Criminal Fairness in the House of Lords

Don Mathias, Barrister, Auckland

This article has now been published: [2002] NZLJ 435, copyright LexisNexis NZ Ltd, and should not be copied without permission.

Introduction

Recent decisions of the House of Lords point to three areas where our law needs improvement: the standard of proof of an issue when the statutory burden of proof is on the defence, the interpretation of legislation which appears to require a course of evidence which would be unfair, and the trial consequences of serious official misconduct in investigating the offence charged. These areas for improvement have been highlighted as a result of the introduction of European jurisprudence into English law via the Human Rights Act 1998 [UK]. The common law tradition of acknowledging the highly persuasive value of decisions of the House of Lords can be expected to prevent a drift of our legal system into an international backwater.

Statutory burdens on the defence

Occasionally a statute will place the burden of proof of an exculpatory issue on the defence, without specifying the standard of proof that accompanies that burden. An example is s 6(6) of the Misuse of Drugs Act 1975, which provides that if a person is in possession of a specified quantity of a drug, he shall, "until the contrary is proved be deemed" to be in possession of that drug for the purpose of dealing in it. No standard of proof is specified. Traditionally the standard of proof on the person was interpreted to be "on the balance of probabilities".

This standard of proof survived the enactment of the New Zealand Bill of Rights Act 1990: *R v Phillips* [1991] 3 NZLR 175; (1991) 1 NZBORR 6 (CA). [Disclosure: your present author was counsel for the unsuccessful appellant in *Phillips*.] The same issue arose in *R v Lambert* [2001] 3 WLR 206; [2001] 3 All ER 577 (HL), where a provision requiring the defendant to prove that he did not know that the thing in his possession was a controlled drug was held, in the light of human rights legislation, to place an evidential burden (as opposed to a legal burden of proof on the balance of probabilities) on him. Lord Steyn (one of the 4-1 majority) noted in para 42, that Lord Cooke had favoured an evidential burden in *R v DPP, ex parte Kebeline* [1999] 4 All ER 801; [2000] 2 AC 326 HL, and another member of the majority, Lord Hope, in para 84, quoted as follows:

> "As Lord Cooke of Thorndon said in *R v Director of Public Prosecutions, ex parte Kebilene* [sic] [2000] 2 AC 326, 373G:
>
> > ". . . for evidence that it is a *possible* meaning one could hardly ask for more than the opinion of Professor Glanville Williams in 'The Logic of "Exceptions"' [1988] CLJ 261, 265 that 'unless the contrary is proved' can be taken, in relation to a defence, to mean 'unless sufficient evidence is given to the contrary;' and the statute may then be satisfied by 'evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence'."

The result in *R v Lambert* contrasts with *R v Phillips*, above, where Cooke P stated the Court was

> "not persuaded that the ordinary and natural meaning of the word "proof" or "proved" is capable of extending so far. To suggest that s 6(6) of the Misuse of Drugs Act can be used in the sense contended for is, in our view, a strained and unnatural interpretation which, even with the aid of the New Zealand Bill of Rights Act, this Court would not be justified in adopting."

To call this interpretation of such legislation "strained and unnatural" is a matter of some controversy. The legislation in question in *Lambert* was s 28 of the Misuse of Drugs Act 1971[UK]. This, in its material parts, provides "(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged. … (3)(b) … shall be acquitted thereof (i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug …". In *Lambert* Lord Clyde, at para [157], thought there was no straining of language in interpreting this to mean only an evidential burden on the defence:

> "It requires no straining of the language of section 28 to construe the references to proof as intending an evidential burden and not a persuasive one. Indeed, as I have already stated, it would be a construction to which I would in any event have inclined, even without the added compulsion of the Human Rights Act. The construction seems to me to be something which is well within the scope of what is "possible" for the purposes of section 3. In rewriting the legislation as it did in the Act of 1971, Parliament must have recognised that in fairness to the accused provision must be made for the case where he was ignorant of the nature of the thing which he possessed and that the law as laid down by the majority of this House in *Warner* was unduly harsh. It seems to me that the proper way by which that harshness should be alleviated is to recognise that the accused should have the opportunity to raise the issue of his knowledge but to leave the persuasive burden of proof throughout on the prosecution. Respect for the "golden thread" of the presumption of innocence deserves no less."

In *Kebeline*, Lord Cooke distinguished *Phillips* as follows:

> "I must not conceal that in New Zealand the Glanville Williams approach was not allowed to prevail in *R. v. Phillips* [1991] 3 NZLR 175. But, quite apart from the fact that the decision is of course not authoritative in England, section 6 of the New Zealand Bill of Rights Act 1990 is in terms different from section 3(1) of the Human Rights Act 1998. The United Kingdom subsection, read as a whole, conveys, I think, a rather more powerful message."

It is suggested, with respect, that the messages are the same. Section 3(1) of the Human Rights Act 1998 [UK] reads:

> **"3.** - (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Compare that with s 6 of the New Zealand Bill of Rights Act 1990:

> "6. **Interpretation consistent with Bill of Rights to be preferred** – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

The relevant right in *Lambert* was "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law": Article 6.2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; the same right was relied on in *Phillips*: s 25(c) of the New Zealand Bill of Rights Act 1990. In other words, in both *Lambert* and *Phillips* the question was what was the effect of the presumption of innocence on the interpretation of legislation placing a burden of proof on the defence. This turned on the influence of the interpretation provisions, s 3 and s 6 above, and it is suggested that there is no material distinction between them.
Ironically, a strained interpretation can apparently support a perception of a distinction between s 3 and s 6, and casual judicial language can perpetuate the unfortunate error in *Phillips*. Lord Steyn has done this, referring in *R v A* [2002] 1 AC 45; [2001] 3 All ER 1 (HL), discussed in more detail below, to the alleged distinction between the New Zealand and the United Kingdom legislation in the following terms (para [44]):

> "The draftsman of the [Human Rights] Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights."

With respect, s 6 does not contain a "reasonable interpretation" limitation, and its strength is not readily distinguishable from that of the United Kingdom provision. It would be unfortunate if this sort of judicial hedging were to leave us with a law that would be regarded as a breach of fundamental human rights in Europe. It is clearly time to revisit the question.

Straining for fair meanings of legislation: admissibility

Occasionally legislation will push the courts towards conduct of trials which involves unfairness, and the strength of the resistance of the common law to that push is a matter of fundamental importance. This contest of power brought *R v A* [2001] UKHL 25; [2001] 3 All ER 1(above) to the House of Lords. The focus was legislation which purported to prevent the defence cross-examining the complainant in a rape trial on her previous sexual experience with the accused. Specifically, s 41(3)(b) of the Youth Justice and Criminal Evidence Act 1999[UK] prohibits the court from permitting cross-examination of the complainant, where the issue is consent, on previous sexual experience with the accused, unless that experience was "at or about the same time" as the alleged offence. Similarly, s 41(3)(c) prohibits cross-examination on the complainant's similar sexual experience with the accused unless it was "part of the event

which is the subject matter of the charge", or it "took place at or about the same time as that event".
At issue was what the trial judge should do if, in the circumstances of the case, it would be unfair to the defence to disallow questioning about sexual conduct which was more remote in time than that which the statute permitted.
The leading speech in *R v A* was delivered by Lord Steyn, who recognised, in para [44], that s 3 of the Human Rights Act 1998[UK] (above) permits a strained interpretation of the evidence legislation. He concluded, with Lords Slynn, Hope, and Hutton agreeing, that questions of the kind purportedly prohibited would be permitted if fairness required that. In effect, a qualification to the terms of the legislation was implied (para [45]):

> "45. In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in section 3 of the 1998 Act. That is the approach which I would adopt."

We can appreciate, in the light of *R v A*, how unwise it would be to restrict the application of interpretation provisions such as s 6 of the New Zealand Bill of Rights Act 1990. It is suggested that if our courts were placed in a dilemma like that in *R v L*, where legislation appeared to command unfairness, if the courts could not rely on s 6 to permit a strained interpretation in the interests of protecting the fairness of the proceedings, an alternative, but drastic, course would still be available. The statute would be applied, the consequent unfairness recognised, and the proceedings stayed.

Finding a fair remedy for official misconduct
A stay of proceedings is one of the most powerful ways by which the common law protects the integrity of the administration of justice. At present in New Zealand the usual ("usual", although fortunately cases are rare) remedy for entrapment is exclusion of the

wrongfully obtained evidence. The House of Lords has now indicated that the more assertive remedy of a stay is appropriate.

In *R v Loosely* [2001] UKHL 53 (25th October, 2001) the developments in the law as to the appropriate judicial response to evidence obtained by entrapment were surveyed. The statutory remedy is exclusion of the evidence, pursuant to the discretion granted to judges by s 78 of PACE, whereby the court has power to exclude evidence on which the prosecution proposes to rely if, having regard to all the circumstances, the court considers 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. Common law developments have supplemented that discretion with the power to stay proceedings.
Lord Nicholls reviewed these developments and concluded:

> "16. Thus, although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to section 78. In these respects *Sang* has been overtaken. Of these two remedies the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment. Exclusion of evidence from the trial will often have the same result in practice as an order staying the proceedings. Without, for instance, the evidence of the undercover police officers the prosecution will often be unable to proceed. But this is not necessarily so. There may be real evidence, or evidence of other witnesses. Exclusion of all the prosecution evidence would, of course, dispose of any anomaly in this regard. But a direction to this effect would really be a stay of the proceedings under another name. Quite apart from these practical considerations, as a matter of principle a stay of the proceedings, or of the relevant charges, is the more appropriate form of remedy. A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way.
>
> "17. I should add that when ordering a stay, and refusing to let a prosecution continue, the court is not seeking to exercise disciplinary powers over the police, although staying a prosecution may have this effect. As emphasised earlier, the objection to criminal proceedings founded on entrapment lies much deeper. For the same reason, entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.
>
> "18. A further point of principle should be noted. As observed by Auld LJ in *R v Chalkley* [1998] 2 Cr App R 79, 105, a decision on whether to stay criminal proceedings as an abuse of process is distinct from a determination of the forensic fairness of admitting evidence. Different tests are applicable to these two decisions. Accordingly, when considering an application by a defendant to exclude evidence under section 78, courts should distinguish clearly between an application to exclude evidence on the ground that the defendant should not be

> tried at all and an application to exclude evidence on the ground of procedural fairness. Sometimes a defendant may base his application under section 78 on both grounds. Then the court will need to reach a separate decision on each ground."

Lord Hoffmann indicated that even when a stay was not considered appropriate, the subsidary question of admissibility may nevertheless be decided in favour of the defence:

> "42. The section 78 discretion enables the judge to safeguard the fairness of the trial. But the entrapped defendant is not ordinarily complaining that the admission of certain evidence would prejudice the fairness of his trial. He is saying that whatever the evidence, he should not be tried at all. The appropriate remedy, if any, is therefore not the exclusion of evidence but a stay of the proceedings. The distinction was clearly made by the Law Commission in its 1977 Report at para 5.29, by Andrew Choo in *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), pp. 164-166 and by Potter LJ in *R v Shannon* [2001] 1 WLR 51. …
>
> "43. On the other hand, if the court is not satisfied that a stay should be granted and the trial proceeds, the participation of state agents in the commission of the crime may well be relevant to the exercise of the discretion under section 78. As Potter LJ pointed out in *Shannon's* case at p 68, the question at that stage is not whether the proceedings should have been brought but whether the fairness of the proceedings will be adversely affected by, for example, admitting the evidence of the agent provocateur or evidence which is available as a result of his activities."

Accordingly, cases such as *R v Pethig* [1977] 1 NZLR 448 Mahon J, and *Teki v R* (1989) 4 CRNZ 374 McGechan J should now attract the remedy of a stay of proceedings. The seriousness of official misconduct may warrant more frequent use of the stay, in cases of breaches of rights. Examples of such facts occur in cases such as *R v Oldham* (1994) 11 CRNZ 658, *R v W* (1986) 2 CRNZ 576, *R v Accused (CA39/94)* (1994) 11 CRNZ 380, *R v McArdle* (1995) 13 CRNZ 517, *R v Schroder* [1996] DCR 235 (upheld in the Court of Appeal: *R v Schroder* 24/6/96, CA83/96), *R v Moresi* (No 2) (1996) 14 CRNZ 322, and *R v Ratima* (1999) 17 CRNZ 227 (CA). Even *R v Shaheed* (2002) 19 CRNZ 165 (CA), on the view of the majority that the police were grossly negligent to the point of recklessness concerning compliance with the law (para [164]), could be presented as a candidate for a stay.

Conclusion

The House of Lords cases discussed here reveal three areas in which the courts need to be vigilant to guard against unfairness. As the body of case law grows, past approaches to fairness may be seen as inadequate. Standards of justice are becoming international, and in some respects we need to make improvements. Section 6 of the Bill of Rights can be a powerful guard against unfairness but there is a risk that its potential will not be realised. A narrow approach to remedies for prosecutorial misconduct can also fall short of international standards.