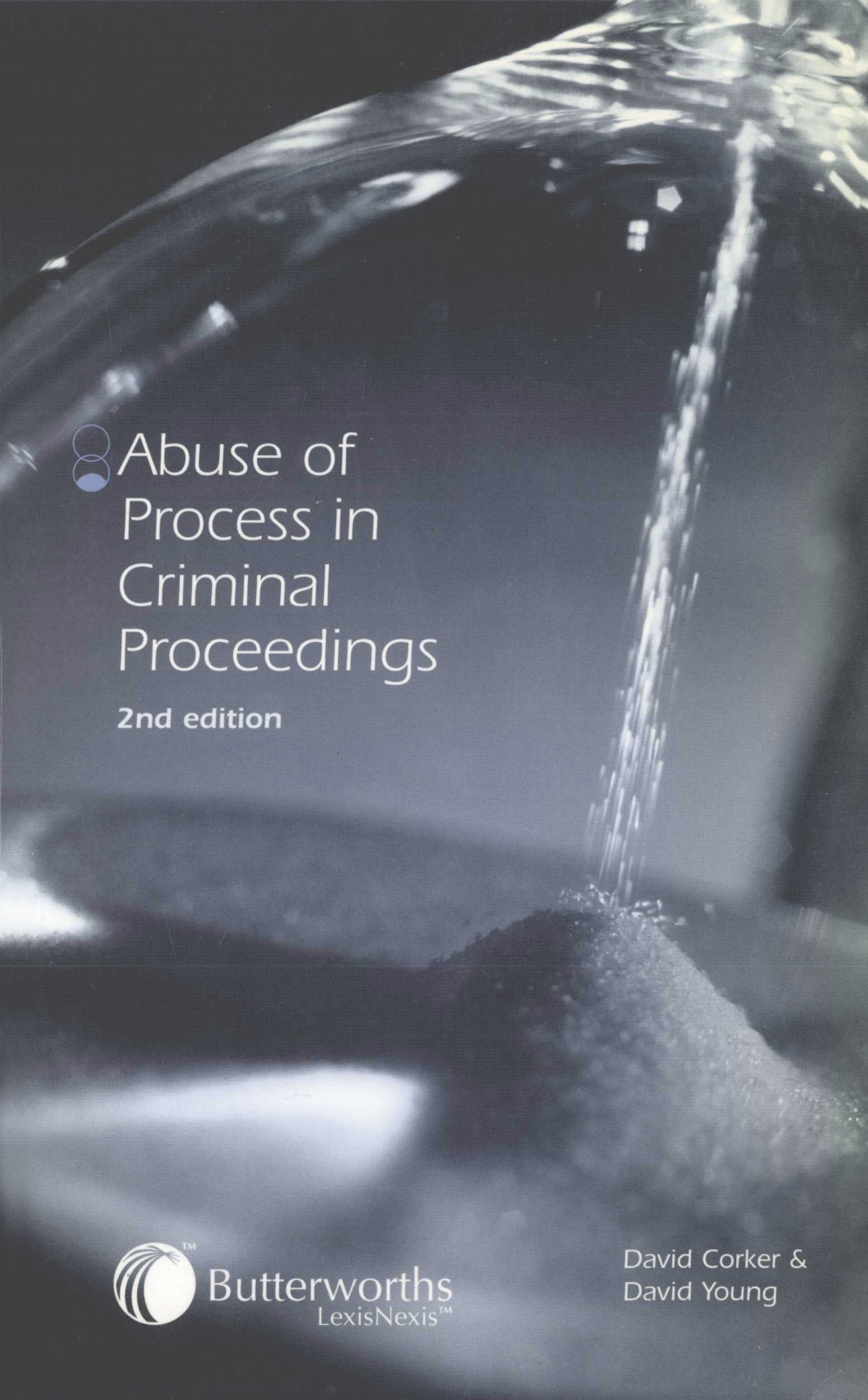

Abuse of Process in Criminal Proceedings

2nd edition

David Corker &
David Young

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Abuse of Process in Criminal Proceedings

Second edition

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Foreword

It came as something of a surprise, but also an honour, to this professional prosecutor to have been asked by the authors to write the Foreword of a book aimed at defence practitioners looking for ways of eliminating the risks to their clients inherent in a trial process based on the evidence by preventing a trial taking place at all.

The book takes a snapshot of the abuse of process 'family' as it looks in early 2003. Sadly for the prosecutor, many of its members are clearly in rude health and looking likely to survive into ripe old age and beyond. The photograph is superbly composed. All family members and their children (for these see in particular Chapters 4 and 10) stand out in sharp focus. The authors are, however, dispassionate in their treatment of their subjects, who are shown 'warts and all'. Of course a book aimed primarily at one side of the court will be of enormous use to the other side, and to the investigators of crime whose activities so often give rise to applications to stay.

This field of law has developed as rapidly as any over the last 50 years. I have no doubt that it will continue to do so as criminal procedure, the rules of evidence, and the scope of the substantive criminal law continue to develop. I would, for instance, be surprised of the next edition did not contain one or two decisions arising from prosecution appeals against 'terminating rulings' following the enactment of the proposals contained in Sir Robin Auld's Report.

Finally, may I commend this book to all practitioners. Its authors are universally admired for their mastery of their subject and their willingness to share their knowledge with all who are interested. The book is well written and structured and, so far as this humble practitioner is concerned, an accurate account of the law as it stands today. Some of the editorial suggestions may or may not survive judicial scrutiny but all are eminently arguable. Meanwhile I and other prosecutors will use the book both to assist investigators, the media and ourselves to avoid falling into the traps so clearly set out in its chapters and to encourage the Court of Appeal to do better than King Canute (see Chapter 10) in stemming the tide of such applications!

Sir David Calvert-Smith QC
Director of Public Prosecutions
February 2003

Preface

In summer 2002 we decided that the law on abuse of process had moved on sufficiently to merit a second edition of our work. There had been plenty of abuse authorities in the intervening period between publication of the first edition in early 2000 and then. There were important new authorities concerned with loss of evidence/relevant material and entrapment. Moreover it was timely to consider the impact of human rights jurisprudence on the pre-existing common law on abuse following domestic incorporation of the Convention via the implementation of the Human Rights Act in October 2000.

It is interesting to reread the Preface to our first edition. Imbued with the human rights zeitgeist then sweeping through the legal profession, and no doubt influenced by the propagandists of the promised new era, we penned the following:

> '... fairness as interpreted by the European Court in particular factual situations will come to play an increasingly important role in our criminal law. It is perhaps likely that in the years ahead the label of abuse of process will wither and be supplanted by a label of either "fairness" or "human rights law"'.

Any thoughts concerning an early demise of abuse and its supplanting by Convention-led law can now be dismissed. This child of the common law has proved itself robust and largely able to see off the would-be trespasser from Strasbourg. This however is not to suggest that in abuse cases Convention jurisprudence has not been important and often referred to in judicial reasoning but primacy has clearly remained with the common law approach.

As an example take article 8, the right to privacy. Immediately prior to implementation it was thought by many learned commentators that this article would have a dramatic effect on domestic criminal cases where there had been anterior police surveillance and undercover approaches to suspects. It was considered that many of these cases would have to be stayed for breach of the principle of legality enshrined in that article. Such prophecies have proved unfounded in the light at least of a determined policy by the judiciary to undermine and marginalise its role in criminal cases. In *P* ([2001] 2 WLR 463) Lord Hobhouse said:

> 'The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides.'

Commenting upon the ECHR case of *Schenk* ((1988) 13 EHRR 242), Lord Hobhouse continued:

> 'The importance of the ECHR decision is that it confirms that the direct operation of articles 8 and 6 does not invalidate their Lordships' conclusion or alter the vital role of s 78 as the means by which questions of the use of evidence obtained in breach of article 8 are to be resolved at a criminal trial ... Similarly, the ECHR decision that any remedy for a breach of article 8 lies outside the scope of the criminal trial and that article 13 does not require a remedy for a breach of article 8 to be given within that trial shows that their Lordships were right to say that a breach of article 8 did not require the exclusion of evidence. Such an exclusion, if any, would have to come about because of the application of article 6 and s 78.' (page 475)

Whilst, and with justification, the judiciary are proud of their invented abuse doctrine, it serving as a guarantor of both their independence from the State and of real fairness in criminal trials, they also have a love-hate relationship with it. The element of hatred is based upon the following fears. First the perennial fear of rolling bandwagons and opening floodgates whereby the courts are swamped with a multitude of groundless abuse applications each of which has to be heard before being rejected. This fear was very evident in the judgment of Woolf CJ in *Childs* ([2002] EWCA Crim 2578), which was an otherwise unremarkable appeal against conviction. Displaying his frustration at hearing yet another hopeless appeal based on alleged abuse he said:

> 'The court cannot but be aware that up and down the country it is now the practice to raise arguments of abuse of process. These arguments distort the trial process in cases where there is no justification for this. Practitioners should not advance arguments of abuse of process unless they are warranted. Furthermore, if they are advanced before courts when they are not warranted, courts should make clear that it is inappropriate conduct. Judges should take appropriate steps if necessary making wasted costs order when, as sometimes happens, a huge amount of court time is wasted in consequence of unjustified applications. The trial process today is complicated enough. It is irresponsible to add to that complexity by putting forward unnecessary allegations dressed up as abuse of process.'

The underlying messages to trial judges below was clear; if stern judicial admonition proves an insufficient deterrent to the making of undeserved abuse claims, then the stick of wasted costs orders aimed at directly penalising defence lawyers should be used.

Apart from trial-management issues the other fear surrounding abuse is the extent to which the judiciary should concern itself with scrutinising

alleged State misconduct. Since the landmark House of Lords decision in *Bennett* ([1994] AC 1) where as Lord Griffiths put it, 'If the court is to have the 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' (page 150), in principle any complaint of impropriety may require investigation.

Consider for example the issues which arose in *McDonald* (April 2002, unreported, Woolwich Crown Court), a case discussed in Chapter 5, concerning alleged illegal acts committed by UK State agents overseas. Should, or even can, a Crown Court judge become embroiled in issues concerning alleged violation of foreign law by such agents and further, the legality and acceptability of international relations subsisting between the UK government and its counterpart foreign State. A reluctance to enter such legal minefields is understandable but with the unstoppable shift towards joint law enforcement operations with different agencies in different countries collaborating together to gather evidence against an eventual defendant, is such a reluctance principled or acceptable? In this instance abuse raises uncomfortable questions of pragmatism versus principle.

The sentiments of Lord Griffiths quoted above suggest that the abuse jurisdiction will oblige the judiciary to journey into areas they would prefer not to tread. Why for example where there has been such an international operation should the activities of foreign law enforcement officials be immune from scrutiny where there is cause to believe that their acts are unlawful either under domestic or foreign law? The willingness of the trial judge, in the face of determined prosecution opposition, in *McDonald*, to consider a complaint of alleged illegality of UK agents operating abroad demonstrates that the categories of abuse are never closed. As Sir David Calvert-Smith QC acknowledges in his Foreword to this work, this particular monster, like Medusa, has many heads.

At the heart of the doctrine of abuse lies the issue of the rule of law. This is sometimes concealed in consequence of emphasis upon the question of whether or not, in order to show an abuse, proof of prejudice is required. If there has been improper or even unlawful conduct by a State agent in the course of an investigation leading up to the prosecution of an individual, to what extent should such conduct be sanctioned by the court of trial? Should there be an insistence that, before a stay will even be considered, the defence must demonstrate that any complained of misconduct has caused prejudice or unfairness, or is the priority that the law is to be equally obeyed by all, such that unlawful or improper acts alone deserve sanction without there also being a need to show consequential prejudice?

Unsurprisingly and in our view rightly, the judiciary have sought to weigh principle and pragmatism together and eschewed any universal or catch-all approach. Contrast the abuse cases relating to delay and loss of evidence, where there is a rigid requirement that the effects of such be shown to have caused unfairness, with those concerning breach of promise and abuse of power where the emphasis on consequent unfairness is far less. To a large extent, a student wishing to classify the categories of abuse could bifurcate them along the edge of whether prejudice is a pre-requisite or not.

The judiciary have shown themselves wary of offending public opinion even when faced with significant unlawful conduct by law enforcement officials. Lofty principles like the rule of law seem fine except when on the other side are determined and organised criminals who, unless stopped, may undermine society. This applies particularly to drug trafficking. Lord Steyn perfectly described this dilemma in *Latif* ([1996] 1 WLR 104):

> 'If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine pubic confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime' [at 112].

Unfortunately when considering unlawful behaviour in this edition there is a sense of déjà vu. In our first edition we surveyed various cases which had involved illegal conduct by Customs officers, the cases of *Carrington* and *Togher* especially. If anything, this pattern of unlawful activity has deepened since then and in this edition we consider another raft of Customs cause celebres where it has transpired that the courts were misled on a number of occasions during PII hearings. These cases challenge the courts to confront the issue of whether the fight against crime entails the end justifying the means. In these cases at least, the Court of Appeal decided that the obvious guilt of some of the appellants was no bar to relief where a court had been lied to. Here the rule of law was to be upheld whatever the outcome.

We have endeavoured to state the law as at 1 March 2003.

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