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Judgment: approved by the Court for handing down
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

CLIFFORD GEORGE McKEOWN

Before Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

Introduction

[1] On 12 November 2002 the appellant, Clifford McKeown, was convicted by Campbell LJ sitting at Belfast Crown Court without a jury, of two offences: - possession of firearms and ammunition with intent, contrary to article 17 of the Firearms (NI) Order 1981; and possession of articles for a purpose connected with terrorism, contrary to Section 32(1) of the Northern Ireland (Emergency Provisions) Act 1996. He was sentenced to concurrent terms of imprisonment of twelve years and two years respectively. His co-accused, Robert Andrew Murphy, had pleaded guilty on the opening day of the trial and was sentenced to nine years imprisonment for the offence of possession of firearms and ammunition with intent and to two years imprisonment concurrent for the offence of having articles for a purpose connected with terrorism.

[2] The appellant appeals against his conviction on both charges. The principal ground of appeal is that the failure of the prosecution to disclose certain material on the grounds of public interest gave rise to unfairness in his trial and constituted a breach of article 6 of the European Convention on Human Rights. On the trial Campbell LJ received submissions from counsel for the Attorney General on the human rights issues that arose and in

particular whether special counsel should be appointed to look after the interests of the appellant. This court also heard argument from Mr McCloskey QC for the Attorney General.

Factual background

[3] At about 10 pm on 29 March 2000 the appellant was seen by police driving a Renault 11 car along Lake Road, Craigavon, with Murphy in the front passenger seat. Police officers followed the car and saw items being thrown from it. These were subsequently recovered and found to be firearms. The car was stopped and searched. Two black balaclavas, dark woollen gloves and one round of ammunition were found in the car, together with a blue plastic container containing petrol. The appellant's case was that he had simply given Murphy a lift and that he knew nothing about the articles that he had brought into the car.

[4] Following his arrest the appellant was interviewed by police at Gough Barracks, Armagh. He was shown a number of the items that had been found in the Renault car and he said that, apart from the blue plastic container, he had never seen them before. He told police that at about 9.30 pm on the night of his arrest, he had been asked by Murphy to take him to Lurgan. He claimed that he had initially refused, telling Murphy that every time he left the house, "the police were on to" him. He was persuaded by Murphy, however, and they went to the car, Murphy carrying a bag that McKeown was unable to describe. As they were driving to Lurgan they were intercepted by police cars. The appellant asserted that he had been entrapped. He was sure that someone had sent Murphy to his home with the guns because he had no doubt that the police did not arrive adventitiously to stop his car.

[5] On the appellant's trial it was established that ten police officers, in three cars, were on patrol in the general area of Lurgan and Craigavon at the time that the car was intercepted. Those police officers who had attended a briefing at Mahon Road Station said that they were told that there was intelligence that loyalist paramilitaries were in possession of a firearm in the Lurgan/Craigavon area. One crew had travelled from Belfast, and they said they did not arrive in time for the briefing but they were told by radio that loyalist paramilitaries had obtained access to weapons. It emerged during cross-examination, based on logs obtained on disclosure, that at 10 pm a message was sent to control to the following effect:

> "...a vehicle acting suspiciously at Parkmore, VRM
> - DDZ 1039, blue/green Renault 11".

The information passed by control to the three patrol cars was recorded as:

> "... blue/green Renault car acting suspiciously in the Craigavon area"

No reference was made to the registration number, or Parkmore in the controller's message to the patrols. The case made on behalf of the appellant at trial was that the reason that the controller did not pass to those on the ground the registration number of the Renault and information as to the place where it was last seen, was that this was an operation in which police were already in position waiting for the appellant's car to appear. All police officers to whom this suggestion was made roundly denied it.

The proceedings

[6] The appellant was arraigned on 8 June 2001 and pleaded not guilty to both counts. A defence statement was served on his behalf on 12 June 2001. It contained the following:

> "The defendant believes that he may have been entrapped by a person known to him working with the police either for the purpose of incriminating this defendant or his co-defendant. In consequence he requires disclosure of all information and material touching upon this issue and informing the state of knowledge of the police prior to the stopping and arrest of the defendant and all such material shall be disclosed because failure to do so would mean unfairness to the defendant and would be in breach of Article 6 of the European Convention. "

[7] From June until August the appellant's solicitors were in correspondence with the Department of Public Prosecutions seeking disclosure. On 21 September 2001 the DPP served a notice on the appellant advising him of an application that was to be made for an order under Section 9(8) of the Criminal Procedure and Investigations Act 1996 in accordance with rule 2(3) and (5) of the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997. Although the notice referred to rule 2(3), the covering letter indicated that the notice was served under Rule 2(2). (Rule 2(3) provides that, where the prosecutor has reason to believe that to reveal to the accused the nature of the material to which the application relates would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed, the prosecutor does not have to specify the nature of the material to the accused. Rule 2(2) on the other hand provides that the prosecutor shall serve a notice on the accused and shall specify the nature of the material to which the application relates.) The appellant's solicitors wrote to the DPP on 28 September 2001 requiring

specification of the nature of the material to which the Crown application related. The DPP replied on 10 October 2001 advising that the application in respect of disclosure would be made *ex parte*.

[8] The practice in this jurisdiction in non-jury trials is for such an application to be made to a judge, other than the trial judge, who is designated by the Lord Chief Justice and is customarily referred to as the disclosure judge. In this case the application was heard by McCollum LJ and he gave his ruling on 18 February 2002. Although the application was made *ex parte* and the disclosure judge considered the materials in the absence of the defence, McCollum LJ received submissions on behalf of the accused. In his ruling, he outlined the considerations that he had to take into account in the following passage: -

> "The considerations which I applied in considering the prosecutor's application were –
>
> 1. If it is compatible with the public interest then all relevant material should be disclosed;
> 2. All of the material for which non-disclosure is ordered and which is not prejudicial to the defendant should be available to the trial judge;
> 3. The prosecutor should monitor the continuing non-disclosure of potentially prejudicial material. "

The learned judge then gave his ruling as follows: -

> "Having considered the matter ex parte, I have decided that in the light of the defence statement none of the material which is the subject of the application before me is such that it might reasonably be expected to undermine the case for the prosecution or to assist the accused's defence. On the evidence before me I do not anticipate any circumstances which would result in the material becoming of value to the defence. I consider that it is not in the public interest to disclose the material and have ordered accordingly. "

At the end of the ruling he stated that he had prepared a statement of the reasons for his decision (in accordance with Rule 4(2) of the 1997 Rules), and that this should remain confidential to the prosecutor and the trial judge (pursuant to Rule 9(2) of the 1997 Rules).

[9] On 17 and 19 June 2002 an application was made to the trial judge for an order staying the proceedings. The grounds for the application appear from a letter sent by the appellant's solicitors to the DPP dated 12 June 2002 as follows: -

> "It would be contrary to the public interest in the integrity of the criminal justice system and contrary to the defendant's right to a fair and public trial to permit a trial to take place in circumstances where the trial judge, who is also the judge of fact, and the prosecution have the benefit of a statement of reasons arising from an ex parte application by the prosecution in respect of disclosure which is denied to the defence. The said statement of reasons of necessity is likely to refer to and relate to the nature of the material withheld from the defence. The defence are to be kept in ignorance of the extent and content of the document or documents held by the one performing the jury function. The sole protector of the defendant's interests, monitoring as the case proceeds whether further disclosure is necessary, is the prosecutor who in our adversarial system is the defendant's adversary. It is anticipated as possible as the case proceeds that the prosecutor may disclose to the one performing the jury function material which then may or may not be disclosed to the defence. "

[10] When the application came on for hearing Campbell LJ made it clear that he had not at that stage seen the ruling of the disclosure judge nor the statement of reasons for the ruling. He suggested that this might be a suitable case for the appointment of special counsel. The matter was adjourned, however, until 1 August 2002 after counsel for the prosecution indicated that any ruling to that effect might have implications for the rest of the United Kingdom and that he would require to take instructions.

[11] On 1 August 2002 Mr Morgan QC appeared on behalf of the Attorney General to make submissions to the trial judge. At that time, Campbell LJ indicated that he had by then read the ruling of the disclosure judge and the statement of reasons for his decision. He characterised the difficulty facing the parties as 'how does one protect the interests of the defendant in relation to the non-disclosed material and its possible relevance, which might only become apparent as the trial proceeded?'. He decided that the matter should

be referred to the disclosure judge as the person best equipped to ensure that sufficient procedural safeguards were in place.

[12] The matter came before the disclosure judge on 13 September 2002. In an *ex tempore* judgment he ruled: -

> "There is no further safeguard that I am aware of that would be of any assistance, that one could conceive would be of any assistance at this stage, and I would not regard the case as requiring the appointment of special counsel … The present reality is that I cannot foresee any circumstance in which the undisclosed material, that is the material undisclosed to the trial judge, would be of assistance to the defence. But it may be that the defence may advance a proposition or raise an issue that might by remote possibility make that so, and I think if the Crown concedes that that is the position then the Crown should make the matter known to the trial judge and consideration could be given then to referring back to me. "

There were, McCollum LJ said, two types of material involved. The first could not assist the appellant because it was, he implied, adverse to him. The second related to police procedures; was general in nature and content and did not relate directly to the appellant.

[13] The trial took place during October and November 2002. In the course of the trial Mr Kane for the accused argued that, in order to advance the defence of entrapment, further disclosure was required. On this submission Campbell LJ commented: -

> "Mr Kerr [prosecuting counsel] has heard what you have got to say. If he feels that there is information that would assist you I have no doubt he will go back to McCollum LJ and ask him about it, but beyond that I can't go." (page 221 of transcript 8 October 2002 lines 9-12).

[14] At the conclusion of the case for the prosecution the trial judge was invited to stay the proceedings on the ground of entrapment, and to rule that there was no case for the appellant to answer. Campbell LJ rejected the application, relying on the following passage from the speech of Lord Nicholls in *R v Looseley* [2002] 1 Cr.App.R.305: -

> "Ultimately the overall consideration is always whether the conduct of the police (or other law enforcement agency) was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation of a prosecution which would affront the public conscience is substantially to the same effect. "

The trial judge ruled that there was no evidence that the conduct of the police could affront the public conscience and he therefore declined to stay the proceedings. He accepted, as had been suggested in cross-examination, that the police may have been in possession of more evidence than was revealed at the trial.

Statutory Background

[15] Disclosure in criminal cases is regulated by Part 1 (Disclosure) of the Criminal Procedure and Investigations Act 1996 and the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules (Northern Ireland) 1997. Section 3 of the Act deals with primary disclosure by the prosecutor. Section 3 (1) (a) provides that the prosecution must disclose to the defence any material which, in the opinion of the prosecutor, might undermine the prosecution case against the accused. Primary disclosure is followed, where appropriate, by the accused providing a defence statement under Section 5(5). This triggers secondary disclosure by the prosecution under Section 7(2)(a); the focus is on material which might reasonably be expected to assist the accused's defence as made known by the defence statement.

[16] Section 8 of the Act provides a mechanism for the accused to apply to the court for an order that the prosecutor provide material hitherto undisclosed. Section 9(2) requires the prosecutor to keep under review whether disclosure is required. Various provisions (in particular sections 3(6), 7(5), 8(5) and 9(8)) forbid disclosure where the court, on an application by the prosecutor, concludes that it is not in the public interest to disclose it. Section 14 (summary trials) and section 14A (scheduled offences) provide that the accused may apply to the court to review its decision to order non-disclosure on grounds of public interest. By virtue of section 15 where a court has made a non-disclosure order it must keep under review the question whether it is still not in the public interest to disclose material affected by its order. This should take place without requiring an application to be made but the accused may apply to the court for a review of that question.

[17] Rule 2 of the 1997 Rules applies to the making of an application under Section 3(6), 7(5), 8(5) or 9(8) of the 1996 Act. There are three types of application under Rule 2;

(a) An application by the prosecutor to the judge, to be determined at an *inter partes* hearing. The accused receives notice of the application and details of the nature of the material to which the application relates.

(b) An *ex parte* application by the prosecutor to the judge, of which notice is given to the accused. The accused does not receive information on the nature of the material to which the application relates.

(c) An *ex parte* application by the prosecutor to the judge of which the accused receives no notice.

The application in the present case was of the kind described in (b) above.

[18] By virtue of Rule 2(5)(a) the application shall be heard by a judge designated by the Lord Chief Justice where the offence is scheduled. Rule 3(5) provides that where an application is made under Rule 2(2) only the prosecutor shall be entitled to make representations to the court. Under Rule 4(2) the court is obliged to state reasons for making an order and a record of that statement must be made. Under Rule 9(2) where a hearing is held in private the court may specify conditions to which the record of its statement of reasons made in pursuance of Rule 4(2) is to be kept.

[19] In November 2000, three years after the commencement of the 1996 Act, the Attorney-General published guidelines, *Disclosure of Information in Criminal Proceedings* [November 29, 2000] concerning the role of participants in the disclosure process, pending any review by the Government of the legislative scheme. The guidelines contain a number of changes addressing areas not covered by the 1996 Act. They aim to clarify the responsibilities of investigators, disclosure officers, prosecutors and defence practitioners and generally improve the operation of the 1996 Act (from May, R. and Powles, S. "*Criminal Evidence*". 5th Ed. 2004, Sweet and Maxwell (pages 523-524)).

The appellant's arguments

[20] The principal argument advanced by Mr Orr QC on behalf of the appellant was that, under the current system of non-jury trial, where it was not possible to release sensitive material to the trial judge (who is the tribunal of fact), the prosecution was in effect the only monitor of the need to disclose material to the defence. He suggested that the disclosure judge could not be aware of the potential relevance of undisclosed material to ongoing issues unless informed. The only person in a position to alert the disclosure judge

was the prosecutor. That situation offended the equality of arms principle and constituted a breach of article 6 of ECHR. It was well established, Mr Orr claimed, that criminal proceedings should be adversarial in nature - *Rowe and Davis v the United Kingdom* [2000] Crim LR 584. In this connection Mr Orr drew our attention to the Attorney General's guidelines on disclosure. These emphasised the importance of disclosure in achieving a fair trial.

[21] Mr Orr raised a discrete complaint about the procedure adopted at the trial. Campbell LJ had read the statement of reasons given by the disclosure judge and that this had never been revealed to the defence. The trial judge (who was the adjudicator of the factual issues in the case) had therefore had access to material that had been withheld from the defence.

[22] As to the statement of the disclosure judge that he could not envisage any circumstances in which the material could be of assistance to the appellant, Mr Orr submitted that this could not provide sufficient reassurance that no disadvantage had accrued to him or that the trial was demonstrably fair. The disclosure judge could not be apprised of the potential relevance of the undisclosed material unless he had day-to-day familiarity with the issues as they emerged. A conclusion that the material was innocuous or irrelevant might have to be revised as the evidence unfolded but the disclosure judge had no means of reviewing his original decision.

[23] In support of his claim that access to the undisclosed material or the provision of some other efficacious safeguard was required, Mr Orr supplied a list of what he described as "unexplained coincidences" which, he said, established that the appellant was entrapped. It was remarkable, he claimed, that the police were present in such numbers so soon after the appellant had departed his house. There were significant omissions from the notebook entries of a number of police witnesses. The fact that a number of specialised units were used to the exclusion of normal police patrols remained unexplained. He suggested that the trial judge failed to give proper weight to these and the other anomalous features in the case and failed to exercise his discretion to refer the matter back to the disclosure judge when these anomalies had been identified.

[24] Although he claimed that it was not incumbent on the appellant to identify measures necessary to counteract the difficulties that the present system created, Mr Orr suggested two alternative safeguards that could be put in place. Firstly, the disclosure judge could obtain transcripts and get information from the trial judge on a daily basis or, secondly, special counsel could be appointed. If special counsel were appointed, he would require to have access to all the papers and be familiar with the disclosure issues. Contact with the accused and his legal team would, he asserted, be indispensable.

[25] Two subsidiary arguments were advanced on behalf of the appellant. It was suggested that the trial judge erred in drawing an adverse inference against the appellant under the Criminal Evidence (Northern Ireland) Order 1988. The circumstances of the appellant's arrest were not sufficiently taken into account as a possible explanation for his refusal to answer questions at his first interview or to give evidence. Furthermore, the unsatisfactory position concerning the disclosure issue ought to have made the trial judge more reticent to draw adverse inferences against the appellant. Finally, the trial judge failed, Mr Orr claimed, to appreciate fully the weight of the evidence in favour of an entrapment theory. He ought to have acknowledged that the incongruities in the circumstances of the appellant's arrest pointed inexorably in that direction.

The arguments for the Attorney-General

[26] Mr McCloskey argued that to establish a breach of article 6 in the present context it was incumbent on the appellant to show that insufficient safeguards were in place to ensure that the trial was as fair as it could be. He submitted that the appellant had failed to show that any unfairness had accrued to him. The statutory regime supplied ample protection of the appellant's rights.

[27] The critical ruling in the case was that given by McCollum LJ on 19 February 2002, Mr McCloskey said. The disclosure judge was aware of the nature of the appellant's defence (entrapment) and had expressed himself trenchantly to the effect that none of the non-disclosed material could assist that case. This was powerful evidence of the absence of unfairness in the trial procedure. In fact the claim of entrapment remained the centrepiece of the appellant's defence throughout the trial. There was not the merest suggestion that the non-disclosed material could have assisted that case. The trial judge and the prosecutor were likewise aware that this was the pivotal defence made by the appellant but at no stage did it ever appear that this defence might have been helped by the non-disclosed material. In this context it was relevant, Mr McCloskey said, that the House of Lords in *R v H and C* [2004] 2AC 134 had recognised that in a non-disclosure situation the prosecutor had a crucial role to play in safeguarding the accused's interests. It was to be presumed, he suggested, that the prosecutor would discharge that function with scrupulous integrity.

[28] Because of the system of non-jury trial the 'disclosure judge' arrangement was peculiar to Northern Ireland but this was entirely harmonious with the principles outlined in *H and C*, Mr McCloskey said. It was perfectly feasible to revisit the question of disclosure throughout the trial and the disclosure judge remained available to deal with the issue at any time that further consideration was warranted. Mr McCloskey submitted that the House of Lords, in endorsing the extant disclosure regime generally, had simultaneously approved the propriety of entrusting this duty to the

prosecutor. It had also emphasised the pre-eminent role of the trial judge in ensuring that the Defendant's trial was fair.

[29] Mr McCloskey suggested that special counsel would be required to be appointed very rarely. In virtually every instance it should be possible to devise procedures to sufficiently protect the accused. It was moreover important to recognise that the use of special counsel was not necessarily a panacea for the difficulties that disclosure of sensitive material presents. In those cases where it is not possible to reveal to the accused that an application for public interest immunity is to be made the appointment of special counsel may be less effective than other measures. Moreover, in the Bar Library system that operated in Northern Ireland, there would be a risk that the appointment of special counsel in a particular case might become known. Accordingly, Mr McCloskey argued, recourse to special counsel in Diplock trials may not provide a satisfactory solution; it is a course which has not been espoused by ECtHR and it may not suffice to secure compliance with article 6 in a given case.

The authorities

[30] The leading authority in this area is *R v H and C*. In that case the defendants were charged with conspiracy to supply a Class A drug. At a preparatory hearing the Crown sought a ruling as to whether material could be withheld from disclosure to the defence on the ground of public interest immunity. The judge ruled that the PII hearing should not be conducted in open court inter partes but that special independent counsel should be appointed to introduce an adversarial element into the hearing so as to comply with the jurisprudence of the ECtHR and to avoid a possible violation of article 6 of the Convention. The Court of Appeal concluded that although in certain circumstances the trial judge should invite the Attorney General to appoint special counsel from an approved panel to take part in the PII hearing it was premature to do so in the present case. They accordingly allowed the Crown's appeal. On the defendants' appeal to the House of Lords the Court of Appeal certified the following points of law: -

> "(1) Are the procedures for dealing with claims for public interest immunity made on behalf of the prosecution in criminal proceedings compliant with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms?
>
> (2) If not, in what ways are the procedures deficient and how might the deficiency be remedied?"

[31] The House of Lords held that the trial judge on a PII application was required to ensure that any derogation from the full disclosure rule was the minimum necessary to secure the required protection; that an application made *ex parte* without notice to the defence was permitted only in exceptional circumstances; that the appointment of special counsel to represent a defendant as an advocate on such an application might in an exceptional case be necessary in the interests of justice but such an appointment should not be ordered unless and until the trial judge was satisfied that no other course would adequately meet the overriding requirement of fairness to the defendant; that since the trial judge was required to ensure protection of the defendant's proper interests and to keep the matter under review as the trial progressed, there was no dissonance between the domestic law and the European jurisprudence; and that, provided the existing procedures were operated in accordance with those governing principles and with continuing regard for the defendant's interests, there would be no violation of article 6.

[32] The finding that public interest immunity may legitimately be claimed in criminal proceedings chimed well with the statement of Lord Steyn in *Attorney General's Reference No 3 of 1999* [2001] 1 All ER 577, 584:

> "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. In a criminal case, this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public."

[33] The rights of the accused must not be viewed in isolation from those of the victim and the public interest. Therefore, while the House of Lords in *H and C* recognised and articulated the golden rule that "fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence", it also acknowledged that "circumstances may arise in which [such] material … cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest." A reconciliation of competing public interests may arise, therefore, when there is a need to protect from disclosure material that might imperil informers or put at risk other witnesses. What *H and C* made clear, however, was that where derogation from the 'golden rule' was necessary, it should be the minimum required to protect the public interest in question and must never jeopardize the overall fairness of the trial.

[34] One of the issues that arose in *H and* C was whether, and in what circumstances a special advocate should be appointed in PII cases. On this subject Lord Bingham said: -

> "22. There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems; of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown.

> Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. …"

[35] A number of decisions of ECtHR preceded the decision in *H and C*. In *Rowe and Davis* the prosecution, on avowed grounds of public interest, withheld certain evidence from the defendant and the trial judge at the original trial. In the Court of Appeal, during *ex parte* hearings, non-disclosure rulings were made. The applicants before ECtHR (who had been the defendants in the original trial) asserted a breach of article 6 of the Convention. The European Court recognised the fundamental nature of the rule that all material evidence should be disclosed to the defence but also acknowledged that the right to such material could not be regarded as absolute. In paragraphs 60 and 61 of its judgment the court said: -

> "60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v Austria* judgment of 28 August 1991, Series A no. 211, paras. 66, 67). In addition Article 6(1) requires, as indeed does English law (see para. 34 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned *Edwards* judgment, para. 36).
>
> 61. However, as the applicants recognised (see para. 54 above), the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v The Netherlands*

> judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, para. 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1) (see the *Van Mechelen and others v The Netherlands* judgment of 23 April 1997, Reports 1997-III, para. 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned *Doorson* judgment, para. 72 and the above-mentioned *Van Mechelen and others* judgment, para. 54). "

[36] Where, in the interests of national security or in order to protect witnesses, some mitigation of the full rigour of the rule in relation to disclosure is warranted, proper safeguards must be in place to ensure that the defendant's right to a fair trial is protected. Clearly, what safeguards may be required in a particular case will depend on the circumstances of that case and the nature of the measures that are feasible. Unsurprisingly, ECtHR concluded that the trial judge had a pivotal role to play since he was "in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases" – paragraph 65. Because of the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure the applicants had been deprived of a fair trial.

[37] By contrast, in *Jasper –v- United Kingdom* [2000] 30 EHRR 441 the trial judge was involved in the exercise. In that case the applicant had been convicted of drugs offences. An appeal on the basis that the prosecution had not disclosed unused and potentially relevant material was dismissed. The applicant complained that the withholding of material evidence violated article 6. By a majority, ECtHR rejected the complaint. Before the trial began, the defence was notified that the prosecution would make an *ex parte* application to the trial judge to withhold material in its possession on the grounds of public interest immunity. The defence was not told of the nature of the material that the prosecution sought to withhold but had the

opportunity to outline the defence case to the trial judge. This circumstance and the fact that the trial judge was able to monitor the propriety of withholding the material from the defence throughout the trial were influential in the court's decision that no violation of article 6 arose. The court also noted that the withheld material formed no part of the prosecution case whatever, and was never put to the jury. Finally, it concluded that the fact that the Court of Appeal considered whether or not the evidence should have been disclosed provided "an additional level of protection for the applicant's rights". An argument that special counsel should have been appointed was rejected.

[38] In *Fitt -v- United Kingdom* [2000] 30 EHRR 480 the same reasoning was followed by ECtHR in finding that there had been no violation of article 6. The fact that the defence was kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without revealing the material and that the withheld material had not formed part of the prosecution case were again deemed to be important factors. Emphasis was also placed on the role of the trial judge in monitoring the withholding of the material, especially since he was "fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial" – paragraph 49.

[39] In *Edwards and Lewis v United Kingdom* [2003] 15 BHRC 189 both applicants had been arrested by undercover police officers and faced separate criminal trials during which the prosecution successfully applied at *ex parte* hearings to withhold material evidence on the basis of public interest immunity. The applicants unsuccessfully applied under section 78 of the Police and Criminal Evidence Act 1984 to have the prosecution evidence excluded on the basis that they had been entrapped by undercover officers into committing the offences in question. The first applicant was convicted and that conviction was upheld on appeal. The second applicant pleaded guilty. Both complained to ECtHR that their right to a fair trial under article 6 had been infringed because it had been impossible, on the evidence that had been made available to them, for them to establish whether or not the involvement of *agents provocateurs* rendered proceedings against them unfair.

[40] In both cases the trial judge had examined the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police. All of this bore directly on the question whether the defence of entrapment might be available to the applicants but they were not permitted to participate in any evaluation of the material examined in the course of the *ex parte* hearings or to make representations on it. For these reasons the court concluded that a violation of article 6 had been established. At paragraph 57 *et seq* the court said: -

"57. In the present case … it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police (see para 30 above). Had the defence been able to persuade the judge that the police had acted improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants' trials, and the public interest immunity evidence may have related to facts connected with those applications.

58. Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue. For example, in Mr Edwards' case, the Government revealed before the European Court that the evidence produced to the trial judge and Court of Appeal in the *ex parte* hearings included material suggesting that Mr Edwards had been involved in drug dealing prior to the events which led to his arrest and prosecution. During the course of the criminal proceedings the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation, which might have been directly relevant to the judges' conclusions that the applicant had not been

> charged with a "state created crime" (see para 16 above). In Mr Lewis' case, the nature of the undisclosed material has not been revealed, but it is possible that it also was damaging to the applicant's submissions on entrapment. Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure (see *R v Keane*, para 36 above).
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> 59. In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of art 6(1) in this case. "

[41] The fact specific nature of the cases is apparent from these passages. The trial judges had to deal directly with the defence of entrapment and the material produced to them may well have sounded on that issue. Moreover there was plainly prejudicial material in the evidence that the judges saw but which was denied to the defence. Not only were the defence put at a disadvantage because they could not contribute to the assessment that the judges were making but, in Edwards' case, prejudicial material was put before the judge as well.

[42] In *Dowsett -v- United Kingdom* [2004] 38 EHRR 41, the applicant had been convicted of murdering his business partner and sentenced to life imprisonment. The applicant's defence was that he had hired two others to injure the victim in order to put him out of action for a few weeks while the applicant effected his transfer to another branch of the firm. He suggested that it was relevant to this defence to show that the victim had been involved in fraud and there was therefore no need to murder him to ensure his silence. At the commencement of the applicant's appeal, prosecution counsel disclosed some previously withheld material, it notified the defence that certain information remained undisclosed, without however revealing the nature of this material. The withholding of material, not only from the defendant but also from the trial judge, was critical to the outcome of the application before ECtHR. At paragraph 50 the court said: -

> "50. … the Court re-iterates the importance that material relevant to the defence be placed before

> the trial judge for his or her ruling on questions of disclosure, namely, at the time when it can serve most effectively to protect the rights of the defence. This aspect of the case can be distinguished from that of *Edwards v UK* [1992] ECHR 13071/87, where the appeal proceedings were adequate to remedy the defects at first instance since by that stage the defence had received most of the missing information and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence (at paras 36-37). "

The Court expressly declined to rule on the applicant's separate argument that the additional safeguard of scrutiny of the withheld material by special counsel was required.

The principles

[43] From these cases the following principles relevant to the present appeal can be recognised:-

- Full disclosure of any material held by the prosecution which weakens the prosecution case or strengthens that of the defendant should be made.
- Minimum derogation from this golden rule is permissible where full adherence would create risk of serious prejudice to an important public interest.
- The judge dealing with an application for non-disclosure must have a full understanding and appreciation on an ongoing basis of all the issues in the trial and in particular the nature of the defence.
- The appointment of special counsel will always be exceptional. It should not be ordered unless the trial judge is satisfied that no other course will adequately meet the over-riding requirements of fairness to the defendant.

The application of the principles to the present case

[44] The system of non jury trial, involving as it does the judge as the tribunal of fact as well as the arbiter on legal issues, clearly calls for a different model than that which is suitable for trial by judge and jury. Judicial superintendence of the extent and nature of disclosure is essential but the form that this will take depends not only on the mode of trial (*i.e.* whether it is by judge alone or by judge and jury) but also on the issues that arise. The

present case exemplifies the position. Since it is a non-jury trial, it would be plainly unsuitable for the judge who must decide on the accused's guilt to see material that might be adverse to him. A 'disclosure judge' had to be assigned to examine the subject of the material that should be made available to the defence. The level of intervention by the disclosure judge depended on the nature of the issues that arose on the trial.

[45] In the present case the centrepiece of the appellant's defence was that he had been the victim of entrapment. This was well known to the trial judge, the prosecution and the disclosure judge. No other issue has been identified that might sound on the question of disclosure. It was against this background that the disclosure judge made his first ruling. It is important to note that he made two distinct, although related, findings; he also made an observation on the undisclosed material that was extremely important. Firstly, he concluded that "none of the material … [was] … such that it might reasonably be expected to undermine the case for the prosecution or to assist the accused's defence". In effect, therefore, the judge had concluded that none of the material was relevant to the appellant's defence. Secondly, the judge decided that it was not in the public interest to disclose the material. This finding was independent of his conclusion that the material was not relevant to the defence advanced by the appellant. Finally, the judge stated that he "[did] not anticipate any circumstances that would result in the material becoming of value to the defence". In other words he could not envisage any circumstances in which that material could assist the defence either by enhancing the case that was being made for the appellant or by undermining or weakening the prosecution case.

[46] The matter came before the disclosure judge on the second occasion because of the discussion about the need for special counsel. He was equally emphatic on this occasion that he could not foresee circumstances in which the material would assist the defence. The judge did refer to the prospect that the defence might "advance a proposition or raise an issue that might by remote possibility make that so" but it is clear that he was considering this as a theoretical possibility rather than one actually anticipated by him. It is also clear that this was a reference to a line of defence emerging other than the entrapment case that the appellant had already signalled in his defence statement. In the event, neither on the trial nor in the appeal before this court has an alternative line of defence ever been suggested that might have prompted a revisiting of the issue of disclosure.

[47] Ultimately, it was to cater for the purely speculative possibility that a line of defence might emerge that the appellant claimed that further safeguards in the form of special counsel or more pro-active intervention by the disclosure judge was required. As to the first of these we agree with the view of the House of Lords that this should be confined to exceptional cases. And, as Lord Bingham said, the need for appointment must be shown. It has not been

shown in the present case. Neither has it been demonstrated that more assiduous examination of the issues that arose in the case was required from the disclosure judge. On the contrary, no new line of defence has emerged. Nothing has appeared that suggests that material characterised by the disclosure judge as wholly irrelevant to the appellant's defence might suddenly have become relevant.

[48] In effect the appellant's claims as to the role that the disclosure judge should have played amount to the proposition that he ought to have obtained a daily transcript and examined this for any sign of material that might have assisted the appellant's case. As we now know, however, no new line of defence ever emerged that might have prompted a reconsideration of his decision that the material did not assist the appellant. There may be occasions when a daily transcript will have to be considered by the disclosure judge but we are satisfied that this was not warranted in the present case and that all steps necessary to safeguard the appellant's interests in relation to disclosure were taken.

The statement of reasons

[49] The trial judge did not read the statement of reasons given by the disclosure judge before the first hearing on the question of disclosure. The circumstances in which he considered these before the second hearing on this issue are not entirely clear. In general, where material is not to be released to a defendant, it will be inappropriate for the trial judge in a non-jury case to see it. In the present case the trial judge made clear that he had not seen any material that was adverse to the appellant and Mr Orr did not dispute this statement. In the particular circumstances of the present case, therefore, the trial judge's consideration of this material has not brought about any unfairness to the appellant and we do not consider that this rendered his conviction in any way unsafe.

Adverse inferences

[50] During his first interview from 12.30 to 12.58 pm Mr McKeown did not answer any questions apart from saying that he was not in possession of any firearms. Later on the same day at the second interview, which began at 5.10 pm, he was reminded that he had not answered any questions and he said that he had been brutalised by the police and he did not see why he should answer questions. On this aspect of the case Campbell LJ said: -

> "Although he had been cautioned under the Criminal Evidence (Northern Ireland) Order 1988 before his first interview Mr McKeown, when invited to do so, did not offer any explanation for the guns and other items thrown from the car or

> for those items found in it when it when it was stopped. The explanation he offered for this at his second interview was that he had been 'brutalised' and that he did not see why he should have to sit and answer questions when he had bruises on him. It is not disputed that his attitude at the first interview was as recorded. Secondly it would be open to a jury to take the view that he could reasonably have been expected to mention, at the outset, the facts that he relied upon later in his interviews. Further that the only sensible explanation for his failure is that he had no answer at the time or none that would stand up to scrutiny. Finally that the prosecution case was such that it clearly called for an answer. A jury could therefore take this failure as some additional support for the prosecution case".
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> and
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> "I consider that Mr McKeown could reasonably be expected to have told the police at the very earliest opportunity that Mr Murphy had asked him to give him a lift and that he knew nothing about the articles that Mr Murphy brought with him. I find unconvincing his explanation that his failure to do so was because of the treatment that he says that he received from other police officers at the time of his arrest. Nor do I consider that it was sufficient to say, "I certainly was not in possession of any firearms". The objects that had been thrown from his car and those found in it were such that an explanation was clearly necessary. I conclude that the only reason why Mr McKeown did not take the first opportunity to give his explanation was that he had not thought of it at that time".

[51] On the appellant's failure to give evidence the learned trial judge said: -

> "There is now the additional fact that Mr McKeown did not give evidence. What inferences (if any) can properly be drawn from this? At this stage he has supplied an answer after his first interview by saying that he was giving Murphy a lift and had no idea what he had with him. I take the view that he failed to give evidence because he

> realised that his explanation would not stand up to cross-examination. I am satisfied that it is fair to draw this inference against him".

[52] Mr Orr's criticism of the judge's drawing of inferences against the appellant centred on the circumstances of his arrest but it is clear that the judge had considered these carefully and the appellant's explanation for the failure to answer and he concluded, quite reasonably in our view, that this did not justify the failure to answer what were not only pertinent but entirely obvious questions. Having concluded that there was no acceptable explanation for the failure to answer questions and that the only feasible explanation for having refused to reply to the queries put to him by police was that he had not thought of the excuse that he later proffered, it was unsurprising that the judge should draw what we consider was a virtually inevitable inference against the appellant.

[53] We can detect no merit in the suggestion that the judge should have felt reticence about the drawing of inferences on account of the dispute about disclosure. So far as the judge was concerned this matter had been dealt with comprehensively in a series of rulings given either by himself or the disclosure judge. There was no reason that he should have been deflected from the task of drawing inferences fully justified by the failure of the appellant to answer questions or to give evidence by reason only of the existence of a dispute as to disclosure which had, in the event, been resolved against the appellant.

Failure to give sufficient weight to the entrapment theory

[54] Campbell LJ referred to cross-examination of police witnesses about the entrapment theory. He acknowledged that it had been suggested that they knew more about the matter than they were prepared to admit but he made no adverse finding in relation to their evidence. There is no reason to suppose that he failed to give this aspect of the case sufficient weight. It had been the central plank of the appellant's defence and was thoroughly explored not only in cross-examination of the witnesses but in extensive canvassing of the 'coincidences' referred to in paragraph [23] above. The trial judge had the advantage of hearing the witnesses give evidence about these matters and had the opportunity to assess them as they gave their explanations as to the circumstances in which they came to be involved with the appellant. We can find no reason to conclude that this issue was not fully considered.

Conclusions

[55] None of the grounds on which the appeal was advanced has been made out. It is therefore dismissed.