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## Chapter 5

# ABUSE OF PROCESS AND DELAYED PROSECUTIONS

Andrew L.-T. Choo

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#### A. Introduction

**5.01** Delayed prosecutions of sexual offences continue to generate publicity and controversy,<sup>1</sup> and to raise difficult and conflicting issues. On the one hand, as a result of the passage of time, a defendant on trial for ‘historical sexual offences’ might well encounter significant forensic disadvantage in defending himself. Such disadvantage might stem, for example, from ‘the fact that any potential witnesses have died or are not able to be located’<sup>2</sup> or from ‘the fact that any potential evidence has been lost or is otherwise unavailable.’<sup>3</sup> ‘Obviously,’ the Court of Appeal has noted, ‘as a matter of commonsense, if someone is facing allegations relating to events that have occurred a long time ago there will be difficulties in recollection, not only for those who make the allegations but for those who have to defend themselves against them.’<sup>4</sup> On the other hand, delays in making complaints of offences of this nature might be

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<sup>1</sup> See, e.g., Topping, A. (2014). ‘Historic Sex Case Prosecutions Will Continue, Vows Chief Prosecutor.’ The Guardian, 20 February, online; Gibb, F. (2014). ‘Prosecutors Pledge Fresh Pursuit of Historical Abuse Cases.’ The Times, 27 February, online; Pidd, H. (2014). ‘DPP Defends Failed Prosecutions of Celebrities over Historic Sex Claims.’ The Guardian, 27 February, online; Hamilton, F., Gibb, F., Simpson, J., and Pitel, L. (2014). ‘Prosecutors in Dock as Sex Case MP Is Cleared.’ The Times, 11 April, online; Mason, R. and Bowcott, O. (2014). ‘Attorney General Demands Answers from CPS over Failed Sex Offence Cases.’ The Guardian, 11 April, online; Mason, R., Halliday, J., and Pidd, H. (2014). ‘CPS Defends Decision to Bring Assault and Rape Charges against Nigel Evans.’ The Guardian, 11 April, online; Rustin, S. (2014). ‘Alison Saunders, Director of Public Prosecutions: “I Think Women Have Had, as Witnesses and Victims, a Raw Deal.”’ The Guardian, 2 May, online.

<sup>2</sup> Evidence Act 1995 (New South Wales), s. 165B(7)(a); Evidence (National Uniform Legislation) Act 2011, s. 165B(7)(a).

<sup>3</sup> Evidence Act 1995 (New South Wales), s. 165B(7)(b); Evidence (National Uniform Legislation) Act 2011, s. 165B(7)(b).

<sup>4</sup> R v M (Brian) [2007] EWCA Crim 1182 [17].

perfectly understandable: ‘Some victims of sexual abuse may not feel confident or strong enough to report until many years after the abuse has taken place, and often not until they are adults. This delay in reporting can be for a wide range of reasons ...’.<sup>5</sup> The task of ensuring that relevant legal principles accommodate these conflicting considerations is a complex one. This chapter examines one such principle: the abuse of process doctrine.<sup>6</sup>

## **B. Why the abuse of process doctrine is the chief mechanism for protecting defendants charged with sexual offences**

**5.02** It is worth clarifying two points which explain why the abuse of process doctrine is the chief mechanism potentially protecting defendants charged with sexual offences after undue delay from facing trial.

### **(1) No time limit**

**5.03** While section 127 of the Magistrates’ Courts Act 1980 prevents a magistrates’ court from trying an information unless it was laid within six months of the commission of the offence, no time limit of this nature applies to the commencement of trials on indictment (which are the forum in which prosecutions of sexual offences will be tried).

### **(2) Limited applicability of right to be tried within a reasonable time**

**5.04** The second point is that the right to be tried ‘within a reasonable time’, guaranteed by article 6(1) of the European Convention on Human Rights, and made directly enforceable in domestic law by the Human Rights Act 1998, has limited applicability in the present context. This right has generated a very large volume of jurisprudence from Strasbourg; indeed, it was commented in 2007 that ‘[l]ength of judicial proceedings is ... the issue that has most

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<sup>5</sup> Crown Prosecution Service (2013). Guidelines on Prosecuting Cases of Child Sexual Abuse Issued by the Director of Public Prosecutions [96]. See also *R v Wright* (Amersham Crown Court, 6 February 2014) (sentencing remarks); *R v Cullen* (Derby Crown Court, 24 March 2014) (sentencing remarks); *R v Clifford* (Southwark Crown Court, 2 May 2014) (sentencing remarks).

<sup>6</sup> I have drawn here on some of my earlier analyses in Choo, A. L.-T. (2008). *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd edn, Oxford: Oxford University Press, ch 3.

occupied the European Court of Human Rights in quantitative terms – so much so that since 1968 it has accounted for almost 30% of the judgments handed down by the Court'.<sup>7</sup> In terms of the implications of the right, the Strasbourg Court has explained that,

. . . in criminal matters, the 'reasonable time' referred to in Article 6, §1, begins to run as soon as a person is 'charged'; this may occur on a date prior to the case coming before the trial court . . ., such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when preliminary investigations were opened . . . 'Charge', for the purposes of Article 6, §1, may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'.<sup>8</sup>

In essence, therefore, it is only delay after the defendant has been officially notified in some way of the relevant allegation against him or her that falls within the scope of the right to be tried within a reasonable time.<sup>9</sup> Delayed prosecutions of sexual offences, however, are typically caused by delay occurring well before that stage. For this reason, the right is of limited significance in the present context.

### **C. The abuse of process doctrine: general principles**

**5.05** The judicial power to stay criminal proceedings which constitute an abuse of the process of the court<sup>10</sup> is well established, having being refined in modern times by the House of Lords in

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<sup>7</sup> Edel, F. (2007). *The Length of Civil and Criminal Proceedings in the Case-Law of the European Court of Human Rights*. 2nd edn, Strasbourg: Council of Europe Publishing, 6.

<sup>8</sup> *Korshunov v Russia*, App no 38971/06 (ECtHR, 25 October 2007) [68], quoting from *Deweere v Belgium* (1980) 2 EHRR 439 [46].

<sup>9</sup> Relatively recent authorities in which such a right is discussed include *Boolell v State of Mauritius* [2006] UKPC 46, [2012] 1 WLR 3718; *Tapper v DPP of Jamaica* [2012] UKPC 26, [2012] 1 WLR 2712; *Celine v State of Mauritius* [2012] UKPC 32, [2012] 1 WLR 3707; *Rummun v State of Mauritius* [2013] UKPC 6, [2013] 1 WLR 598.

<sup>10</sup> See generally Choo, A. L.-T. (2008), cited above at n.6; Wells., C. (2011). *Abuse of Process*. 2nd edn, Bristol: Jordan Publishing; Young, D., Summers, M. and Corker, D. (2014). *Abuse of Process in Criminal Proceedings*. 4th edn, Haywards Heath: Bloomsbury Professional.

Connelly v DPP<sup>11</sup> and in subsequent cases such as *R v Horseferry Road Magistrates' Court, ex p Bennett*,<sup>12</sup> *R v Latif*,<sup>13</sup> and *R v Looseley*,<sup>14</sup> and, most recently, by the Supreme Court in *R v Maxwell*.<sup>15</sup> The abuse of process doctrine is considered to have two limbs. In the words of Lord Dyson JSC:

It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety ... or will undermine public confidence in the criminal justice system and bring it into disrepute ...<sup>16</sup>

**5.06** It is clear that the concern of the first limb is with epistemic considerations. A 'fair trial', therefore, may be seen as one which facilitates accurate fact-finding or truth discovery; its concern is with what Bentham called 'rectitude of decision'.<sup>17</sup> To put it simply, pursuant to the first limb, criminal proceedings may be stayed to prevent the wrongful conviction of an innocent person. This reflects a recognition that '[p]eople have', as Dworkin has explained, 'a profound right not to be convicted of crimes of which they are innocent'.<sup>18</sup> In the words of another commentator, '[t]he extreme unfairness of depriving a person of freedom for an

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<sup>11</sup>[1964] AC 1254.

<sup>12</sup>[1994] 1 AC 42.

<sup>13</sup>[1996] 1 WLR 104.

<sup>14</sup>[2001] UKHL 53, [2001] 1 WLR 2060.

<sup>15</sup>[2010] UKSC 48, [2011] 1 WLR 1837. See also the decision of the Privy Council in *Warren v Attorney General for Jersey* [2011] UKPC 10, [2012] 1 AC 22.

<sup>16</sup>*R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 [13].

<sup>17</sup>Bentham, J. (1827). *Rationale of Judicial Evidence, Specially Applied to English Practice* (5 vols). London: Hunt and Clarke, vol. i (reprinted New York: Garland Publishing, 1978) 1.

<sup>18</sup>Dworkin, R. (1986). *A Matter of Principle*. Oxford: Clarendon Press, 72.

offense she did not commit is beyond dispute'.<sup>19</sup> The second limb of the abuse of process doctrine, on the other hand, has at its root deontological concerns with values that are unrelated to the promotion or achievement of accurate fact-finding. This limb therefore 'represents a political-moral judgment that certain values are more important than accuracy in fact-finding. As such, it limits the truth that is allowed to appear at trial in favour of social goals which transcend the importance of factual truth.'<sup>20</sup> A trial may be stayed on the basis of the second (and, arguably, more controversial<sup>21</sup>) limb of the abuse of process doctrine not because of any danger that to allow the prosecution to continue may result in an inaccurate verdict, but because to do so may undermine particular values that are deemed worthy of protection.

**5.07** With these underlying considerations in mind,<sup>22</sup> we may proceed now to the main focus of this chapter: the operation of the abuse of process doctrine in the context of delayed prosecutions.

#### **D. The abuse of process doctrine and delayed prosecutions**

**5.08** The decision on abuse of process and delay in *A-G's Reference (No 1 of 1990)*<sup>23</sup> has been followed by over two decades' worth of further case law from the Court of Appeal on the

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<sup>19</sup> Tomkovicz, J. J. (2011). *Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance between Freedom and Order*. New York: Oxford University Press, 82.

<sup>20</sup> Burns, R. P. (1999). *A Theory of the Trial*. Princeton, NJ: Princeton University Press, 95.

<sup>21</sup> Non-epistemic considerations that are said to underlie particular principles of evidence and procedure have been the subject of much discussion and debate: see, eg Pizzi, W. T. (1999). *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It*. New York: New York University Press; Laudan, L. (2006). *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge: Cambridge University Press.

<sup>22</sup> For a fuller discussion of epistemic and non-epistemic justifications in the law of criminal evidence and procedure, see Choo, A. L.-T. (2013). *The Privilege against Self-Incrimination and Criminal Justice*, Oxford: Hart Publishing, pp.3-10.

<sup>23</sup> [1992] QB 630.

subject. In *R v F (S)*,<sup>24</sup> the Court, sitting with five judges, sought to clarify the principles that trial judges ought to apply when faced with abuse of process applications in the context of delay.<sup>25</sup> The Court expressed the view that the instant decision as well as three of its previous decisions – *R v Galbraith*,<sup>26</sup> *A-G's Reference (No 1 of 1990)*,<sup>27</sup> and *R v S (S P)*<sup>28</sup> – ‘contain all the necessary discussion about the applicable principles’ and ‘[n]o further citation of authority is needed’.<sup>29</sup> The principles that were thought to be encapsulated in these four decisions were summarized as follows:

(i) An application to stay for abuse of process on grounds of delay and a submission of ‘no case to answer’ are two distinct matters. They must receive distinct and separate consideration. . . .

(ii) An application to stay for abuse of process on the grounds of delay must be determined in accordance with *Attorney General's Reference (No 1 of 1990)* [1992] QB 630. It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by the delay which cannot fairly be addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only in so far as it bears on that question. . . .

(iii) An application to stop the case on the grounds that there is no case to answer must be determined in accordance with *R v Galbraith* [1981] 1 WLR 1039. For the reasons there explained, it is dangerous to ask the question in terms of whether a conviction would be safe, or the jury can safely convict, because that invites the judge to evaluate the weight and reliability of the evidence, which is the task of the jury.

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<sup>24</sup> [2011] EWCA Crim 1844, [2012] QB 703. See generally Samuels, A. (2013). ‘Abuse of Process Applications – A Tougher Stance’. 177 *Criminal Law and Justice Weekly* 154.

<sup>25</sup> For earlier discussion, see Choo, A. L.-T. (2008), cited above at n.6 (pp.77-80).

<sup>26</sup> [1981] 1 WLR 1039.

<sup>27</sup> [1992] QB 630.

<sup>28</sup> [2006] EWCA Crim 756, [2006] 2 Cr App R 23.

<sup>29</sup> [2011] EWCA Crim 1844, [2012] QB 703 [47]. The Court also clarified the implications of *R v B* [2003] EWCA Crim 319, [2003] 2 Cr App R 13 and *R v Smolinski* [2004] EWCA Crim 1270, [2004] 2 Cr App R 40.

The question is whether the evidence, viewed overall, is such that the jury could properly convict. . . .

(iv) There is no different R v Galbraith test for offences which are alleged to have been committed some years ago, whether or not they are sexual offences . . .

(v) An application to stay for abuse of process ought ordinarily to be heard and determined at the outset of the case, and before the evidence is heard, unless there is a specific reason to defer it because the question of prejudice and fair trial can better be determined at a later stage . . .<sup>30</sup>

**5.09** R v F (S) is undeniably an important decision. In particular, it provides valuable guidance on the distinction between stay applications and submissions of no case to answer that are made pursuant to R v Galbraith, and on the implications of this distinction. It also confirms that stays for delay are to be granted in exceptional circumstances only; the normal situation would be for the trial to proceed and for reliance to be placed on the protections available in the course of the trial. Such protections would consist primarily of the exclusion of particular evidence considered to have been ‘tainted’ by the delay, and the delivery of ‘care warnings’ to the jury. Two aspects of R v F (S), however, deserve comment.

**5.10** First, and more broadly, the decision appears to confirm that only epistemic considerations would justify a stay of proceedings on the basis of delay. This may be too narrow an approach: it may be

. . . argued that there is also a case for not holding a trial where it is no longer fair on the participants to require them to recount events and account for actions so far in the past. One of the purposes of criminal proceedings is not simply to establish whether the accused committed the offence charged but also to engage with the accused and hold him or her to

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<sup>30</sup> [2011] EWCA Crim 1844, [2012] QB 703 [48].



account for certain actions. This view . . . would suggest that proceedings should be stopped when it is no longer possible for defendants to be called to account for events because they can no longer relate to the events at that period of time in their life.<sup>31</sup>

**5.11** The second point is that *R v F (S)* leaves the position concerning the burden and standard of proof in abuse of process applications uncertain. The Court does not address the issue itself, but it is addressed in two of the three earlier decisions specifically endorsed by the Court. In *A-G's Reference (No 1 of 1990)*, Lord Lane CJ, reading the opinion of the Court of Appeal, stated that 'no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court'.<sup>32</sup> In *R v S (S P)*, however, the Court of Appeal stated:

In our judgment, the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. It is, therefore, potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof, which is more apt to an evidence-based fact-finding process. Accordingly, we doubt whether, today, in the light of intervening authorities in relation to the exercise of judicial discretion, Lord Lane would have expressed himself as he did with regard to the burden and standard of proof.<sup>33</sup>

The latter approach would appear consistent with recent judicial thinking in relation to the discretion to exclude prosecution evidence under section 78(1) of the Police and Criminal

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<sup>31</sup> Jackson, J. and Johnstone, J. (2005). 'The Reasonable Time Requirement: An Independent and Meaningful Right?' [2005] Criminal Law Review 3, 23.

<sup>32</sup>[1992] QB 630, 644.

<sup>33</sup>[2006] EWCA Crim 756, [2006] 2 Cr App R 23 [20].

Evidence Act 1984.<sup>34</sup> In *R (Saifi) v Governor of Brixton Prison*,<sup>35</sup> for example, the Administrative Court noted pragmatically that

. . . [t]he power [conferred by section 78(1)] is to be exercised whenever an issue appears as to whether the court could conclude that the evidence should not be admitted. The concept of a burden of proof has no part to play in such circumstances. No doubt it is for that reason that there is no express provision as to the burden of proof, and we see no basis for implying such a burden. The prosecution desiring to adduce and the defence seeking to exclude evidence will each seek to persuade the court about impact on fairness. We regard the position as neutral and see no reason why section 78 should be understood as requiring the court to consider upon whom the burden of proof rests.<sup>36</sup>

Acceptance of such a view would not in any way affect the principle that any factual determination that is to form the basis of a decision on whether a stay should be granted must be governed by the usual rules governing the burden and standard of proof. Thus, the burden would be on the prosecution to prove beyond reasonable doubt that any fact alleged to be relevant by the defence did not exist.<sup>37</sup>

**5.12** It is to be noted, however, that, notwithstanding *R v S (S P)*, the case law on abuse of process continues to feature statements suggesting that it is for the defence to prove, on the balance of probabilities, that particular facts justify a stay of the proceedings. For example, the Administrative Court noted very recently, in the context of an abuse of process application on the basis of the non-availability of evidence: ‘If there is a breach of the obligation to obtain or retain the relevant material, it is . . . necessary to decide whether the defence has shown, on

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<sup>34</sup> This provides: ‘In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.’

<sup>35</sup> [2001] 1 WLR 1134.

<sup>36</sup> *Ibid.* [52].

<sup>37</sup> See further Choo, A. L.-T. (2008), cited above at n.6 (p.167).

balance of probabilities, that owing to the absence of the relevant material the defence will suffer serious prejudice to the extent that a fair trial cannot take place.’<sup>38</sup>

**5.13** Decisions of the Court of Appeal subsequent to *R v F (S)* – notably *R v E*,<sup>39</sup> *R v S (P)*,<sup>40</sup> *R v D (R)*,<sup>41</sup> *R v T (A)*,<sup>42</sup> and *R v Taylor*<sup>43</sup> - have continued to take a similar line to that taken in *R v F (S)*. In *R v Taylor*, for example, the Court stated:

It is, we accept, undoubtedly true that the very considerable interval between the events covered by the indictment and the trial created disadvantages for the appellant. However, the trial process was fully capable of making due allowance for those difficulties and, properly directed, the jury was able, if appropriate, to reflect their judgment upon those difficulties in their verdicts.<sup>44</sup>

## E. Care warnings

**5.14** The Crown Court Bench Book provides the following guidance on the administration of care warnings pertaining to delay:

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<sup>38</sup>*Morris v DPP* [2014] EWHC 105 (Admin) [14]. *R (Ebrahim) v Feltham Magistrates’ Court* [2001] EWHC Admin 130, [2001] 1 WLR 1293 was endorsed. See also *R v E* [2012] EWCA Crim 791 [22]. Perhaps more troubling is the apparent suggestion in *R v Moore* [2013] EWCA Crim 85[75], in the context of a discussion of allegations of entrapment, that the defence must prove relevant facts on the balance of probabilities: ‘it must be recalled that the burden of proof is on the applicant defendant, albeit the standard is only that of the balance of probabilities. Unless the relevant facts are agreed, or are assumed for the purposes of argument, it may be necessary therefore for an applicant to give evidence in a voir dire, or to cross-examine the undercover officers as to their conduct or for there to be at least agreed assumptions as to the facts. If Ms Moore wished to say, as was submitted on her behalf, that it was a clear, albeit unspoken, premise of her relationship with the undercover officers that they were taking advantage of her vulnerability and innocence to lure her into offending by the temptation of cheap goods, and that the recordings of their conversations did not reflect the true circumstances as they had to be understood, then it was for her to initiate the necessary evidence and cross-examination.’

<sup>39</sup>[2012] EWCA Crim 791.

<sup>40</sup>[2013] EWCA Crim 992.

<sup>41</sup>[2013] EWCA Crim 1592. See generally Corker, D. (2013). ‘Delays and Historic Offences,’ 177 *Criminal Law and Justice Weekly* 836.

<sup>42</sup>[2013] EWCA Crim 1850.

<sup>43</sup>[2013] EWCA Crim 2398.

<sup>44</sup>*Ibid* [79]. See also *R v E* [2012] EWCA Crim 791 [28] (‘In sum, no error of principle has been relied upon ... in this appeal, and no specific features of this case suggest that this was one of those exceptional cases where incurable prejudice has been caused, for which the judge’s conduct of the trial and directions to the jury cannot compensate, resulting in an unfair trial. We cannot say that the judge was wrong to consider that the appellant would be able to have a fair trial’); *R v T (A)* [2013] EWCA Crim 1850 [39] (‘We do not think that this was an exceptional case justifying the grant of a stay. The trial process was capable of dealing with the difficulties raised for the defence’); and, very recently, *R v Downey* (Central Criminal Court, 25 February 2014) (conclusion on first ground).

- The judge should refer to the fact that the passage of time is bound to affect memory. A witness's inability to recall detail applies equally to prosecution and defence witnesses but it is the prosecution which bears the burden of proof. The jury may be troubled by the absence of circumstantial detail which, but for the delay, they would expect to be available. Conversely, the jury may be troubled by the witness' claim to recall a degree of detail which is unlikely after such a prolonged passage of time. Whether reference should be made to such possibilities is a matter for the trial judge to assess having regard to the evidence and the issues which have arisen in the case.
- If, as a result of delay, specific lines of inquiry have been closed to the defendant the disadvantage this presents should be identified and explained by reference to the burden of proof.
- A defendant of good character will be able to assert that the absence of any further and similar allegation is significant.
- Directions must make clear that the jury should give careful consideration to the exigencies of delay.<sup>45</sup>

**5.15** These, of course, are merely guidelines which are not intended to be prescriptive. Considerable leeway is accorded to trial judges in this field, and the Court of Appeal displays considerable reluctance to intervene.<sup>46</sup> While the Court of Appeal has stressed the importance of care warnings in delay cases being tailored to the facts of the case,<sup>47</sup> there is a danger, as

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<sup>45</sup> Judicial Studies Board (2010). Crown Court Bench Book: Directing the Jury, 33.

<sup>46</sup>See, e.g., R v T (A) [2013] EWCA Crim 1850 [88]: 'Looking at the position overall, we take the view that, while the summing-up should, to advantage, have alluded to the specific elements of prejudice said to have been occasioned to the applicant by reason of the delay, the failure to do so was not such as to render the convictions unsafe.'

<sup>47</sup>See, e.g., R v S (P) [2013] EWCA Crim 992 [24]: 'On the basis of [the] authorities, it is self-evident that no two cases are the same and whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case. We stress, therefore, that the need for a direction, its formulation and the matters to be included will depend on the circumstances of, and the issues arising in, the trial.' See also R v T (A) [2013] EWCA Crim 1850 [88]: 'It is, often, not desirable to provide simply a generalised formula as to possible

previous experience in Australia suggests, that the administration of such warnings may, in time, become ‘decontextualized’, taking insufficient account of the rationale for administering them or of the particular circumstances of individual cases. Because of fears in Australia that care warnings were suggesting that delay would inevitably create forensic disadvantage, the Australian uniform evidence legislation introduced a provision designed to halt this practice.<sup>48</sup> This provision, section 165B,<sup>49</sup> states that, if the court ‘is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence’,<sup>50</sup> ‘but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay’,<sup>51</sup> and ‘significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay’.<sup>52</sup> This ought to provide useful lessons for trial judges in England and Wales.

## F. Conclusion

**5.16** While *R v F (S)* is not immune to criticism, it helpfully clarifies aspects of the abuse of process doctrine as it applies in cases of delay, while emphasizing that stays are very rarely to

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prejudice by reason of delay – the formula should, where appropriate, be applied to the particular facts and particular prejudice identified as arising.’

<sup>48</sup> See generally Cossins, A. (2010). ‘Time Out for Longman: Myths, Science and the Common Law.’ *Melbourne University Law Review*, 34, 69; Gans, J., Henning, T., Hunter, J. and Warner, K. (2011). *Criminal Process and Human Rights*. Sydney: Federation Press, pp.474-81.

<sup>49</sup> Recent considerations of s 165B may be found in *KSC v R* [2012] NSWCCA 179; *Greensill v The Queen* [2012] VSCA 306; *Groundstroem v R* [2013] NSWCCA 237.

<sup>50</sup> Evidence Act 1995 (Commonwealth of Australia), s.165B(2); Evidence Act 1995 (New South Wales), s.165B(2); Evidence Act 2001 (Tasmania), s.165B(2); Evidence Act 2008 (Victoria), s.165B(2); Evidence Act 2011 (Australian Capital Territory), s.165B(2); Evidence (National Uniform Legislation) Act 2011 (Northern Territory), s.165B(2).

<sup>51</sup> Evidence Act 1995 (Commonwealth of Australia), s.165B(4); Evidence Act 1995 (New South Wales), s.165B(4); Evidence Act 2001 (Tasmania), s.165B(4); Evidence Act 2008 (Victoria), s.165B(4); Evidence Act 2011 (Australian Capital Territory), s.165B(4); Evidence (National Uniform Legislation) Act 2011 (Northern Territory), s.165B(4).

<sup>52</sup> Evidence Act 1995 (Commonwealth of Australia), s.165B(6)(b); Evidence Act 1995 (New South Wales), s.165B(6)(b); Evidence Act 2001 (Tasmania), s.165B(6)(b); Evidence Act 2008 (Victoria), s.165B(6)(b); Evidence Act 2011 (Australian Capital Territory), s.165B(6)(b); Evidence (National Uniform Legislation) Act 2011 (Northern Territory), s.165B(6)(b).

be granted. One commentator has remarked that ‘it seems that [the only] abuse submission with a good chance of gaining traction with the court is one where the specificity of the allegation allows for the mounting of either a quasi-alibi defence or one where the absence of a witness or document can demonstrably be shown to have caused prejudice’.<sup>53</sup> The strategy of relying where possible on care warnings, rather than preventing the case from going to the jury altogether,<sup>54</sup> is consistent with the trend in the law of evidence towards ‘trusting the jury’ to evaluate evidence the reliability of which may be in doubt, rather than excluding that evidence from the jury’s consideration altogether.<sup>55</sup> Caution must be exercised, however, to ensure that care warnings do not become a substitute for stays in circumstances where nothing short of a stay would suffice to provide the defendant with adequate protection from the risk of wrongful conviction stemming from delay.

### Further reading list

Corker, D. (2013). ‘Delays and Historic Offences,’ 177 *Criminal Law and Justice Weekly* 836

Samuels, A. (2013). ‘Abuse of Process Applications – A Tougher Stance’. 177 *Criminal Law and Justice Weekly* 154

Young, D., Summers, M. and Corker, D. (2014). *Abuse of Process in Criminal Proceedings*. 4th edn, Haywards Heath: Bloomsbury Professional

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<sup>53</sup> Corker, D. (2013), cited above at n.41; *R v E* [2012] EWCA Crim 791 and, very recently, *R v Dent* [2014] EWCA Crim 457, both of which are decisions in which the Court of Appeal held that the relevant abuse applications had rightly failed, illustrate this point well.

<sup>54</sup> Such a strategy has been endorsed by Dingwall, G. (1996). ‘Protecting the Accused and Delay in Sexual Abuse Cases.’ *King’s College Law Journal*, 7, 132, 135: ‘The reluctance to stay proceedings due to a general prejudice caused by delay, ... and the preference of leaving the matter to the jury, with suitable direction where necessary, is, it is suggested, the optimum way of ensuring that complainants who have delayed making accusations and defendants facing difficulties in obtaining exculpatory evidence receive a fair hearing.’

<sup>55</sup> See, eg, Stein, A. (2005). *Foundations of Evidence Law*. Oxford: OUP, 107, who writes of the idea of ‘free evaluation of evidence (or free proof). This idea is ... influential amongst practitioners, law reformers, and legal scholars. The endorsement of this idea by law reformers (both legislative and judicial) is responsible for the ongoing abolition of evidentiary rules and the flowering of discretion in adjudicative fact-finding. The abolitionist trend is especially noticeable in England.’

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