IN THE CROWN COURT

AT PLYMOUTH

Between

Mark Manning First appellant

Julian Campbell Baker Second Appellant

And

Devon and Severn IFCA Respondents

RULING ON APPLICATION TO ADDUCE EVIDENCE (1) and STAY PROCEEDINGS (2)

1. The appellants were convicted at the Plymouth Magistrates Court on 15th November 2018 of 16 offences. Each of the offences is alleged to be contrary to s 163 of the **Marine and Coastal Access Act 2009.** Mr Manning was convicted as " master" and Mr Baker as " owner" of the vessel Stella Maris. The dates of the alleged offences ranged from October to December 2016.

2. An appeal against that decision was lodged on the 30th November 2018. There have been numerous hearings of this case between the date of conviction and now which have involved listings to hear applications for abuse of process and indeed listings of the substantive appeal. These have all ended up being adjourned for one reason or another.

3. I have been asked to sit alone and make binding rulings in relation to the admissibility of evidence and a more fundamental application to stay these proceedings as an abuse of the process of the court. Both counsel have researched the issue and have assured me that I have power to make rulings on this basis.

4. I have read skeleton arguments from both sides. I have read a summary of the case and reviewed the charges which the appellants faced. I have read a bundle of documents which Mr Telford has produced which includes some evidence, medical reports on Mr Manning and a deal of other material relevant to these applications. I have, of course, listened with care to the helpful submissions of both counsel.

5. In this case, as in every case coming before the Crown Court, the court has in mind the " overriding objective" set out in the Criminal Procedure Rules to deal with cases "justly" – this includes the duty to deal with cases " efficiently and expeditiously" and in a way which takes into account the gravity of the offences, the complexity of what is in issue and the severity of the consequences for the defendant and others affected. Of course these considerations involve endeavouring to ensure the acquittal of the innocent and conviction of the guilty.

6. I cannot help but conclude these introductory remarks by voicing concern, great concern about this obvious feature of the case. These allegations go back to 2016. The convictions were recorded in November 2018 – delay in a trial- any trial -works injustice or at least has the potential to. I shall return to this issue shortly.

7. **I turn firstly to the prosecuting authority's application to adduce evidence from a Dr Sandbrook which reports upon the appellant Mark Manning's ("M.M.")mental health.**

8. This report was obtained as a consequence of MM's solicitors obtaining psychiatric reports on him which show quite clearly that he is, and is likely to remain "unfit to be tried". Those reports also offer opinions on the mental health of MM at the time that he was interviewed in relation to these allegations in 2016. In October 2021 this court, sitting in it's appellate capacity, made an order that any report by the prosecution should be served by 3rd December 2021. For reasons that simply do not matter the report was not served by that date. No application to extend that period was made by the prosecuting authority before the deadline expired. I was not the judge that made that order. HHJ Mousley KC was the judge. The report was served outside the period HHJ Mousely KC allowed. He was asked on 15th December to allow MM to be medically examined by Dr Sandbrook- that fact betrays the fact the Dr Sandbrook had by no means conducted the sort of examination that one would expected when he concluded his report on 8th December. I have read the report. With respect to Dr Sandbrook it is quite clearly inadequate. It is based upon telephone calls which he had with MM on the 3rd and 7th December 2021. On 15th December HHJ Mousley KC ruled upon the prosecution authority application to adduce this report and to examine MM in person. He refused both.

9. I am not an appellate authority over the rulings of another first instance judge. HHJ Mousely KC made the ruling he did and that is conclusive. I have no doubt he ruled as he did in an effort to inject some pace into a case which was already flagging. In my opinion however , and for what it is worth I am satisfied that he was right to make the ruling he did. The court already had three medical reports on the mental health of MM. Additionally, as will shortly be seen, the prosecuting authority knew full well there were issues over the mental well-being of MM. It had been highlighted in the trial at first instance and had lead to MM being tried in his absence in, frankly, astonishing circumstances.

10. I therefore rule that the prosecution may not deploy the report of Dr Sandbrook in this case.

11. **I now turn to the application on the part of the appellants to stay these proceedings as an abuse of the process of the court.**

12. I shall firstly set out the various basis' upon which the applications are made. I shall set out the prosecuting authority's response, I shall set out the principles which guide my decisions and then shall give my ruling.

13. It is submitted as follows:

    a) The mental medical condition of MM is such that he cannot participate in a trial and thus cannot have a fair trial.

    b) The absence of MM at a trial involving Mr Baker means that Mr Baker cannot have a fair trial or else it is unfair, absent MM, to try Mr Baker.

    c) The prosecuting authority have contributed to the delay in this case by insisting in the court below that a case heard at the Crown Court at Gloucester which it regarded as a test case be concluded before the instant case was tried.

d) The prosecuting authority are seeking to advance a case on a different basis from the way in which it was advanced in the court below in order to avoid criticism from relying on VMS data alone to found a conviction in contravention of a ministerial comment OR in the alternative the prosecuting authority are to all intents and purposes relying on VMS alone to found a conviction in contravention of a ministerial comment that such should not happen.

e) The prosecuting authority have withheld relevant and disclosable material which means that the appellants cannot have a fair trial.

f) The prosecuting authority have not conducted the appropriate reviews of the case to ensure that it meets the " public interest" or " merits" criteria.

g) The prosecution commenced these proceedings on a false premise and rather than properly investigate a crime, concluded that a crime had been committed then set out to justify that conclusion rather than fairly investigate it. In short the prosecuting authority are guilty of "confirmation bias" rather than involved in a fair investigation and prosecution.

h) The appellants submit that it is unfair to try them or in the alternative a fair trial is impossible.

14. The prosecuting authority respond as follows:

a) The mental condition of MM may be capable of supporting a submission that he is unfit to be tried but does not found an application for a stay.

b) Mr Baker can quite easily have a trial alone. He faces allegations which are or are very nearly alleged offences of strict liability. He can defend them without MM. It is not unfair to try the owner of the vessel even if the master cannot be tried.

c) The prosecuting authority have in no real sense contributed to the delays that there have been in this case. Since conviction, it is argued, the delays that there have been have been occasioned by the appellants repeated applications to adjourn the case, repeated but then abandoned attempts to have the case "stayed" and of course the covid pandemic has played a significant part in the delay that there has been. The respondents further argue that the case at Gloucester attracted no adverse judicial comment (as the appellants suggest) and that whilst that case ultimately ended in the acquittal of the defendants it is nothing to do with this case. The prosecution accept that the case there did involve the exclusive deployment of VMS evidence.

d) The case is being prosecuted on the same basis now as it was in the magistrates court. Some of the witnesses may have changed but the foundation for the prosecution is the same; namely VMS evidence but this time interpreted by an expert(s). The experts now to be deployed are independent unlike the employed " expert" that gave evidence in the court below. The prosecution therefore do not accept that there is anything wrong with this evidence as interpreted being used as the sole evidence in the case.

e) Nothing has been withheld. There have been no applications for specific disclosure and a potentially highly relevant video said by the appellants to exist and to be in the hands of the prosecuting authority simply does not exist, or if it does, they , their servants or agents have never seen it.

f) The prosecuting authority have repeatedly conducted a review of this case on both the public interest and merits basis' and have concluded that it satisfies both.

g) There was a full investigation into the merits of this case before a charging decision was made. They have not sought simply to provide substance to an allegation made but subsequently withdrawn by a Mr Tapper.

h) It is not unfair to try the appellants and a fair trial is possible for both.

15. The principles that guide my decision making are as follows:

i) The power of the court to order a stay of proceedings is a power to be invoked only in exceptional circumstances and only where either a fair trial is impossible or else it is

unfair to try the accused ***(See Mouat v DPP , Att. Gen Ref No 1 1990. R v Feltham Magistrates Court 2001 2 Cr.App R. 23)***

ii) No court can issue a stay based upon an alleged abuse of process merely to mark the courts disapproval of official conduct, but only if satisfied that either of the two grounds for the imposition of a stay are made out.

iii) the second ground- namely that it is unfair to try an accused will be made out where the court is satisfied that " it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.....In the second category of case, the court is concerned to protect the integrity of the criminal justice system" (the words of Lord Dyson in ***R v Maxwell 2011 1 WLR 1837 and to similar effect R v S and S 2015 EWCA Crim 662, Warren v Att-Gen for Jersey 2012 1 AC 22 and R v Salt 2015 1 WLR 4905)***

iv) The burden of establishing that the continuation or inception of proceedings amounts to an abuse of process rests with the appellants. ***R. v Telford JJ ex parte Badhan 1991 2Q.B.78***

16. I have to effect a balancing exercise between on the one hand ensuring people accused of crimes are tried and on the other of ensuring that public confidence in the criminal justice system is preserved.

17. I now address each of matters raised by the appellants and responded to by the prosecuting authority with these issues in mind:

A) the health of MM. In my judgement the normal way of dealing with this issue would be for either the appellant to request a " nolle prosequi" in an indictable case.(This application would be ruled upon by the Att- gen.)This is not an indictable case. The alternative and more usual route would be for the appellant to satisfy the court that he is unfit to be tried in accordance with the so-called " Pritchard" criteria. In this case Dr Huckle indicates in his August 2021 report that he has applied that criteria and concluded that MM is fit to be tried. In his report dated September however, he concludes (without identifying the relevant case) that the appellant is simply unable to instruct counsel or to attend court to give evidence. On that basis in any normal sense of the expression the appellant MM is not fit to be tried. So, why does this found a stay application rather than a submission that the appellant is unfit to be tried?

Mr Telford candidly accepts that he took Dr Huckle at face value in his August report and gave no real thought to what he says in his later report. I asked in argument what would be the consequence of a finding of unfitness to be tried. In my view it would with no doubt at all be an absolute discharge. This would follow if he was found to have done the acts in question in this case , namely deliberately fished within a prohibited area. Such a finding could only flow following a trial of the facts lasting – say both counsel -some 6 days. In my clear view that would be a ludicrous way of expending £10,000s . It would not be a case that this court could hear this year or possibly even next. In my view the fact that MM is not fit for trial in these circumstances is capable of founding and does found a solid ground for the appellants application. To continue these proceedings would offend this court's sense of justice and propriety and bring the criminal justice system into disrepute. I am fortified in that view when I examine what took place in the court below. I am told that at trial in the court below an application was made to adjourn the case as MM was unwell and not present. A letter, a copy of which I been shown supported that proposition. An application was made to adjourn the trial based upon the absence of the accused. I have been told that the prosecuting authority opposed that application. I asked whether the checklist for trial in absence identified by the (then) House of Lords in ***R v Jones 2002 UKHL 5*** was considered. The answer was that the magistrates legal advisor gave advice but inexplicably did so in private; the magistrates then returned and directed that the trial proceed. I am not, it goes without saying, the Divisional Court giving a ruling on a matter " case stated" but I simply cannot understand how a court, correctly directing itself, could reach a conclusion that it was appropriate for a trial to proceed in these circumstances. The appellant would have had

a zero prospect of acquittal for the offence of " knowingly fishing in a controlled area" unless he was there to defend himself.

That observation applies here equally. Unless MM is well enough to attend and it seems he is not, there is no prospect of him being fairly tried: I add, he is not " voluntarily absenting himself" from these proceedings – he is simply too unwell to attend.

For these reasons I conclude that notwithstanding the novelty of the application in these circumstances it is well made and on these grounds I would stay these proceedings against MM. I am further fortified in my view that a "stay" can be the correct remedy in circumstances such as these when I review cases such as ***R.(T.P.) v West London Youth Court 2006 1 Cr.App.R.25***

B) I now turn to the position of Mr Baker. As is clear I shall stay these proceedings in the case of MM. I ask now this rhetorical question; where the master of the vessel is not going to be prosecuted for knowingly fishing in a prohibited area is it fair to try the owner. Mr Matthews, in argument, submitted that a conviction in the case of Mr Baker is NOT contingent upon a conviction or even a prosecution in the case of MM. He argues that the offence under s163 is almost but not quite an offence of strict liability. Once the vessel is proven to have been knowingly fished in an exclusion area (I paraphrase) the offence is committed. Mr Telford does not agree. He points to the requirement of " knowledge" and raises the potential issue of accidental fishing in the area, movements being undertaken for reasons of safety and due diligence in the employment of a competent master. I have read the statute and agree with Mr Telford's analysis. This is not an offence of strict liability and indeed Mr Mathews concedes that in a similar case the CACD held back from saying that this was a strict liability situation.

The person that could give evidence on this, and potentially be a compellable witness is unfit to be tried, unfit therefore to give evidence. In my view a fair trial for Mr Baker in these highly unusual circumstances is not possible. More than that, in my view it would offend the court's sense of justice and propriety to allow the prosecution of the owner- in respect of whom the prosecution do NOT say there was knowledge of the movements of the vessel- to be prosecuted when the master cannot be. There are, one can conceive of them , circumstances in which this could legitimately happen; if , say the owner had a proven track record of employing maverick skippers or if there was evidence of instruction or even knowledge of and acquiescence with a masters poor practice but that simply is not the situation here.

I rule that it is both unfair to try Mr Baker and that a fair trial cannot take place and the proceedings against him too should be stayed.

18. In case this judgement falls to be further considered elsewhere I must and do set out my conclusions in relation to the other issues.

19. Delay. There has been a completely unconscionable delay in this case getting even to this stage. To some degree I am satisfied that the delay between the date of the alleged offences and the trial in the court below has been caused or contributed to by the prosecuting authority awaiting a decision of another court. There was no need for that. However, the sort of delay that that approach occasioned was not of such length that it would have caused any, let alone serious prejudice to the trial or these proceedings. These proceedings have, on the contrary been delayed and delayed by the approach of the appellants or their earlier legal teams taking and then abandoning issues and then late being unready for trial. The fact however is that for whatever reason the trial is delayed. It is trite to say justice delayed is justice denied. The delay may have contributed to the current predicament of MM and may have lead to witnesses now being unavailable who may if approached earlier been able to shed light on relevant events. I do not find that standing alone the delay would lead me to stay these proceedings but when sat alongside other issues it does lead me to the conclusion that the continuation of these proceedings is unfair; the CPR imperative that cases

are dealt with " efficiently and expeditiously" has not been born sufficiently in mind in this case.

20. I turn now to the issue of a prosecution based in large measure if not solely on VMS data. In a ministerial answer the then Minister of State for Agriculture Fisheries and Food , the Rt Hon Robert Goodwill MP said in a letter dated 24th July ....." I shall reiterate what the MMO have confirmed; namely that I-VMS data alone can only show a vessel's position, heading and speed which is not of itself, sufficient to prove to a criminal standard that a vessel was fishing". This is self -evident. The appellants' point that the prosecution are now advancing a case which differs from that advanced in the court below is, with respect to Mr Telford, not the position. But in many ways it is because they are doing what they are doing that this method of attempting to prove the case once again offends one's sense of what is right. All VMS can do is show heading, position and speed. Charts can be plotted which show that. The argument that the prosecuting authority got different plans and charts for the appeal than they had before is not a good argument . Neither is it a good argument that they have now retained independent " experts" whereas at the court below they had an employed agent to give or attempt to give opinion evidence. The evidence, says Mr Mathews, is opinion evidence of what the VMS data shows i.e. that the movements of the vessel which were plotted was only consistent with active fishing. It is that conclusion from simply VMS evidence that is objectionable and that is why, no doubt, the minister said what he did. It's a little like the old law of corroboration in sex cases. Before this evidence can be used there must be other evidence capable of supporting the prosecution case. Here, Mr Matthews concedes, this is the only evidence of fishing in the restricted zone.

21. In my view a prosecution founded on this evidence alone is likely to fail at the conclusion of the prosecution case. Again I do not stay these proceedings wholly or largely on this basis but it is another bullet in the armoury or the applicants.

22. The knowing withholding of evidence. If I had the slightest belief that the prosecution had relevant material and were choosing to withhold it I would stop this case on that ground alone and not be giving this judgement. I have absolutely no doubt at all that the prosecution team of Mr Howell and Mr Matthews honestly believe that they have disclosed everything required of them and would never dream of telling me otherwise. There have been requests for disclosure, sometimes repeated requests for the same disclosure to which the prosecuting authority have responded. There have been no formal s8 disclosure applications but one matter has repeatedly surfaced. The appellants believe that the prosecuting authority or someone within the authority have a video of the Stella Maris fishing. It was taken by Mr Tapper and sent to the authority. MR Tapper does not now support this prosecution. I think it more likely than not that a video existed but I am sure that the prosecuting authority do not have it and therefore cannot hand over what they do not have. This aspect of the application fails.

23. A review of the public interest and merits of the prosecution. A judge can simply not get involved in ordering a prosecuting authority to drop a case on the public interest basis without very solid grounds- if they can do it at all – which is doubtful. ***(Environment Agency v Stanford 1998 C.O.D.373)*** Mr Matthews tells me that there have been regular reviews of the both the merits and public interest in the prosecution and a decision has been made that it should continue. For what it is worth, and it is worth very little; my view differs from that of the prosecuting authority. I can see no public interest in prosecuting MM at all. If the case were to proceed, he would, in all likelihood be found unfit to plead. Even if, after many days of evidence and argument he was found to have "done the acts" the inevitable result would be for him to be discharged absolutely. In my clear view there is no public interest in that at all. It would be an expensive way of making a point and that should not be where we are now. Additionally I see some but little public interest in the prosecution of the owner when the master can expect, at worst an absolute discharge. The owners position is less culpable

than that of the master. So it is that I disagree with the decision to prosecute these men. But that does not come close to even supporting a stay argument let alone founding one. Mr Matthews tells me that there has been a review- more than one review and if he says that then the prosecuting authority have done that which the law requires of them regardless of the views of a judge.

24. What I have called " confirmation bias" , although Mr Telford did not use that expression. In short I find no basis upon which I would stay these proceedings on this ground. I think it likely, highly likely , probable that the prosecuting authority started this case based upon the report of Mr Tapper and wanted him to support it. I have no doubt that the rug was pulled from beneath their feet when he withdrew his support for the prosecution (if he ever supported it) but there is nothing intrinsically offensive or objectionable about that. Frequently the police get an anonymous tip-off about a case and launch an investigation therefrom but if the informant doesn't support the prosecution or wont give evidence that will not mean that any other evidence is inadmissible. So even if there is some degree of " confirmation bias" is does not support nor found a stay application.

25. For the reasons given above I stay these proceedings as an abuse of the court's process. I have not taken this step lightly. I have taken a lot of time to read volumes of material and conducted some of my own researches. I find this to be a wholly exceptional case- an exceptional combination of factors that leads me to the conclusions that I have identified. I have not sought in this ruling to refer to every point made by counsel but only such of those as impact upon my decision making process. I conclude, and I have no doubt about it, that neither appellant can have a fair trial and further that it would be unfair to try them.

26. Penultimately and for the purposes of completeness only, Mr Telford made certain applications regarding the admission of evidence were this case to have proceeded. I did not hear argument on this. My provisional view however was that the evidence in question would not have been admitted for the reasons given by Mr Telford in his application.

27. I want to add this to this judgement though it perhaps does not add too much to what I have already said: I want to pose this rhetorical question. As everyone knows we are emerging from a pandemic; we are, we hope about to start to have to tackle a massive backlog of work occasioned by the action the Bar have been involved in. In these circumstances is it really a good use of the court's time and the countries resources to try a case in which the allegations are that 6 years ago a trawler sailed in such a manner as to be only consistent with fishing in a regulated area where, if the result was that the appellants remained convicted their sentences would have to be an absolute discharge? Articulated like that it is perhaps easy to see why members of the public would not think that it was a good use of this court's time. This case does not establish any precedent; it is highly fact specific and exceptional. This judgement must not be seen as critical of the decision to investigate or to prosecute. Whilst I do not agree with the prosecuting authorities assessment of the current public interest in prosecuting this case – I am not critical of it- they have done what they think right. The only area where I do direct criticism is of the decision to resist the adjournment application at fist instance but that is only the smallest part of this judgement.

HHJ Robert Linford