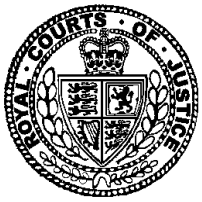

Neutral Citation Number: [2021] EWHC 2938 (Admin)

Case No: CO/1003/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2021

Before :

LORD JUSTICE STUART-SMITH
MRS JUSTICE MAY DBE

- -

Between :

DANNY MANSFIELD — **Appellant**

- and -

DPP — **Respondent**

- -
- -

Maya Sikand QC and **Lee Sergent** (instructed by GT Stewart) for Appellant
Louis Mably QC and **James Boyd** (instructed by Appeals and Review Unit, Crown Prosecution Service) for the Respondent

Hearing dates: 19 October 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mrs Justice May DBE :

Introduction

1. By this appeal the appellant, Danny Mansfield (DM), challenges the decision of District Judge Heptonstall dated 23 December 2020 refusing his application to stay proceedings as an abuse of process. He seeks an order quashing his conviction for possession of a bladed article in a public place. By a case stated dated 10 March 2021 the Divisional Court is invited to determine two questions as follows:

   (i) Was the District Judge right to find that the magistrates' court did not have the jurisdiction to determine this type of abuse of process application?

   (ii) On the facts found, was this prosecution an abuse of the court's process?

Background facts

2. We take the facts from paragraphs 6 to 13 of the full and helpful case stated provided by the District Judge:

   "6 On 18 July 2020 [DM] was 18 years old and of previous good character. He was the front seat passenger in a vehicle that was stopped by PC Roberts, shortly before midnight. The officer noticed the smell of cannabis. [DM] told him that he had a "spliff" rolled cannabis cigarette and the driver did not have anything on him. The officer took the cigarette from [DM]. Soon after the officer lawfully searched [DM] and noticed a solid object in the front left-hand pocket of his shorts; that was a lock knife. [DM] was arrested at 12.06am and made no reply to caution; he was taken to the police station arriving at about 12.45am.

   7. Shortly after 1am the police contacted the duty solicitor Mr Balhar Dhamrait of GT Stewart in order to provide [DM with] representation; Mr Dhamrait was admitted as a solicitor in 2004 and has 21 years' experience in representing suspects in police stations. There was further contact about 7am. Around 8am PC Wearing provided pre-interview disclosure to Mr Dhamrait via email; he had a telephone consultation with [DM] from 8.11-8.21am, in which he advised to make no comment. Prior to the consultation Mr Dhamrait raised some queries to which PC Wearing responded at 8.16am. Mr Dhamrait sent a further email at 8.19am to enquire whether *"All options available by way of caution for both offenses (sic)?".* The officer did not respond to that email but the issue was taken up in a telephone conversation.

   8. The conversation: when asked about the email PC Wearing told Mr Dhamrait that her sergeant had authorised a caution for both allegations only on the basis that [DM] made admissions to both offences.

   9. PC Wearing then allowed Mr Dhamrait to have a further conference with [DM] via her laptop. He noted that PC Wearing confirmed in front of [DM] at 8.38am that a caution had been authorised. Accordingly, in the private consultation, Mr Dhamrait's advice changed from no comment to making full admissions.

   10. [DM] was interviewed between 8.46 and 8.53am, by officers Wearing and Harris, with Mr Dhamrait assisting him via Microsoft Teams. He said that [he] worked in construction. In relation to the knife, he accepted that it was his, that he did not have lawful authority to carry it and did not know that it was an offence to carry the knife.

When asked why he had the knife he said, *"I didn't have any intent to do anything with it, I just had it in case"* and in response to whether it was for his own protection, *"I was not willing to use it"* adding later, *"Yes, with the knife I had no intention to harm anyone."*

11. PS Robinson was the ERO [evidential review officer] who made recommendations for the method of prosecution. These were recorded on the custody record: at 9.51 he noted that:

> Having reviewed the evidence in this case I give authority to proceed by way of
>
> Simple Caution.
>
> I have discussed this case with the interviewing officer and I have reviewed the Director Guidance on charging. I am satisfied that I am able to make a decision in this case.
>
> DP was stopped as a passenger in a vehicle. He was found to be in possession of a small quantity of cannabis and a knife.
>
> In interview, he gives a full account with his solicitor present. He admits possession of the knife and to having the cannabis for his own personal use.
>
> I have confirmed that the DP is no trace on PNC and has never been arrested before. I have not been informed of any other relevant history.
>
> I have reviewed the gravity matrix and assess the score to be 3.
>
> DP to be offered a caution for possession of cannabis and a caution for possession of a bladed article.

12. PS Robinson communicated that decision to PC Wearing and she passed it on to the custody sergeant so that the cautions could be administered. The sergeant challenged the decision and PS Robinson was asked to reconsider. A further custody record entry by the(sic) PS Robinson at 10.20am was identical apart from a score of 4 and a disposal by way of community resolution for possession of cannabis and charge for bladed article. There was no explanation in the entry for the change of position but he did send PC Wearing a WhatsApp message at 10.21am stating "All done. Sorry, I was looking at the wrong document for the Gravity Matrix." [DM] was charged at 10.42am.

13. Mr Dhamrait was informed of that outcome by PC Wearing by email at 11.02am. He responded at 11.10am expressing his surprise as there had been an assurance that there would be a caution."

3. When the case came before the District Judge solicitor for DM submitted that the magistrates' court had jurisdiction to hear and determine whether the proceedings against DM should be stayed as an abuse of process by reason of the clear indication of a caution to both offences given by PS Robinson on the basis of which DM made admissions in interview. In response, the Crown, relying on the cases of *Nembhard v DPP* [2009] EWHC 194 (Admin) and *Woolls v North Somerset Council* [2016] EWHC 1410 (Admin), argued that the magistrates' court did not have jurisdiction, and that the issue of abuse was a matter for the High Court alone to determine.

4. DJ Heptonstall decided that he was bound to follow *Nembhard* and *Woolls*, whilst expressing a concern as to the correctness of those decisions regarding the breadth of magistrates' jurisdiction over cases of abuse. In his admirable case stated the DJ thoroughly reviewed the development and application of the caselaw in this area, suggesting that there may have been an "unintended elision" between abuse which engages wider rule of law principles and a broader supervisory jurisdiction, as discussed by the House of Lords in the case of *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] AC 42 and the second of the two principal types of abuse identified by this court in *R v Beckford* [1996] 1 Cr App R 94.

5. The District Judge took the view that, notwithstanding his reservations concerning *Nembhard* and *Woolls*, he was bound by those authorities. He found in DM's favour on the facts but made no determination as to whether there had been an abuse of process. Following the District Judge's rulings DM pleaded guilty to a single charge of possession of a bladed article.

The parties' arguments on appeal

6. We are grateful to all counsel - Maya Sikand QC and Lee Sergent for the appellant and Louis Mably QC for the respondent - for their clear and helpful skeleton arguments and for their assistance during oral submissions.

Jurisdiction

7. It was common ground that there are essentially two categories of case where a stay is warranted on grounds of abuse of process: the first (category 1) where it is impossible for the defendant to receive a fair trial; the second (category 2) where all the circumstances taken together offend the court's sense of propriety and justice: *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13], cited in *Warren v Attorney General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [22]. Counsel were agreed that the present case falls within category 2.

8. Ms Sikand contended that the analysis undertaken by Maurice Kay LJ in *Nembhard* took a wrong turn and that the error was thereafter repeated in *Woolls*. She argued that the court had in each case mistakenly understood previous authority as supporting a wholesale exclusion of category 2 cases from the magistrates' jurisdiction when in fact the authorities relied upon did not do so. She submitted that the House of Lords decision in *Bennett* and a subsequent line of Divisional Court authority, together with obiter dicta from the Privy Council's decision in *Panday v Virgil* [2008] UKPC 24, [2008] 1 AC 1386, make it plain that it is only one very narrow aspect of category 2 cases that is excluded from the jurisdiction of the magistrates' court.

9. Mr Mably recognised that the issue as to whether the magistrates' court has jurisdiction to stay proceedings on the ground of the second category of abuse has been the subject of conflicting authority and judicial comment. He also acknowledged – in my view correctly - that the cases relied upon by the courts in *Nembhard* and *Woolls* did not provide support for their conclusion that the Magistrates Court has no jurisdiction over category 2 cases.

10. In his skeleton argument Mr Mably suggested that there was nevertheless a basis for preferring the *Nembhard/Woolls* line of authority, submitting that the magistrates'

court, exercising a summary jurisdiction, was not an apt forum for determining circumstances said to render proceedings an affront to justice. Ms Sikand pointed out that there was no basis for concluding that *Nembhard* and *Woolls* were to be preferred. She contended that these two decisions are wrong, being inconsistent with the House of Lords' decision in *Bennett,* arguing that the fact that those cases had not (yet) been explicitly overruled was an insufficient reason for this court to follow them.

Abuse of process

11. Counsel were agreed that if we decided jurisdiction in the appellant's favour, we should nevertheless exercise this court's concurrent jurisdiction and proceed to determine the question of whether a stay should be granted.

12. Ms Sikand referred us to *R v Abu Hamza* [2007] 1 Cr App R 27, and to the necessary pre-conditions identified by Lord Phillips, then LCJ, for a stay to be granted. She pointed out that all were met in this case. She accepted that in category 2 cases there are competing public interests, in particular that not proceeding against a defendant engages the public interest in seeing that offences are prosecuted. She acknowledged that the present case is not an entrapment or other like case where "but for" the administrative misconduct an offence would not have been committed. Nevertheless, she argued, a breach of assurance engages a powerful public interest in officials of the state adhering to their promises. She referred in this connection to *R(H) v Guildford Youth Court* [2008] EWHC 506, a decision of Silber J sitting in the Administrative Court. Silber J held that the official promise was such an important consideration that it outweighed all other considerations. Ms Sikand added that in *R v Croydon Justices ex parte Dean* [1993] QB 769 the offence had been of very high seriousness – the defendant in that case was charged with assisting a suspect in a murder investigation – yet the court still found that the breach of assurance justified the grant of a stay.

13. Mr Mably submitted that in category 2 cases there is a balance to be struck. He suggested that each case will depend on its own facts, that that there is no rule by which a reneged-upon promise will automatically result in proceedings being stayed. He referred us to the judgment of Lord Phillips in *Abu Hamza* making the point that whilst breach of assurance cases are capable of amounting to abuse the circumstances must be such as to render the proposed prosecution an affront to justice. Mr Mably argued that the present circumstances did not constitute such an affront where:

    (i) DM's acting to his detriment did not result in his committing the offence.

    (ii) The assurance was "forensically academic" in the proceedings, in the sense that any unfairness would have been remedied by exclusion of the interviews and admissions from the evidence at trial.

    (iii) The offence – carrying a knife in a public place – was serious. There is great public concern about young people carrying knives, such that mandatory minimum sentences have been introduced for a second offence. Accordingly there is a strong public interest in prosecuting persons who carry a knife, even if it is a first offence.

    (iv) The assurance given in this case was a genuine mistake, rectified within a short space of time, albeit after interview.

14. Ms Sikand responded pointing out that there is nothing in the case law which requires a connection between the breach of promise and commission of the offence. As to the detriment, it was not right to limit it in the way Mr Mably suggested. In this case the appellant's solicitor had changed his advice on the basis of PC Wearing's assurance of a caution; the appellant might otherwise have said he had a good reason, events might have gone very differently, she suggested.

Discussion and conclusions

Jurisdiction

15. I have referred at [7] above to the two categories of abuse justifying a stay. The issue in the case before us concerns category 2 abuse. As the District Judge rightly identified, there are two decisions of this court which have determined that the magistrates lack jurisdiction over category 2 cases: *Nembhard v DPP* [2009] EWHC 194 (Admin) and *Woolls v North Somerset Council* [2016] EWHC 1410 (Admin).

16. In *Nembhard* the defendant had been charged with failing to provide documents to a constable. The defence argued that prosecuting him for this offence was an abuse since the request to supply documentation had been part of a police campaign of harassment against him. Although *Nembhard* did not involve a breach of assurance, it is relevant by reason of the court's observations when deciding the jurisdiction issue. Maurice Kay LJ, after referring to the two categories of abuse, concluded as follows, at [14]:

> "In the Crown Court the trial judge has jurisdiction to stay proceedings by reference to either limb. However, on the authorities, in a summary trial, the magistrates or a District Judge can only stay by reference to the first limb and not the second, which is a matter for the High Court: see *Bennett*; *R v Aldershot Youth Court ex parte Anderson* [1997] (CO/1911/96); and *R v Belmarsh Magistrates Court ex parte Watts* [1999] EWHC Admin 112, [1999] 2 Crim App R 188."

Interestingly, Maurice Kay LJ went on to express regret that the authorities did not permit the magistrates court to determine applications falling under the second limb.

17. *Woolls* also involved category 2 abuse. In that case the defendant was tried in the magistrates' court for failing to pay excess charges incurred when parking without displaying a valid ticket. Prior to trial he alleged that the proceedings were an abuse of process on a number of grounds, including that the respondent council had made representations, upon which he had relied, that he would not be prosecuted for non-payment of parking charges in the particular car park. The District Judge found that she did not have jurisdiction to determine the abuse and the matter went to the Divisional Court on a case stated. By a similar process of reasoning to that of Maurice Kay LJ in *Nembhard*, the court dismissed the defendant's case on jurisdiction, approving the District Judge's decision.

18. The leading authority relied upon in both *Nembhard* and *Woolls* was the House of Lords decision in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42. The appellant in *Bennett* had been brought back to the UK from South Africa to face criminal charges in this jurisdiction. He alleged that unlawful and forceful means had been used to return him to the UK, in disregard of available extradition procedures and

in breach of international law. It was argued on his behalf that such egregious executive misconduct so tainted criminal proceedings in this country that they ought to be stayed as an abuse. The Divisional Court held that the court had no power to investigate how or by what means a person had been brought into the jurisdiction, nor to sanction any executive misconduct by stopping what would otherwise be a fair and properly conducted trial. However the House of Lords, by a majority (Lord Oliver dissenting), found that the abuse jurisdiction should be extended to cover the processes by which a defendant may have been brought to appear before the court. Lord Griffiths, with whom the majority agreed, explained this development as follows, at p.61B:

> "As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused."

After citing from the case of *Reg v Derby Crown Court ex parte Brooks* (19845) 80 Cr App R His Lordship went on:

> "There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair the try the accused for the offence that it amounted to an abuse of process. In *Chu Piu-wing v Attorney-General* [1984] HKLR 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission against Corruption that he would not be required to give evidence, McMullin V.-P. said, at pp. 417-418:
>
> "there is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed in the bargain."
>
> And in a recent decision of the Divisional Court in *Reg v Croydon Justices Ex parte Dean* [1993] QB 769, the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to section 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.
>
> Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

19. Lord Griffiths then turned to the question of which court should have jurisdiction to investigate such wider allegations of abuse, stating (at p.62H):

> "The question then arises as to the appropriate court to exercise this aspect of the abuse of process jurisdiction. It was submitted on behalf of the respondent that the magistrates have no power to stay proceedings on the ground of abuse of process…
>
> Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. …. there is a formidable body of authority that recognises this power in the justices."

After referring to a number of cases dealing with the power of magistrates to deal with cases of abuse his Lordship went on (at 64B):

> "I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *Reg. v Guildford Magistrates Court, Ex parte Healy* [1983] 1 WLR 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken."

20. I agree with Ms Sikand that, on a close reading of the passages set out above, it was evidently not Lord Griffiths' intention to exclude from the magistrates' jurisdiction all category 2 cases of abuse. Properly understood, Lord Griffiths' observations characterise circumstances such as those under consideration in *Bennett* as falling within a sub-set of category 2. It was the class of case falling within this sub-set which his Lordship intended exclusively to be subject to the wider jurisdiction of the High Court, and which would thus fall outside the ordinary jurisdiction of the magistrates.

21. Further support for this interpretation is to be found in the speech of Lord Oliver in *Bennett*. Lord Oliver dissented on the question of whether the High Court had the wider supervisory jurisdiction approved by the majority, but was in agreement on the scope of jurisdiction of a criminal court (by necessary implication including a magistrates' court) to determine cases of abuse, delineating it as follows, at p.70E-H:

> "It is not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively – for instance, if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not

> for a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *Reg v Croydon Justices, Ex parte Dean* [1993] QB 769, where the court quashed committal proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the bona fides of the prosecution and on the fairness of the process to an accused who has been invited to prejudice his own position on the faith of the undertaking."

22. The next case relied upon in *Nembhard* and *Woolls* as support for the conclusion that magistrates lacked jurisdiction in respect of all category 2 cases was that of *R v Belmarsh Magistrates Court ex parte Watts* [1999] EWHC (Admin) 112. *Watts* concerned criminal summonses issued against a customs officer by an offender convicted of cannabis importation. The customs officer sought to have proceedings stayed as an abuse of process on the basis that proceedings were a collateral attack on the conviction, which the offender had not sought to appeal. The stipendiary magistrate found that the summonses were, and were intended to be, such a collateral attack but held that he did not have jurisdiction to hear and determine the abuse of process issue. On appeal by way of case stated the Divisional Court held that the magistrate did have jurisdiction. In the course of his reasoning, and after referring to Lord Griffiths' speech in *Bennett*, Buxton LJ summarised the position as follows, at pp.194-5:

> "It will be recalled that the "abuse" complained of in *Bennett* was of a very particular nature, (allegedly) involving not specifically unfairness within the proceedings, but rather misconduct and indeed law-breaking by public authorities in bringing the defendant within the jurisdiction at all. As Lord Griffiths indeed said, it was something very different from abuse affecting what his Lordship called domestic criminal trial procedures.
>
> On the basis of these observations, and with other authority in mind, the law as to jurisdiction over allegations of abuse in magistrates' court cases is in our view as follows:
>
> 1. The Divisional Court and the magistrates court in principle have concurrent jurisdiction.
> 2. The Divisional Court is able to consider abuse of all types, including cases of the type characterised by Lord Griffiths as domestic: see for instance *Croydon Justices ex p. Dean* (1994) 98 Cr App R 76, [1993] QB 769, which has never been suggested to have been wrongly decided as a matter of jurisdiction.
> 3. Within the general jurisdiction referred to in paragraph 1 above there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they have. So much is clear from Lord Griffith's speech in Bennett, though the exact reach of this category remains to be determined. Such cases should, as in *Bennett*, be addressed by the wider supervisory jurisdiction of the Divisional Court. That category is however a narrow one. It excludes every complaint that is directed at the fairness or propriety of the trial process itself.

> 4. It will however always be open to magistrates in cases that do not fall within the narrow *Bennett* category to decline jurisdiction, and require the matter to be pursued in the Divisional Court, whether because of the complexity or novelty of the point, or because of the length of investigation that is required. Any such decision by a magistrate, being one taken within the limits of his judgment, will be unlikely to be overturned in this court.
> 5. The wide category of cases over which magistrates have jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly: see for instance Per Lord Oliver of Aylmerton in *Bennett* at pages 132 and 70. Lord Oliver dissented in *Bennett* on the issue of whether the Divisional Court, or any other court, had any general supervisory jurisdiction of the order envisaged by the majority; but his observations about the general jurisdiction of the magistrates court are, with respect, a valuable synopsis of that jurisdiction, that accurately expresses the assumptions made by the other of their Lordships…"

23. I do not understand Buxton LJ's reasoning or his conclusions as excluding from the magistrates' jurisdiction all category 2 cases; on the contrary at point 5 above he specifically includes within that jurisdiction cases of "whether the prosecution has been instituted oppressively or unfairly".

24. The third case relied upon in *Nembhard* to oust the magistrates' jurisdiction over category 2 cases was *R v Aldershot Youth Court ex parte Anderson* [1997], unreported 19 February 1997 (CO/1911/96). The applicant in that case was a youth aged 16 who had been found in possession of drugs. He alleged that, on arrival at the police station in answer to bail, he was assured that if he were to cooperate with the interviewing officer by admitting to the offences he would receive a caution and no further proceedings would be taken against him. He was subsequently interviewed and admitted the offences. Subsequently, notwithstanding the assurances he had been given, the youth was charged. His counsel sought a preliminary hearing to determine whether proceedings should be stayed as an abuse. The justices decided that they would not rule on the issue of abuse at any stage before the trial, further that the allegation put forward by the applicant concerned a species of abuse falling outside the type identified by Lord Griffiths in *Bennett* as suitable for hearing by the magistrates. The applicant applied to challenge that decision by way of judicial review.

25. The High Court (Rose LJ, Stuart White J and Hooper J) allowed the application and remitted the case back to the magistrates for the question of abuse to be determined at a preliminary hearing. The jurisdiction of the justices to hear and entertain the application for a stay was not in dispute before them. Stuart White J (with whom the other members of the court agreed) observed that:

> "It is common ground before this Court that the issue of abuse of process of the kind raised in this case is an issue which a youth court is competent to determine. The ruling of the justices, based on [*Bennett*] is thus, it seems to me, misconceived. If the justices took the view that it was an allegation of abuse of the type that is there indicated they should at once, upon the basis of the speech of Lord Griffiths in the very passage to which they made reference, have adjourned the matter for an application to be made to the Divisional

Court. However, in my judgement it was not an allegation of that kind, but it did indeed directly and only affect the trial of the particular accused."

26. Also relevant for present purposes is the case of *R v Croydon Justices ex parte Dean* [1993] QB 796 which was cited with approval in both *Bennett* and *Watts*. *Dean* concerned a 17 year old arrested on suspicion of assisting an offender in relation to an offence of murder. He was assured by the police that he would not be charged and that he would instead be a witness for the Crown. After being released the youth made a witness statement and over a period of 5 weeks he continued to help the police with their enquiries. Thereafter, in breach of the assurance given to him, he was charged. At committal proceedings it was submitted that in these circumstances a trial would be an abuse of process. The justices rejected the submission and committed the youth for trial. On an appeal by way of judicial review, the High Court granted the application to quash the committal, deciding that the circumstances of a reneged-upon promise amounted to an abuse of process. Staughton LJ, with whom Buckley J agreed, observed towards the end of his judgment that "[t]he justices were bound to treat [the case] as one of abuse of process", indicating that the court took for granted the magistrates' jurisdiction to decide the point. As Buxton LJ pointed out in *Watts*, *Dean* was never suggested to have been wrongly decided by the magistrates as a matter of jurisdiction, whether by Staughton LJ at the time or later by the House of Lords in *Bennett*.

27. In *Abdul v DPP* [2011] EWHC 247 (Admin) the Divisional Court was invited to consider jurisdiction after the District Judge had declined to determine the abuse of process application on the basis of the dicta in *Nembhard*. The defendants in *Abdul* had been charged with public order offences arising from a protest in respect of which they understood they had prior police permission and approval. Having found that the circumstances did not give rise to any abuse of process, Gross LJ (with whom Davis J agreed) observed that the jurisdiction point was academic. Nevertheless he went on briefly to define the issue – whether the alleged abuse fell within the scope of jurisdiction identified by Lord Griffiths in *Bennett* – before saying that each case would be fact-specific but that he "inclined to the view" that the magistrate could properly have exercised jurisdiction on the facts of the case before him.

28. The recent decision in *R (Kay and another) v Leeds Magistrates Court* [2018] EWHC 1233 (Admin) appears directly to conflict with *Nembhard* and *Woolls*. *Kay* concerned the issuing of a summonses for a private prosecution which the proposed defendants sought to have dismissed by the District Judge for want of candour in the application, alternatively for proceedings to be stayed as an abuse of process on the basis that they were being improperly used for an ulterior purpose, namely to gain a commercial advantage in ongoing arbitration proceedings. The District Judge refused both applications. In relation to the application for a stay, she declined jurisdiction, finding that the Crown Court was the appropriate venue for determination of the question of abuse of process.

29. The Divisional Court allowed the claim and quashed the summonses. The question of jurisdiction does not appear to have been contentious by the time the case reached the Divisional Court. In reviewing the law relating to the magistrates' jurisdiction Sweeney J (with whom Gross LJ agreed) summarised the existing position by reference to a number of cases including *Watts* before concluding as follows, at [30]:

"…

> (2) Thus, the wide category of cases over which the magistrates' court has jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly – including, since a magistrate has jurisdiction to refuse to issue a summons that is vexatious, the jurisdiction to stay proceedings on a summons at a later stage"

30. Neither *Nembhard* nor *Woolls* appears to have been referred to or considered by the court in reaching its decision in *Kay*.

31. I have set out extracts from the reasoning in the above cases in some detail to demonstrate why, in my view, the dicta in *Nembhard* and *Woolls* mistakenly overstate the extent of the exception to the magistrates jurisdiction identified by Lord Griffiths in *Bennett*. The District Judge in his thoughtful case stated suggested that there may have been an "unintended elision of the *Bennett* wider supervisory jurisdiction with the familiar second limb of *Beckford*". On a fuller analysis of the authorities I have concluded that the District Judge was right. The true position is that the exception contemplated by Lord Griffiths in *Bennett* is a very narrow one. Most cases falling within category 2 arising in the magistrates' court will be suitable to be considered and determined in that jurisdiction.

32. It is fair to say that Mr Mably did not in oral submissions press the case advanced in his skeleton that it was open to us to prefer the *Nembhard* and *Woolls* line of authority. For my part I do not believe that it is open to us: if it is right that the scope of Lord Griffiths' exception is limited to a small sub-set of category 2 cases, as I have concluded it is, then the dicta in *Nembhard* and *Woolls* dealing with the scope of the magistrates jurisdiction are wrong and should not be followed.

33. The question then arises as to the precise scope of the sub-set of category 2 case falling within Lord Griffiths' exception and thus outside the magistrates' jurisdiction. As to this there is very little authority apart from the case of *Bennett* itself. Gross LJ in *Abdul* characterised the issue as "not entirely straightforward", saying that each case would be fact-specific. In the Privy Council case of *Panday v Virgil* [2008] UKPC 24, [2008] 1 AC 1386 Lord Brown of Eaton-under-Heywood, delivering the opinion of the Board and referring to Buxton LJ's decision in *Watts*, observed as follows, at [34]:

> "…If the Board have any criticism to make of Buxton LJ's analysis… of the limited circumstances in which, pursuant to [*Bennett*], magistrates must themselves decline jurisdiction, it is that it does not go far enough in narrowing down that class of case. Indeed their Lordships find it difficult to think of any situation save where, as in [*Bennett*] itself, the accused has been unlawfully brought within the jurisdiction, in which the magistrates would have to adjourn the proceedings in favour of a judicial review challenge. The rationale for that particular exception must be that unlawful extradition introduces into the case cross-border considerations which may be of a sensitive character and which certainly range far outside the prosecution process itself."

34. In the light of Lord Brown's remarks in *Panday*, the class of abuse case falling to be decided exclusively in the High Court would seem to be very narrow indeed, perhaps comprising only executive misconduct in relation to extradition, as occurred in *Bennett*

itself. I would decline to attempt any more precise definition of the exception. What appears clear from the above review of the authorities, however, is that magistrates will be competent to investigate and determine a wide range of circumstances falling into category 2 arising from, and bearing upon the fairness of, the domestic criminal process. Turning to the case before us, it is clear that that jurisdiction will encompass instances where the police have given an assurance which is then withdrawn.

Abuse – should the proceedings be stayed?

35. In the light of the conflicting authorities and, in particular, the decisions in *Nembhard* and *Woolls*, the District Judge cannot be criticised for declining to determine the substantive issue, instead confining himself to making the findings of fact which are reproduced at [7] above.

36. Neither party suggested that, in the event of our deciding the jurisdiction issue in the appellant's favour, the substantive issue should be remitted back to the District Judge. The abuse jurisdiction is a concurrent one and accordingly we are able to decide it. We agreed that it would be convenient and expeditious for us to do so.

37. As regards abuse cases falling within category 1, where the accused cannot have a fair trial, proceedings will be stayed without more and no question of balancing competing interests will arise: see the case of *Warren*, at [22]. However, where category 2 abuse is alleged, competing public interests may come into play. When the court is considering whether the circumstances are such as to offend the court's sense of justice and propriety, it will need to balance the public interest in ensuring that administrative errors or misconduct do not undermine public confidence in the administration of justice on the one hand with the public interest in ensuring that those accused of serious crime are properly tried on the evidence on the other.

38. The circumstances under which a breach of assurance might give rise to a stay on the grounds of abuse were discussed in *R v Abu Hamza* [2007] 1 Cr App R 27, which was an appeal against conviction in relation to multiple counts of soliciting murder. The defendant was an imam who had been arrested in 1999 in relation to a terrorist incident in Yemen. In the course of the police investigation into that incident they seized a number of items of property, including an Encyclopaedia and recordings of speeches which the defendant had given at his mosque and elsewhere. The police retained this property for many months, after which they returned it, informing the defendant that no further action would be taken regarding the offences for which he had been arrested. Some years later the defendant was arrested and charged with offences of soliciting to murder arising from material contained in the items of property which had been seized and then returned. It was contended that proceedings were an abuse of process. His counsel submitted that, by returning the items after many months of holding them, the police had implicitly represented that they did not intend to proceed upon the contents.

39. After reviewing relevant authorities Lord Phillips LCJ set out his view as to the necessary pre-conditions for the grant of a stay founded upon an alleged breach of assurance:

> "These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution

> of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on the representation to his detriment. Even then, if the facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation." (at [54])

The court decided that, in the circumstances of that case, the criteria identified by Lord Phillips had not been satisfied.

40. It was not contested that the conditions identified by Lord Phillips in *Abu Hamza* were met in this case. But the matters which Lord Phillips identified are no more than necessary pre-conditions before a court could find that there had been abuse. I do not read the passage from his judgment set out above as indicating that satisfaction of such conditions would in every case be sufficient to establish an abuse of process. Nor, despite authorities such as *Dean* and *H*, would I go so far as to say that every case of a reneged-upon promise made by police and acted upon by the defendant must necessarily result in criminal proceedings having to be stayed for abuse. Each case will depend upon its own facts; as my Lord, Stuart-Smith LJ, observed during argument, amongst the matters to be taken into account will be the seriousness of the underlying offence.

41. In this regard, as Mr Mably rightly identified, the carrying of a knife in public by a young person is a serious offence and a matter of great concern in the current climate. The degree of public concern about knives is such that mandatory minimum sentences have been introduced for second and subsequent offences (at section 315 of the Sentencing Code). To my mind this is the most significant feature weighing in the balance here.

42. It is right that the administrative error did not itself prompt the offending in the present case. As I see it, however, this adds nothing to the balancing exercise which we must undertake: it is clear on the authorities (*Dean, H, Abu Hamza*) that a promise made and acted upon is capable of amounting to an abuse, where the detrimental act(s) do not consist of the offence itself.

43. Nor do I regard the fact that the assurance was given by mistake, or that it was rectified later the same day, as influencing the matter one way or the other. I have no doubt that the giving of the assurance was a wholly unintentional mistake, nevertheless Sergeant Harris was the person responsible for making and conveying the charging decision at the time. Moreover, the correction did not happen until after the defendant had been interviewed and had made full admissions. It would have been a different matter if the position had been clarified before DM was interviewed, but it was not.

44. Lastly, I do not regard the detrimental effect of the assurance as in some way annulled or rendered nugatory by the fact that DM's admissions in interview would have been excluded from the evidence at any trial. If "detriment" is conceived of solely by reference to the defendant's position at trial this is no doubt correct, but in my view Mr Mably's submission was based upon an overly narrow conception of detriment: making admissions in interview may have much wider implications for a young defendant beyond the trial itself. Moreover, I agree with Ms Sikand that to focus exclusively on the impact upon any trial is to confuse category 1 and category 2 types of abuse. Fairness to the accused is the focus of category 1 abuse; category 2 looks more broadly at whether the court's sense of fairness and propriety is offended.

45. As I have indicated above, in my view the key circumstance telling against a stay here is the seriousness of the offence. Against this, in addition to the breach of promise given by the officer responsible for the charging decision is DM's age - just 18 when the car in which he was a passenger was stopped - together with the fact that he had no previous convictions or cautions. Weighing these factors in the balance I conclude that in the particular circumstances of this case the public interest in holding a state official to their promise outweighs the public interest in seeing that an offence, albeit in this case a serious one, is prosecuted. Had circumstances been different, for instance if there was a history of relevant offending, then the balance may have fallen out differently. As the courts have repeatedly emphasised, each case will depend upon its own facts.

Conclusion

46. If my Lord agrees, I would therefore answer the questions posed for us as follows: (i) No; (ii) Yes. The resulting order would quash the conviction and stay the proceedings.

Lord Justice Stuart-Smith

47. I agree.