I had ordered
28 overnight from Ms. McNiven does not deal with what the witness said during this meeting.
29 It was that very fair concern that led me to order Ms. James to write a note of what had
30 been said. I concluded given the case of *R v Carter and Douglas* [2006] CILR 421) that to

1 do so would not place her in the position of being a potential witness with the obvious
2 consequences for this trial.

3
4 14. Both defence counsel say that in the context of the history of this case that any PTI
5 conducted at HMP with RB should have been most carefully noted – more so than had this
6 been a run of the mill PTI prior to a first trial. I entirely accept that it would have been far
7 preferable had this PTI been better noted and recorded than in fact it was.

8
9 **The Law re Abuse of Process**

10
11 15. The burden of establishing a stay of the indictment on the basis of an abuse of process is
12 on the defence and they must satisfy the court that a stay is necessary on the balance of
13 probabilities. In the leading case of Horseferry Road Magistrates' Court ex parte Bennett
14 [1994] 1 AC 42 the court held that the discretion to grant a stay “must be exercised carefully
15 and sparingly and only for very compelling reasons. The discretion to stay is not a
16 disciplinary jurisdiction and ought not to be exercised in order to express the court’s
17 disapproval of official conduct”

18
19 16. In Maxwell [2010] UKSC 48 at para 13 Lord Dyson identified the two categories of case
20 in which the court has the power to stay proceedings for abuse of process:

21 (1) First, where it will be impossible to give the accused a fair trial, and

22 (2) Second, where it offends the court's sense of justice and propriety to be asked to try
23 the accused in the particular circumstances of the case.

24
25 17. Each category has become known as category 1 and category 2 abuse. The defence in this
26 case rely on both. It is rare for there to be legitimate grounds to stay proceedings on the
27 basis of a Category 2 abuse and this was reaffirmed in the large number of Post Office
28 cases (of which there are many) but each guided by Hamilton [2021] EWCA Crim 577 at
29 para 66.



1 18. These principles were also affirmed and applied in BKR [2023] EWCA Crim 903 and more
2 recently in R v Ng and O'Reilly [2024] EWCA Crim 493 at paras 20 to 25.

3
4 19. In the Attorney- General of Jersey [2011] UKPC 10 at [24] it was said by Lord Dyson that
5 an abuse of the second category requires a discretionary balancing of the particular offence
6 charged and the particular conduct complained of, with relevant considerations including
7 the seriousness of any violation of a defendant's rights and the seriousness of the offence
8 charged. Lord Dyson went on to say at [25-26], that how the discretion is exercised will
9 depend on the particular circumstances of the case, that rigid classifications are
10 undesirable, and that:

11
12 *"... the balance must always be struck between the public interest in ensuring that*
13 *those who are accused of serious crimes should be tried and the competing public*
14 *interest in ensuring that executive misconduct does not undermine public*
15 *confidence in the criminal justice system and bring it into disrepute."*

16
17 20. The power to stay criminal proceedings as an abuse of process is an important though
18 exceptional remedy which is to be exercised with care and restraint. A stay of proceedings
19 is considered to be the exception rather than the rule and is a measure of last resort. I put
20 those broad principles of law to defence counsel who accepted their accuracy

21
22 21. The two species of abuse justifying a stay are separate and distinct. The first is when a fair
23 trial is not possible. The second is where it offends the court's sense of justice and propriety,
24 or public confidence in the criminal justice system would be undermined, for the defendant
25 to be tried in the particular circumstances of the case. The abuse must amount to an affront
26 to the public conscience.

27
28 22. A category 2 abuse mainly applies to cases where the police or prosecuting authorities have
29 engaged in misconduct, and that such abuse is by its nature very rarely found because they



1 are "very exceptional" when something out of the ordinary has occurred. There is a two-
2 stage approach when considering Category 2 abuse.

3
4 23. First, it must be determined whether and in what respect the prosecutor has been guilty of
5 misconduct, such as very serious examples of malpractice and unlawfulness as opposed to
6 incompetence or negligence.

7
8 24. Secondly, it must be determined whether such misconduct justifies a stay on the ground of
9 abuse of process. This requires an evaluation of the particular facts and circumstances of
10 each case, weighing the public interest in ensuring that those charged with crimes should
11 be tried, against the competing public interest in maintaining confidence in the criminal
12 justice system.

13
14 25. It is submitted in this case that there was no proper and full record made of the Pre Trial
15 Interview (PTI) and that therefore the lack of proper record in effect amounts to a failure
16 of disclosure by the Crown as they ought to have recorded the entirety of that PTI meeting
17 and disclosed it. I therefore observe that a stay on the grounds of non-disclosure, in
18 Category 2 abuse, would require errors in disclosure to reach the level of grave executive
19 misconduct such that they would undermine public confidence in the criminal justice
20 system and bring it into disrepute.

21
22 26. Cases such as R v F [2011] EWCA Crim 1844, and Stephen Paul S [2006] EWCA Crim
23 756 set out all the necessary principles. However, each case has to be determined on its
24 own facts. Some general principles and factors can however be set out:

- 25
26 a. where there is no fault on the part of the complainant or the prosecution, it will be
27 very rare for a stay to be granted, and
28 b. no stay should be granted in the absence of serious prejudice to the defence, so that
29 no fair trial can be held, and



- 1 c. within that decision a judge has power to regulate the regulate the admissibility of
2 evidence and
3 d. the trial process itself should ensure that all relevant factual issues can be placed
4 before the jury for their consideration in accordance with appropriate directions
5 from the judge.
6

7 27. In order to grant a stay, unfairness to the defendant is not required; rather the focus should
8 be on whether the court's sense of justice and propriety is offended or public confidence in
9 the criminal justice system would be undermined. Equally, a stay should not be imposed
10 for the purpose of punishing or disciplining prosecutorial misconduct. The focus must be
11 on whether a stay is appropriate in order to safeguard the integrity of the criminal justice
12 system. It follows that if, having considered all these factors, a judge's assessment is that a
13 fair trial will be possible, a stay should not be granted.
14

15 28. I wish to make clear at this stage that having considered all of that advanced by counsel, to
16 whom I am very grateful for their assistance, this is a case where it cannot on any analysis
17 of what happened at the PTI be said to be impossible for a fair trial to take place. Counsel
18 can explore what the witness says about his varying accounts and can put the impact of the
19 PTI to him – it will then be for the jury to determine whether (give the crucial / decisive
20 nature of his evidence) they can be sure of his evidence as to the involvement of the two
21 defendants.
22

23 29. Failing to obtain evidence, lost opportunity in preserving evidence and losing or destroying
24 evidence is an area often relied on in applications for granting a stay of an indictment. In
25 the Feltham Magistrates' Court case [2001] EWHC Admin 130, the court suggested that an
26 inquiry into abuse of process might necessarily involve exploration of the nature and extent
27 of the investigating authorities' duty, if any, to obtain and retain evidence. If the failure is
28 so significant then the court must ask itself if it is a fair trial possible when balancing
29 fairness to the defendant and the prosecution, but again consideration must be given to



1 whether the trial process itself is equipped to deal with the bulk of the complaints on which
2 applications for a stay are founded.

3
4 30. Mr. Hughes cites the case of Momodou in his skeleton argument but there is nothing in the
5 case of Momodou [2005] EWCA Crim 177, to suggest a stay for an abuse should be ordered
6 except in exceptional cases. To properly apply the principles derived in Momodou it has
7 been necessary for me to reach a factual conclusion as to whether the content of the PTI
8 went beyond the proper realms of a PTI and strayed into coaching or not.

9
10 31. Let me be clear that I agree with the defence that a greater level of record keeping and note
11 taking would have been desirable and sensible in a PTI in a case with the history with
12 which we are dealing here. However, I am entirely satisfied on what I have seen and heard
13 that to draw the witness' attention to the fact that his main witness statement deals with
14 matters in reverse order is within the proper realms of assisting a witness at a PTI (esp one
15 with the relatively low levels of intelligence that psychiatric reports in this case show are
16 relevant to this witness).

17
18 32. I do not find on the basis of the evidence I have seen regarding that PTI that anything
19 notable or disclosable was said by this witness at that meeting. I accept that whilst the
20 record keeping has not been of the highest standard, that if anything had been said that was
21 in any way of note then it would have been recorded.

22
23 33. So far as the dates are concerned, I do not agree that this is the only occasion that he has
24 given evidence consistent with the dates in the indictment. I accept and agree that he has
25 varied in his account re the dates to some extent. But as I noted several times during the
26 oral submissions, the dates are not a material averment. RB's evidence of there being 3
27 burglaries has been consistent and any change in the actual dates is, at most, a matter that
28 the jury will wish to consider when determining his credibility and reliability. None of this
29 goes anywhere close to satisfying the high standard necessary to justify a stay for abuse.





1 **Conclusion re Abuse**

2
3 34. First it must be determined whether and in what respects the prosecutorial authorities have
4 been guilty of misconduct. Secondly it must be determined whether such misconduct
5 justifies staying the proceedings as an abuse. It is at the second of those stages the court
6 must evaluate the competing public interests.

7
8 35. I do not consider that the prosecution has committed any wrong here. The highest the facts
9 of this case go is to suggest that better note taking would have avoided this issue arising.
10 The Crown told the witness to look at the dates when he refreshed his memory as his
11 statement set out the events in reverse order. Those are details that do not amount to
12 material averments. But it goes no further than that. Is his evidence better or less confused
13 due to him being told that in the PTI or because he has had so much practice now that
14 whilst he remains someone who makes inconsistent statements regarding certain perhaps
15 more important details, he is now quite good at remembering the likely dates (dates of
16 events that after all he has pleaded guilty to)? There is no impropriety by the Crown and
17 nor is there any unfairness to the defence. It is not unfair to try the defendant. The trial
18 process will enable the defence to use the various iterations of the witness' evidence to
19 explore his credibility fully. That is proper. But it goes no further than that. In summary,
20 there are no circumstances meeting the high threshold of exceptionality such as justifying
21 a stay of the proceedings as an abuse of the court process.

22
23 **The application to exclude the witness' evidence**

24
25 36. In the alternative, the defence submits that I should exclude the evidence of RB under
26 section 40 of the Evidence Act (2021 Revision) which provides:

27
28 *“Discretion of court to disallow evidence in criminal proceedings*

1 40. *Nothing in this Act derogates from the power of a court in any criminal*
2 *proceeding to disallow evidence otherwise admissible which, in the opinion of such*
3 *court, would, if allowed, operate unfairly against an accused person”*
4

5 37. At its highest, on the basis of my assessment of the evidence I have heard, I find the defence
6 criticism amounts to drawing the witness’ attention to the dates. I say again – the dates are
7 not a material averment. I have reminded myself of the relevant principles and case law
8 that would apply to an application under section 40 EA.
9

10 38. I considered the principles derived from the case of Samuel [1988] 87 Cr App R 232 which
11 held that it is undesirable to attempt general guidance when dealing with a judge’s
12 discretion in respect of an exclusionary power such as that contained in the similar
13 provision under s78 of the Police and Criminal Evidence Act 1984. Every such application
14 must be considered on its merits by a Judge.
15

16 39. I conclude that the standard for the exclusion of evidence in respect of section 40 would
17 not require there to be any impropriety on the part of the prosecution, the power to exclude
18 would be exercisable if I considered that admitting it would operate unfairly against either
19 or both defendants.
20

21 40. In my view the circumstances in this case fall far short of coming close to justifying the
22 exclusion of the evidence for the same reasons as I set out regarding the abuse limb of the
23 application. The trial process is well equipped to deal with the previous inconsistent
24 statements made by this witness. The jury is well placed then to assess his evidence for its
25 strengths and weaknesses.
26



1 41. That being so I order that this case now continue and I refuse the defence applications.

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3 **Dated the 21st day of February 2025**

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The Hon. Justice Emma Peters
Judge of the Grand Court