Neutral Citation Number: [2019] EWHC 514 (Admin)

Case No: CO/4285/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2019

Before :

LORD JUSTICE BEAN
MRS JUSTICE SIMLER

- -

Between :

The Queen on the application of YOGESH PARASHAR	**Claimant**
- and -	
SUNDERLAND MAGISTRATES' COURT	**Defendant**
CROWN PROSECUTION SERVICE	**Interested Party**

- -
- -

Jeremy Benson QC (instructed by **Geoffrey Miller Solicitors**) for the **Claimant**
James Boyd (instructed by **Appeals and Review Unit, Crown Prosecution Service**) for the **Interested Party**
The Defendant court did not appear and was not represented

Hearing date: 26 February 2019

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Approved Judgment

Lord Justice Bean:

1. On 12th February 2018 the Claimant Mr Parashar drove a BMW car into a Tesco car park in Sunderland where he allegedly collided with a parked vehicle. When he entered the store he was observed to be smelling strongly of alcohol. The police were called. A preliminary roadside breath test was carried out giving a reading of 102ug/100ml of breath. He was arrested and taken to a local police office. He attempted to provide his first specimen of breath but the device produced a "mouth alcohol" message and aborted the test procedure. Shortly thereafter he provided two specimens of breath for analysis, the lower reading being 116ug/100ml of breath, more than three times the legal limit of 35ug/100ml. He was charged with the offence of driving with excess alcohol and released on bail.

2. At the first hearing in the Magistrates' Court on 28 February 2018 the Claimant pleaded not guilty. Directions were given as follows; the defence to state witness requirements by 14 March 2018, any further prosecution evidence to be served by 18 April 2018; trial set for 14 June 2018.

3. On 30 May 2018 the defence served on the prosecution an expert's report by Dr John Mundy. The letter enclosing it stated:-

> "This statement will be tendered in evidence before the court unless you wish the witness to give oral evidence. If you wish this witness to give oral evidence please confirm this within seven days. If you do not do so within seven days of receiving this letter you will lose the right of statement being tendered in evidence and you will only be able to require attendance of the witness with leave of the court under Section 9 of the Criminal Justice Act 1967. We can confirm that a copy of this report has been filed with the court."

4. This letter was received the following day by the CPS, which did not respond.

5. On 5 June 2018 the prosecution served the statements of 8 witnesses. The dates of these statements varied from 12 February to 26 March 2018.

6. On 14 June 2018 the case came before District Judge Purcell. The prosecution had failed to serve all their evidence. In particular, the originals of the breath test results had been destroyed and the printouts available in court were illegible. The judge granted an adjournment. He gave directions that the prosecution were to serve evidence to include the breath test logs by 5 July 2018. A submission by the defence that for the prosecution to proceed would be an abuse of process was listed for hearing on 8 August 2018 (later moved to 10 August 2018 by consent) with provision for the service of skeleton arguments in advance of that date. The judge further directed that if the abuse of process argument was rejected the trial would take place on 8 October 2018. It should be noted that there was no suggestion at this hearing that a prosecution expert would be instructed.

7. On 9 August 2018, the day before the abuse of process hearing, the prosecution at last served a legible copy of the breath test print outs. On the same day the officer in the case, PC Barrass, informed the CPS that he had forwarded the papers to an expert to address the issues in Dr Mundy's report.

8. The next day the abuse of process argument did not proceed. Each party has given an account of what took place: they have some points in common but are not identical. The prosecution witness statement is as follows:

> "From a note inside the envelope I received at court in a CPS court bag the officer seems to have already instructed an expert to comment on the defence expert report. DJ suggests this can be dealt with in same manner as defence expert. i.e. being adduced as hearsay at the trial. This can be hopefully sorted out once both expert evidence are to hand and both cross-served on each expert for their opinion. If not capable to being agreed then they may have to attend the trial but DJ hopes this can be avoided".

9. The defence puts it in a different way.

> "On 10 August 2018 the matter was before DJ Elsey who refused to hear the abuse of process application that had been listed by DJ Purcell. The CPS was supposed to serve legible copies of the breath test print outs or the metrological logs by 5 June 2018. In default the Claimant was supposed to serve an abuse of process application by 19 July 2018. An abuse of process and section 78 argument was served by the Claimant on 25 July 2018 and there was no response from the CPS. On 9 August 2018 the CPS served a legible copy of the print out. On 14 June 2018 DJ Purcell [had] specifically stated that the CPS had a "limited chance" to serve the print out. DJ Elsey disagreed with DJ Purcell and refused to hear an abuse of process argument or Section 78 application without hearing the evidence at trial. … DJ Elsey was referred to the report of Dr Mundy and it was confirmed by the CPS that the science was agreed and it could therefore be read under Section 9 or under the hearsay provisions. The CPS was asked by DJ Elsey if it intended to raise any objection to the report and they specifically indicated that they were content for the report being read as an unchallenged report pursuant to the hearsay provisions. On that basis the current trial date was purposefully [sic] fixed for a date that was incompatible with Dr Mundy's availability."

10. On any view, this adjournment was not at the request of the defence. There seems, with respect, to have been a lack of clear thinking about how the expert evidence was to be treated. If Dr Mundy's report had been truly unchallenged then there was no need for him to attend the trial. But if the prosecution were to be permitted at such a late stage to instruct their own expert to challenge the findings of Dr Mundy, and there was no agreement between the two experts, then fixing a trial date on which Dr Mundy could not attend would clearly have been wrong.

11. On 12 September 2018 the court emailed the parties as follows:

> "Please note the above-named defendant was listed for trial at Sunderland Magistrates Court on 08 October 2018. … The

> district judge has requested this matter is listed with a time estimate of a full day hearing."

12. After referring to a skeleton argument sent in by the defence in two parts and saying that the document appeared to be incomplete the email continued

> "With all this in mind the district judge has directed the trial hearing on 8 October 2018 is vacated, however to remain listed for legal argument. Therefore the trial has been vacated and re-listed for trial as per the below listing: 9 November 2018, 10am, Sunderland Magistrates Court. Please note: the parties are still required to attend the legal arguments hearing scheduled for 08 October 2018 at 10am."

13. On 19 September 2018 the defence solicitor emailed the court stating that the new trial date had not been listed in accordance with availability dates of counsel and the defence expert and put forward suggested dates. The court replied, giving District Judge Elsey's ruling.

> "I note that the matter remains listed on 08 October for a legal argument towards the trial on 09 November 2018. All parties to a summary trial are entitled to expect that matters are dealt with swiftly. There has already been significant delay and I am not satisfied in the interests of justice to delay the trial for the current matters into the new year."

14. The writer asked for further availability dates close to 9 November 2018. The defence reply was that the expert was available on 8 October 2018 but counsel was not. The earliest date when they were both available was 21 January 2019.

15. By a further email dated 26 September 2018 the court office gave the district judge's ruling:

> "The dates had been fixed for some time now and the offence is driving a motor vehicle when alcohol level is above the limits which does not require counsel. The DJ is willing to admit the expert evidence as hearsay and the trial remains in the list."

16. Thus at this stage the court had listed legal argument for 8 October 2018 and the trial, with the only expert report thus far filed to be "admitted as hearsay", for 9 November 2018 in the event that the abuse of process argument was rejected. This was confirmed by the court in an email on Friday 5 October 2018:-

> "The case is listed at Sunderland Magistrates Court on 8 October 2018, courtroom 2, for a legal argument towards the new trial date which is set for 9 November 2018 at 10am, Sunderland Magistrates Court for a full day trial."

17. However, later on 5 October 2018 a further email was sent by the court as follows:

> "Please note the above-named defendant was listed for legal argument at Sunderland Mags Court on 9 November 2018 [sic]. Case Management has reviewed the legal argument and found

> it is an application where the defence are seeking to exclude the interview under section 76 PACE as they state that the interview was conducted while the defendant was still under the influence of alcohol. In view of case management the application cannot be heard without the officer being present and giving evidence. If the witness is expected to attend court, fine, but it seems to be an issue that is better dealt with at the trial with all of the issues in the mix. This has been referenced to a District Judge who has requested the legal argument is removed from the list on Monday 4 October as this will be dealt with at trial." [The last date given was an obvious misprint for Monday 8 October, as was confirmed after a further telephone call and exchange of emails.]

18. So the position was that: (a) DJ Purcell had given directions on 14 June for legal argument in advance of the trial; (b) DJ Elsey had apparently taken a different view on 10 August; (c) on 12 and 19 September DJ Elsey restored the position laid down by DJ Purcell; (d) on Friday 5 October, the last working day before the listed hearing, this direction was effectively reversed by anonymous "Case Management" with the agreement of another judge and in the absence of the parties. I do not regard this as a satisfactory way to conduct court business.

19. On 10 October 2018 the defence applied by email to vacate the trial date of 9 November and asked for an oral hearing of their application.

20. On 12 October 2018 the court refused the application to vacate the trial and informed the defence that DJ Elsey had ruled as follows: "I have already ruled on this. The case has been delayed already and will go ahead in November. It is a summary only matter which does not require counsel and I will admit the expert as hearsay under section 114 CJA so they need not attend."

21. Taking the District Judge's three reasons in turn:

    i) It was correct that the case had been delayed already, but both the June and the August adjournments had been caused not through any fault of the defence but because of the fault of the prosecution, the first time in failing to serve the critical evidence and the second time in seeking at the very last moment to instruct an expert of their own.

    ii) As for the case being "a summary only matter which does not require counsel", it was not for the judge to tell the defendant that he need not be represented at a hearing involving technical expert evidence and the near-certainty of losing his licence if convicted. If the judge meant to refer to <u>specific</u> counsel the comment would have been reasonable; but the availability of particular counsel was not the main issue about the date. No doubt a substitute advocate could have been found if that was the only problem, but the same did not apply to the expert.

    iii) The proposition that the judge would "admit the expert as hearsay so they need not attend" made sense so long as the prosecution had not instructed their own expert. But apparently unknown to the judge this had changed.

22. On 11 October 2018 the prosecution had served an expert report of Mr Geraint Roberts. The defence response was that it was not agreed and Mr Roberts was required to attend trial.

23. By letter of 17 October 2018 the defence solicitors wrote to the court as follows:-

> "We acknowledge receipt of the court's CJSM response to our further application to vacate 12 October 2018 and note this is refused along with the request for an oral hearing.
>
> A further development has arisen since making our application and in accordance with our obligations pursuant to CrPR 1.2 (c) of the Overriding Objective, we wish to bring these to the attention of the court.
>
> The Defence served the report of Dr Mundy on 30 May 2018.
>
> On 10 August 2018 when the matter was last before the court for an ineffective abuse of process application, when listing the matter for a second trial date (the first having been ineffective in June 2018) the Crown was asked by DJ Elsey if it intended to raise any objection to the 'report and they specifically indicated that they were content for the report being read as an unchallenged report pursuant to the hearsay provisions.
>
> On that basis the current trial date was purposefully fixed for a date that was incompatible with Dr Mundy's availability. However, on 11 October 2018 the Crown has served the expert report of Mr Geraint Roberts, seeking to challenge the report of Dr Mundy some 4.5 months after the service of Dr Mundy's report and 2 months after the date when the current trial was fixed. The Crown gave no prior notice of an intention to serve evidence in rebuttal in an attempt to challenge Dr Mundy. Accordingly, the report of Geraint Roberts has not been served as soon as practicable.
>
> We submit that it is wrong in principle to agree to indicate that a forensic toxicologist's conclusions are unchallenged so that the report is read but then seek to go behind that agreement by challenging the report with contradictory expert evidence.
>
> The Crown has not complied with Rule 19.3.3 CrPR and have not indicated on the PET form any intention to rely on an expert in this case. We therefore apply to the court to rule that the report of Mr Roberts is inadmissible pursuant to Rule 19.4 CrPR.
>
> Renewed Application to Vacate Trial (Only in the event that the evidence of Mr Roberts is permitted to be adduced)
>
> If the court concludes the Crown is entitled to rely on the report of Mr Roberts and that Mr Roberts is permitted to give oral evidence at trial, we apply to adjourn the trial.

> We clearly need Dr Mundy to be present at the trial to assist the trial advocate with the cross examination of Mr Roberts, and to give evidence in rebuttal in response to Mr Roberts.
>
> As a matter of principle, it would clearly be unfair to Dr Mundy and the Defendant to allow Dr Mundy's evidence to be read under the hearsay provisions and for another witness to comment on the evidence in an attempt reduce the weight that is attached to it. How will any reasonable tribunal be in a position to make a fair assessment of the evidence on this basis?
>
> Dr Mundy also needs to be in attendance to assist the trial advocate in the cross examination of Mr Roberts, this valid requirement of an expert is well established in *Leo Sawrij v North Cumbria Magistrates' Court* [2009] EWHC 2823 (Admin)).
>
> Dr Mundy is then required to attend the trial to give evidence in rebuttal.
>
> He is not available to attend the trial on the current trial date due to a booking to attend as an expert in another court,
>
> Respectfully, we ask that the court adopts a reasonable and fair approach and agrees to accommodate the Defence witness' availability."

24. They went on to refer to the decision of this court in *CPS v Picton* [2006] EWHC 1108 (Admin), in particular where Jack J said:-

> "where an adjournment is sought by the accused the magistrates must decide whether, if it is granted he will be able to fully present his defence, and if he will not be able to so do the degree to which his ability to do so is compromised."

25. They also referred to the observation of Dove J in *Decani v City of \London Magisrates' Court* [2017] EWHC Admin 3422 that:-

> "There was no suggestion on any side before the justices that this was a claimant playing games. He was pursuing a legitimate defence, supported by evidence."

26. The letter continued

> "Whilst both cases cited above involved a judicial review of a decision to grant an adjournment application made by the Crown, we invite the court to consider the similarities in terms of the apparent unfairness to the Defence in both cases. Mr Parashar has attended each hearing listed by the court in this case ready to proceed but the delays encountered have been caused by the Crown's failings in complying with their disclosure obligations.

> If despite the further explanation within this letter, our request for the trial to be vacated is denied, please note this letter does not contain our full submissions and we request that the matter be listed for a hearing as soon as possible where our full submissions can be made in accordance with Rule 3.6(1)(a) CrPR."

27. Despite this carefully argued letter, the response of the court was that District Judge Elsey had directed as follows:-

> "Reply to the defence and say that their application is based on a misapprehension; their expert was not admitted on the basis that the contents of the report were agreed by the prosecution but as hearsay; as with all hearsay the weight to be attributed to the contents of the report will be decided having heard all the evidence in the case. I am conscious that the advocate will not have the defence expert in attendance but given the fact that this is a routine argument in each of his cases I do not anticipate that he will be at a disadvantage. The case will go ahead on the date fixed."

28. This decision was in my view unsustainable. If the trial had proceeded on 9 November, the court would have had to decide between the evidence of two experts, one of whom was present and one of whom was not. It is not clear to me how the court could have determined the issues between the experts. It would have been particularly unfair to have adhered to the date since it was one which (apparently) suited Mr Roberts, whose report had been served on 11 October 2018, but not Dr Mundy, whose report had been served on 30 May.

29. The issue of the late service of Mr Roberts' report and the consequence that the prosecution required permission to adduce it was simply ignored. It is unfortunate that the defence request for their application to vacate the trial date to be listed for an oral hearing was likewise rejected. Had such a hearing taken place the decision reached might have been different and the case would not have had to come to this court.

30. On 26 October 2018 the defence lodged papers in the present claim in this court and also served them on the CPS. The judicial review claim was issued by the court on Monday 29 October 2018. It contained applications for permission to seek judicial review, for urgent consideration and for a stay of the prosecution until after judgment in this court.

31. The matter was considered on the papers by Julian Knowles J on 1st November 2018. He granted permission and a stay, making the following observations:

> "1 . The reasons given by the district judge for refusing to adjourn the trial to allow for the attendance of the defence expert Dr Mundy are arguably flawed because he failed to consider the applicable principles in *Picton*. Also, his statement that "it is a summary only matter which does not require counsel…" is difficult to understand. Whether counsel should be instructed is a matter for the parties and not the court and so the judge arguably may have taken an irrelevant consideration into account

> 2. If the trial proceeds then the defence will be arguably prejudiced because the judge has said that he may attach less weight to Dr Mundy's evidence because it will have been read as hearsay. The defence have been put in this position because of the failure by the prosecution to comply with the court's case management orders and the late service of their expert evidence. In these circumstances it would be arguably unfair to let the trial proceed on 9 November 2018.
>
> 3. The judge was arguably wrong not to have entertained an oral application."

32. Although the CPS had not taken any proactive steps to make written representations since being served with the papers on 26 October the judge ought, with respect, to have given them (say) 24 hours to show cause against a stay before granting it. There was still a week to go before the hearing and the matter was not so urgent as to justify an order without notice. However, I do not consider that any of the arguments advanced in this court, had they been made on 1st or 2nd November 2018 to the judge, would or should have led to a different decision.

The law

33. Mr Boyd for the CPS relied on what he described as the *Buck* rule. This is a reference to the decision of this court in *R v Rochford Justices ex p Buck* (1979) 68 Cr Rep 114. Lord Widgery CJ cited with approval the decision of this court in *Carden* (1879) 5 QBD 1. In *Carden* Cockburn CJ had said that "while we have authority to issue a mandamus to hear and determine we have no authority, as it seems to me to control the magistrate in the conduct of the case or to prescribe to him the evidence which he shall receive or reject as the case may be".

34. Lord Widgery CJ said that there was an obligation on this court "to keep out of the way until the magistrate had finished his determination" and that "there was no jurisdiction in this court to interfere with the justices' decision that not having been reached by termination of the proceedings below."

35. The "*Buck* rule" is no longer a rule. More useful guidance is to be obtained from the judgment of Hughes LJ in this court in *CPS v Sedgemoor Justices* [2007] EWHC 1803 (Admin). This was, as the name of the case indicates, an application for judicial review by the CPS to challenge a ruling of the justices that the evidence of analysis of the accused's blood specimen was inadmissible. Hughes LJ said:-

> "In general terms this court will not entertain, whether by application for judicial review or by way of appeal by case stated, an interlocutory challenge to proceedings in the Magistrates' Court. … "

He added, however, at paragraph 5 that "it is right to say that this court has sometimes been persuaded to consider a case which is at the interlocutory stage where there is powerful reason for doing so."

36. One of the cases to which Hughes LJ referred was *Hoar Stevens v Richmond Magistrates' Court* [2003] EWHC 2660. In that case the defence sought judicial review of a decision of a district judge (in another breath test case) refusing to stay the

proceedings on the basis of allegedly inadequate disclosure of material relevant to the reliability of the device used. Kennedy LJ said:-

> "It is of the utmost importance that the course of a criminal trial in the Magistrates' Court should not be punctuated by applications for an adjournment to test a ruling in this court, especially when in reality if the case proceeds the ruling may turn out to be of little or no importance. In the present case the District Judge has yet to rule in relation to section 78 if the ruling was to favour the claimant the prosecution would fail. That may or may not be a realistic possibility, but I am satisfied that even when, as here, there is an important substantive point which arises during a trial this court should not and indeed cannot intervene. The proper course is to proceed to the end of the trial in the lower court and then to test the matter, almost certainly by way of case stated."

37. The same phraseology was used by Hughes LJ in *R (Surat Singh) v Stratford Magistrates' Court* [2008] 1 Cr App R 2 where he said at paragraph 7 that "it is important that proceedings in a magistrates' court should not be punctuated by expeditions to this court when one or the other party is the object of a ruling which it does not like."

38. In *Balogun v Director of Public Prosecutions* [2010] 1 WLR 1915 - again, a charge of driving with excess alcohol – the police officer who supervised the taking of the defendant's blood sample was not warned to attend court on the trial date and her statement was not served until that morning. Her evidence was disputed and the prosecution applied for and were granted an adjournment to enable her to be called as a witness. On the new trial date the defendant was convicted. This court granted judicial review and quashed the conviction on the basis that an adjournment should not have been granted and the prosecution's conduct represented an abuse of process. Leveson LJ cited *Buck* and *Hoar-Stevens* and added:-

> "Where the issue of an adjournment is raised, different considerations may apply: that is so not only because of the unsatisfactory nature of quashing a conviction that is not itself before the court, but also because, in the interim, considerable expense has been incurred, not merely by the parties, but also by the court in conducting a hearing which in the event has proved entirely nugatory and therefore setting aside the original decision: in that regard, I take some support from observations of Mitting J in *R(Watson) v Dartford Magistrates Court* [2005] EWHC 965 (Admin) that there was no fetter on this court intervening.
>
> Having said that, it is important that the position is fully understood by those conducting the hearing before the justices. I repeat the observations of Bingham LJ [in *R v Aberdare Justices ex p DPP* (1990) 155 JP 324] that the decision to adjourn is discretionary; challenges to such a decision will be difficult to mount, and should only be commenced if the circumstances are exceptional. If brought, however, any claim for judicial review must be pursued as a matter of extreme

> urgency- in days rather than weeks – so as not to affect the continued progress of the case if the single judge (who will also consider the case as a matter of urgency) determines that permission should not be granted. If permission is granted interim relief can be granted to prevent the prosecution continuing while the matter is being investigated."

39. In *DPP v Manchester and Salford Magistrates Court* [2017] EWHC 1708 (Admin), the court was considering a prosecution application to set aside a pre-trial order by a district judge for disclosure of detailed material on the issue of reliability of the Lion Intoxilyzer Device. In an extempore judgment Sir Brian Leveson P referred to *Carden* and *Buck* and said at [8]:-

> "It is worth underlining that both Lord Cockburn [sic] and Lord Widgery were dealing with appeals during the course of the hearing of the relevant trial (thereby causing an adjournment for the decision to be challenged). We consider that these decisions can be explained and justified on that basis. The same is so for the subsequent decision which relied on *Buck*."

40. At [12] he continued:-

> 12. "The first answer to Mr Benson's submission is that the decisions in the present cases (following an interlocutory ruling and well in advance of the trial) were not made during the trial itself and, thus, strictly the *Buck* principle can be distinguished: it is not difficult to see why the court will do all that it can not to interrupt a trial then proceeding to a conclusion. In any event, we doubt that the proposition that there is a true jurisdictional bar (meaning that the court had no right to consider the issue at all) can be justified: see, for example, the observations of Sedley LJ in *Essen v DPP* [2005] EWHC 1077 (Admin) (at [38]) which suggested that the *Buck* group of decisions could usefully be revisited on the basis that a fixed rule that any challenge must abide a final outcome is capable of working injustice.
>
> 13. There are obvious reasons why the more recent cases were, in fact, determined on their merits (contrary to what would be a true jurisdictional bar). Including words such as 'generally' and observations such as 'in nearly every case' underline what is an entirely pragmatic response to the modern approach to case management and the conduct of hearings in the magistrates' court. In our judgment, however sensible the general rule is (almost inevitably so if a challenge is mounted during the course of the trial), in appropriate and exceptional cases, a mechanism that permits a challenge is entirely consistent with the overriding objective identified in the Criminal Procedure Rules. Accordingly we are satisfied that we have jurisdiction to hear these cases.
>
> 14. In the circumstances, it is appropriate to restate the approach in this way. First, it is difficult to visualise

> circumstances in which it would be appropriate to adjourn a trial simply for the purpose of challenging an interlocutory ruling made during the course of that trial. Such a challenge should be pursued at its conclusion. Second, a challenge to an interlocutory order or decision should not lightly be made but may, exceptionally, be justified where the challenge raises issues likely to have general or wider application and is not dependent on the ultimate result and there is no other means by which the order or decision can be challenged."

41. The *Manchester and Salford* case was one raising issues of wide general application and the final sentence of paragraph 14 of the judgment should be read in that context. Mr Boyd rightly did not rely on it as laying down a rule that an interlocutory challenge can only be made where it raises issues likely to have general or wider application.

42. In *Bourne* v *Scarborough Magistrates' Court* [2017] EWHC 2828 (Admin) (where counsel on each side were the same as in the present case) Holroyde LJ recorded that it was "common ground" that an application for judicial review may in principle be an appropriate means by which to challenge a decision of a magistrates' court as to an adjournment, though only in exceptional circumstances. We asked Mr Boyd to suggest what those circumstances might be. His answer, with which Mr Benson agreed, was as follows:

(1) Where it is properly arguable that the ability of the defendant to present his defence is so seriously compromised by the decision under challenge that an unfair trial is inevitable.

(2) Where an important point of principle is raised, likely to affect other cases.

(3) Where the case has some other exceptional feature which justifies the intervention of the High Court.

43. I agree with this formulation, with the proviso that it will only be in rare cases that this court will consider an interlocutory challenge once the trial is under way (for an example of such a case, see *Allen v Ireland* [1984] 1 WLR 903). But this is not such a case: indeed the decision under scrutiny is accurately described not as a refusal to grant an adjournment, but as a refusal to vacate a trial date in advance. The threshold of exceptionality is less high in such a case.

The decision in this case

44. Mr Boyd submitted that the present application was premature. The defence, he argued, should have waited until the trial date of 9 November, at which the prosecution would have had to seek permission to call Mr Roberts despite the late service of his report. If the judge had excluded the evidence of Mr Roberts then the trial could have proceeded with Dr Mundy's report admitted under section 9 of the 1967 Act and there would have been no problem.

45. I entirely disagree. This would have been an inefficient and potentially costly way to proceed. Unlike many reported cases concerning driving with excess alcohol where the defence have played games with the system, here the defence were not at fault at all. The prosecution had caused the difficulty by instructing an expert very late in the

day and after having raised no objection to the defence expert's report being admitted under s 9 CJA 1967. They could and in my view should either have supported the defence application for the trial to be on a date on which both experts could attend, or indicated that they would not pursue the application to adduce the evidence of Mr Roberts.

46. As I have already indicated, I consider that the decision to fix a date for a trial at which the prosecution expert could attend and the defence expert (whose report had been served in good time) could not was clearly wrong. If the trial had proceeded on that basis the defendant's ability to present his defence would have been seriously compromised and the trial would inevitably have been unfair. This is therefore an exceptional case in which this court should intervene at the pre-trial stage.

47. I would grant judicial review accordingly. This case should now proceed to trial in the magistrates' court either before justices or before a district judge other than DJ Elsey. If the prosecution seek permission to rely on the report of Mr Roberts they must apply in writing within 7 days of this judgment being handed down with the defence then having 7 days in which to respond before a decision is made on the papers by a district judge (again, other than DJ Elsey). If permission is granted, the trial must be on a date when both experts can attend. If permission is refused, then the trial can simply be fixed for the next suitable date and the statement of Dr Mundy admitted under section 9.

Mrs Justice Simler:

48. I agree. This claim is for judicial review of a discretionary decision on an application made in advance to vacate a trial. As was made clear in *Balogun v DPP* (see paragraph 38 above) challenges to discretionary refusals or grants of applications to adjourn are difficult to mount and should only be commenced if the circumstances are exceptional. The same is true here, albeit I endorse the observations of Bean LJ that the threshold for exceptionality is likely to be less high where the application is made pre-trial.

49. I am in no doubt in this case that the district judge failed to exercise his discretion in accordance with the guidance in *CPS v Picton* (above). To insist on a trial date on which the prosecution expert was available but the defence expert was not was wrong and would have led to an unfair trial. There is a high public interest in summary trials taking place quickly and on the day set for trial, and in adjournments not being granted absent compelling reasons. But it is also necessary as a matter of fairness and in the interests of justice, where a defence request to vacate a trial date is made, to consider whether, if it is not granted, the defendant will be able fully to present his defence, and if he will not be able to do so, the degree to which the defence will be compromised. That was not done here. This is an exceptional case justifying this court's intervention by way of judicial review.