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IN THE IN THE COURT OF APPEAL
CRIMINAL DIVISION

No.1999/05912/S1,
1999/04334/S1,
1999/06733/S1
1999/05692/S1

Royal Courts of Justice
The Strand
London WC2

Thursday 9th November, 2000

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(THE LORD WOOLF OF BARNES)
MRS JUSTICE STEEL
AND
MR JUSTICE BUTTERFIELD

- - - - - - -

REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION

UNDER SECTION 9 OF

THE CRIMINAL APPEAL ACT 1995

- - - - - - -

R E G I N A
- v -
KENNETH TOGHER
BRIAN PETER DORAN
ROBERT PARSONS

- - - - - - - - -

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(Official Shorthand Writers to the Court)

MR P MARSHALL appeared on behalf of THE APPELLANT TOGHER
MR D C LOVELL-PANK QC and MR C CAMPBELL-CLYNE appeared on behalf of THE APPELLANT DORAN
MR M BOARDMAN appeared on behalf of THE APPELLANT PARSONS
MR A MITCHELL QC and MR K TALBOT appeared on behalf of THE CROWN

J U D G M E N T
(As Approved by the Court)

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1. THE LORD CHIEF JUSTICE:

2. These are our reasons for dismissing the appeals against conviction in these cases. We announced the result on 13 October 2000.

3. On 29 April 1997 at the Crown Court at Bristol, Brian Peter Doran and Robert Parsons pleaded guilty to an offence of assisting in the commission outside the United Kingdom of an offence punishable under the provisions of a corresponding law in force in that place, contrary to section 20 Misuse of Drugs Act 1971. The offence related to 33 kilos of cocaine which was seized by the Spanish police at a hotel in Madrid. Mr Doran was sentenced to nine years' imprisonment and Mr Parsons was sentenced to eight years' imprisonment.

4. On 30 April 1997 Mr Togher pleaded guilty to the same offence and was also sentenced to nine years' imprisonment. In addition, a confiscation order was made requiring Mr Doran to pay £2,091,084 and Mr Togher to pay £2,410,281. These sums were payable within five years. In default of payment, a sentence of 10 years' imprisonment consecutive was imposed. Mr Doran and Mr Togher were also charged with other offences which had been tried separately. The offence to which they pleaded guilty therefore became known as the 'Madrid Indictment'. However, strictly speaking, there was only one indictment the counts in which had been ordered to be tried separately.

5. It is not disputed that the pleas of guilty of the three appellants were unequivocal and entered after they had each received legal advice. However, Mr Doran and Mr Parsons were given leave to appeal by Jackson J, and Mr Togher appeals following a reference to this court by the Criminal Cases Review Commission.

6. Mr Parsons appeals with the leave of the Full Court. He has already succeeded on an appeal against sentence. On 23 March 1999, this court, (Roch LJ, Mitchell J, and His Honour Judge Colston QC) reduced Mr Parsons' sentence to seven years' imprisonment. Mr Parsons has already served that sentence.

7. Prior to pleading guilty to the Madrid Indictment, on 19 March 1997 at the same court before the same judge, His Honour Judge Foley, Mr Doran and Mr Togher, together with three co-accused, were convicted of being knowingly concerned in a fraudulent evasion of the prohibition on importation of 309 kilos of cocaine, a Class A controlled drug. This was on a re-trial, which lasted some four months. This indictment became known as the 'Frugal Indictment'. Frugal was the name of the boat, which had transported the drugs from the Caribbean to the Sussex coast where the drugs were seized. Mr Doran and Mr Togher were sentenced to 25 years imprisonment on the Frugal Indictment. The sentences imposed on the Madrid Indictment were concurrent with those imposed on the Frugal Indictment.

8. On their appeals the appellants are separately represented. They contend their convictions

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on the Madrid Indictment are unsafe, because either the manner in which the prosecution was conducted was an abuse of process, or because at the time of their pleas of guilty, there was a failure to inform them and their legal advisers of information which would have significantly improved their prospects of successfully avoiding conviction if they had contested their guilt. The assumption being that if there had been disclosure, they would not have pleaded guilty. Mr Togher also relies on a number of additional grounds which are not relied on by the Commission. We have considered these additional grounds and conclude they are manifestly totally lacking in any merit and would not justify leave to appeal.

9. Mr Doran and Mr Togher had given notice of appeal against their conviction on the Frugal Indictment prior to their pleading guilty on the Madrid Indictment. Their appeal was allowed by this Court (Huchison LJ, Ognall and Sullivan JJ) and on 2 November 1998 a retrial was ordered. On 6 July 1999, Turner J gave a judgment in which he ordered a stay of the prosecution of the retrial on the grounds that:

> The prosecution, viewed as a single entity, have, by means which are at least arguably unlawful, deprived the defence of its strategic ability to mount the challenge to the integrity of the prosecution case when looked at in the round."

10. The appellants contend, and this has not been disputed, (in the words of Mr Lovell-Pank QC, who appears on behalf of Mr Doran) that it is only for case management reasons that the Madrid Indictment was to be tried separately from the Frugal Indictment and the decision of Turner J applies equally to the Madrid Indictment. This being the position, the appellants argue before us that the Madrid Indictment was therefore an indictment to which the appellants should not have been required to plead.

11. The appeal raises issues of considerable importance: (a) as to the test which this court should apply in determining whether an appeal should be allowed; and (b) as to the extent of the right of appeal after a plea of guilty.

12. The Legal Issues

13. It is convenient to start by examining the case of R v Chalkley and Jeffries [1998] 2 Cr App R 79. This is because the appellants recognise that the judgment of this court in that case constitutes an impediment to a successful outcome in their appeals. The background to the decision is not unlike the background to the present appeals. The appellants in that case had pleaded guilty. In that case, as in this, there were covert tape recordings of conversations involving the appellants which it was alleged had been obtained unlawfully. There are, however, differences between the two cases. In that case, the prosecution intended to rely on the tape recordings as evidence, while in this case the position of the prosecution is that they would only rely on the tape recordings in rebuttal of evidence given by the defence. More significantly, the present appeal can be distinguished from that case, because in this case the appellants had pleaded guilty from the outset and they now seek to go behind their pleas because of the stay ordered by Turner J of the Frugal Indictment. In

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Chalkley and Jeffries, the appellants only pleaded guilty when the judge overruled the submission of the defendants that the tapes were inadmissible. In that case, the judge came to the conclusion that the police had not acted in bad faith, but there had been breaches of the provisions of the Police and Criminal Evidence Act 1984 and/or of the ordinary common law and of Article 8 of the European Convention on Human Rights in the seizure of one of the appellant's cars, in making a copy of a key to effect a trespass to an appellant's house, in the installation of a 'bugging' device and in making two clandestine visits to renew the device's battery.

14. In his judgment on behalf of the court in Chalkley and Jeffries, Auld LJ considered the effect of the pleas of guilty. He succinctly, and with admirable clarity, analysed the previous authorities, including a judgment of mine in R v Preston (1992) 95 Cr App R 355 at p.381, where it was indicated that the court, after a plea of guilty, might be able to interfere where the plea of guilty was 'founded upon' a material irregularity. This Auld LJ described as a broad approach in contrast to a narrower approach, according to which the court's intervention is confined, after a plea of guilty, to situations:

> where, in the light of the admitted facts, the erroneous ruling left the defendant at trial with no legal basis for a verdict of not guilty. Put the other way round on appeal when the error is corrected, it is "that upon the admitted facts", the appellant "could not in law have been convicted of the offence charged". That is how the test was seen in the early part of this century by Avory J in *Forde* (1924) 17 Cr App R 99, 103".

15. Having examined the authorities, Auld LJ concluded that the narrower approach was correct. He summarised the position (at p.94) in the following terms:

> In appeals against conviction following a plea of guilty, the somewhat mechanical test of whether a change of plea to guilty was 'founded upon' a particular feature of the trial, namely a wrong direction of law or material irregularity, gives way to the more direct question whether, given the circumstances prompting the change of plea to guilty, the conviction is unsafe. However, even when put that way, the good sense of preferring the narrower interpretation, which we have identified, of the expression 'founded upon' lingers on. Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged.
>
> We qualify the above proposition with the word 'normally', because there remains the basic rule that the Court should quash as unsafe a conviction where the plea was mistaken or without intention to admit the truth of the offence charged."

16. In adopting the narrower approach to the court's power to intervene, Auld LJ was influenced by the effects of the amendments to section 2 of the Criminal Appeal Act 1968 made by the Criminal Appeal Act 1995. Prior to the amendment, section 2(1) provided that the Court of Appeal

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should allow an appeal against conviction if they thought the conviction was (a)‘unsafe or unsatisfactory', (b) that the judgment of the court of trial should be set aside on the ground of ‘a wrong decision of any question of law', or (c) ‘that there had been a material irregularity in the course of the trial'. This was subject to the proviso that the court could dismiss the appeal if they were satisfied that no miscarriage of justice had occurred. The effect of the substituted subsection was to confine the grounds of appeal to situations where the conviction was ‘unsafe'.

17. The appellants contend that this amendment did not alter the situation. It merely provides a comprehensive test of lack of safety which applies across the board, and lack of safety is a sufficiently wide test to cover all the situations previously covered by section 2 in its unamended form. The court in Chalkley and Jeffries rejected this approach. They indicated clearly that after the amendment, the court could not, for example, interfere in circumstances such as those that existed in R v Blackledge and Ors [1996] 1 Crim LR 326 ([1998] 2 Cr App R 100). In that case, the defendants had pleaded not guilty at a preliminary hearing as it was their case that in practice there was no prohibition on the export of goods to Iraq, with which they were charged. This was because the Government had decided to turn a blind eye to such exports. The defendants sought a stay of prosecution on the grounds that the proceedings were an abuse of process because the prosecution had failed to produce relevant witnesses and to disclose relevant documents. The application was rejected, and having received hints of sympathetic consideration, and a suspended sentence, the appellants changed their pleas to guilty. The Court of Appeal held that there had been a failure of disclosure on the part of the prosecution which was a material irregularity and as the pleas of guilty were ‘founded upon' the material irregularity, the conviction was unsafe and the appeal would be allowed.

18. Auld LJ, in support of his approach, relied on the views expressed in Archbold 1997, para 7-46a. These were that there could be a material irregularity at a trial, but if there was no doubt as to the defendant's guilt, the irregularities of procedure could be ignored. While adopting a robust approach in Chalkley and Jeffries, Auld LJ recognised that this was "subject to what the court will make of Article 6(1) of the European Convention on Human Rights, entitling everyone charged with a criminal offence to a fair trial, when it becomes part of our domestic law" (p.98). Accordingly, in that case the appellants having by their pleas admitted guilt, their convictions were not unsafe. The court in Chalkley and Jeffries also made it clear that, in their view, the determination of the fairness or otherwise of admitting evidence under section 78 of the Police and Criminal Evidence Act 1984 was distinct from deciding whether to stay criminal proceedings as an abuse of process. The appeal was therefore dismissed in that case.

19. Chalkley and Jeffries could be said to be distinguishable from this case. This is because here the appellants contend that in relation to the separate proceedings, Turner J had come to the conclusion that there had been an abuse of process, which justified a stay of those proceedings. While the appellants accept that those proceedings involved a different trial to that from which the present appeal arises, they say this is an unreal distinction since the two sets of proceedings were

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based in general terms on very similar evidence. The appellants argue that if Turner J was right to stay the other proceedings as an abuse of process, then these proceedings must be an abuse of process as well. The appellants point out that the conduct which constituted the abuse had already occurred when they pleaded guilty. If they had been aware of this conduct prior to their pleas they would not have pleaded and would have made an application for a stay in these proceedings as well. If that application had also been successful, there would have been no need for them to plead guilty as they did. Whilst, therefore, there are undoubted distinctions between Chalkley and Jeffries and this case, the position remains that the approach adopted to the application of the test of lack of safety in Chalkley and Jeffries is a substantial impediment to the appellants' success on this appeal.

20. The approach of the court in Chalkley and Jeffries has to be compared with the approach of this court in the later case of Mullen [1999] 2 Cr App R 143. The facts in Mullen were that the appellant's deportation to this country had been obtained in disregard of available extradition procedures. He appealed on the ground that no trial should have taken place because of the prosecution's abuse of process prior to the trial. The case did not involve a plea of guilty. It involved, rather, a failure to make proper disclosure of the circumstances which made the appellant's deportation to this country unlawful. It was a case where the defence were not able to make an application for a stay at the outset of the trial because they did not then have available to them the information which would enable this to be done.

21. The importance of the case for present purposes is that the Court came to the conclusion that the meaning of 'unsafe' in section 2 of the 1968 Act, as amended, was ambiguous, so it was a case where the Court was permitted to refer to Hansard, from which the Court concluded that it was apparent that the amended form of section 2 was intended to re-state the practice of the Court of Appeal prior to the amendment. Accordingly, the meaning was broad enough to permit the quashing of the conviction on the ground that it was unsafe because of abuse of process prior to trial. In particular, a conviction could be unsafe even if there was no doubt that the defendant had committed the offence of which he had been found guilty.

22. In view of the facts on which the appeal in Mullen was based, in giving the judgment of the Court, Rose LJ examined the authorities starting with decisions relating to abuse of process. He referred to the decision of the House of Lords in Horseferry Road Magistrates' Court, ex parte Bennett [1994] 1 AC 42. That decision is the clearest authority for the proposition that if a defendant is brought within our jurisdiction in disregard of proper procedures to which our own 'police, prosecuting or other executive authorities have been mainly a party' this constitutes an abuse of process. (See p.62G and 67G.) Rose LJ referred to the speech of Lord Lowry (at p.76C) where he said:

> . . . the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will

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mean that the court's process has been abused."

23. Rose LJ also referred to the decision of the House of Lords in R v Latif [1996] 1 WLR 104 where, at p. 112H, Lord Steyn said:

> *Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

24. Rose LJ then went on to consider the meaning of 'unsafe'. He referred to the article of Sir John Smith QC in [1995] Crim L.R. 920, which Lord Bingham CJ described in R v Graham [1997] 1 Cr App R 302 at p. 308, as being a 'penetrating analysis'. Rose LJ summarised the effect of that article by saying that the amendment to section 2 was intended to codify the previous provisions and that parliamentary debates provide clear evidence that the new provision is intended to re-state the prior practice. The effect of the amendment, in Sir John's words, is simply to concentrate the mind on the real issue of every appeal from the outset.

25. When examining the facts in R v Mullen, Rose LJ came to the important conclusion that "the stark fact remains that the appellant was denied any opportunity to challenge deportation under the Act by judicial review . . . " (p.157C). He then went on to emphasise the distinction between abuse of process and all other cases where an exercise of judicial discretion is called for. He pointed out that:

> It arises not from the relationship between the prosecution and the defendant, but from the relationship between the prosecution and the court. It arises from the court's need to exercise control over executive involvement in the whole prosecution process, not limited to the trial itself." (p.158F/G).

26. Rose LJ then summarised his conclusion with regard to that part of the case by saying:

> Having regard to these considerations, namely the combined effect of lack of disclosure at trial and the special nature of *Bennett* -type abuse, we do not consider that failure to seek the trial judge's ruling on abuse is fatal to the appeal." (p.159A/B)

27. Rose LJ then turned to consider the case of Chalkley and Jeffries and pointed out that the case of Bennett was not referred to. He then mentioned a later decision of this Court in which Auld LJ presided, namely R v MacDonald (1 May 1998, unreported). Auld LJ indicated in that case:

> It may be that a conviction in a trial which should never have taken place is to be

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> regarded as unsafe for that reason. It may be that, despite the statutory basis of the court's jurisdiction, it has also some inherent or ancillary jurisdiction basis for intervening to mark abuse of process by quashing a conviction when it considers that the court below should have stayed the proceeding. Or it may be that the recent amendment to the 1968 Act has removed the supervisory role of this court over abuse of criminal process where the affront to justice, however outrageous, has not so prejudiced the defendant in his trial as to render his conviction unsafe. All that is for decision by another court in an appropriate case."

28. In view of these observations by Auld LJ, in Mullen, this Court commented that Chalkley and Jeffries could not be regarded as being the final word on the subject.

29. At the end of his judgment, Rose LJ summarised the views of the Court in these terms:

> " . . . for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the *Oxford Dictionary* gives the legal meaning of 'unsafe' as "likely to constitute a miscarriage of justice".

30. Sir John Smith's article to which we have referred does not deal with unsafe in relation to abuse . . . But, for the reasons which we have given, we agree with his 1995 conclusion that 'unsafe' bears a broad meaning and one which is apt to embrace abuse of process of the *Bennett* or any other kind."

31. The broad approach laid down in Mullen has since been adopted in other cases. However, so has the approach in Chalkley and Jeffries. Before examining the domestic decisions further, it is helpful to refer to the case of Condron v The United Kingdom, decided in the European Court of Human Rights on 2nd May 2000. The applicants in that case contended that they had not been granted a fair trial, inter alia, because the jury had not been given a satisfactory direction as to when it is appropriate for a jury to draw an adverse inference as to an accused's credibility under section 34 of the Criminal Justice and Public Order Act 1994 on the ground that he failed to mention any fact relied on in his defence. There had been a previous appeal to the Court of Appeal relying on the same ground, which appeal had been dismissed. The European Court referred to Chalkley and Jeffries and the approach which this Court adopted to the question of the safety of a conviction in that case. The European Court then stated:

> The Court must also have regard to the fact that the Court of Appeal was concerned with the safety of the applicants' conviction, not whether they had in the circumstances received a fair trial. In the Court's opinion, the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness. In the above-mentioned Edwards case the Court of Appeal considered in detail the impact of the information withheld from the defence (*ibid* ., p.35, §35). It was able to assess for itself the probative value of that information in the light of the arguments of the defence which was by that stage in possession of the information and to determine whether the availability of that information at trial would have disturbed the jury's verdict. Accordingly, the rights of the defence were secured by

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the review conducted on appeal.

> 66. However, in the case at issue it was the function of the jury, properly directed, to decide whether or not to draw an adverse inference from the applicants' silence. Section 34 of the 1994 Act specifically entrusted this task to the jury as part of a legislative scheme designed to confine the use which can be made of an accused's silence at his trial. In the circumstances the jury was not properly directed and the imperfection in the direction could not be remedied on appeal. Any other conclusion would be at variance with the fundamental importance of the right to silence, a right which, as observed earlier, lies at the heart of the notion of a fair procedure guaranteed by Article 6. On that account the Court concludes that the applicants did not receive a fair hearing within the meaning of Article 6.1 of the Convention."

32. Now that the European Convention is part of our domestic law, it would be most unfortunate if the approach identified by the European Court of Human Rights and the approach of this Court continued to differ unless this is inevitable because of provisions contained in this country's legislation or the state of our case law.

33. As a matter of first principles, we do not consider that either the use of the word 'unsafe' in the legislation or the previous cases compel an approach which does not correspond with that of the ECHR. The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance. The common law approach has been enhanced by legislation and in particular, the Police and Criminal Evidence Act 1984 and the codes of practice made thereunder (sections 66 and 67). Fairness in both jurisdictions is not an abstract concept. Fairness is not concerned with technicalities. If a defendant has not had a fair trial and as a result of that injustice has occurred, it would be extremely unsatisfactory if the powers of this Court were not wide enough to rectify that injustice. If, contrary to our expectations, that has not previously been the position, then it seems to us that this is a defect in our procedures which is now capable of rectification under section 3 of the Human Rights Act 1998 ('the 1998 Act'). The 1998 Act requires primary legislation and subordinate legislation to be read and given effect to in a way which is compatible with Convention rights. Section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right and a court is a public authority for the purposes of section 6 (section 6(3)). The 1998 Act emphasises the desirability of taking a broader rather than a narrower approach as to what constitutes an unsafe conviction. In R v Davis, Rowe and Johnson (17 July 2000, unreported), this Court acknowledged that there could still be a distinction between its approach and the approach of the European Court of Human Rights. However, in the later case of R v Francom (31 July 2000, unreported), this Court indicated, in a judgment which I gave on behalf of the Court, that we would expect, in the situation there being considered, that the approach of this Court applying the test of lack of safety would produce the same result as the approach of the E.C.H.R. applying the test of lack of fairness. We would suggest that, even if there was previously a difference of approach, that since the 1998 Act came into force, the circumstances in which there will be room for a different result before this Court and before the ECHR because of unfairness based on the respective tests we employ will be rare indeed. Applying the broader approach identified by Rose LJ, we consider that if a defendant has been denied a fair

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trial it will almost be inevitable that the conviction will be regarded as unsafe. For this reason we endorse the approach of Rose LJ in Mullen and prefer the broader approach to the narrower approach supported by Auld LJ. Certainly, if it would be right to stop a prosecution on the basis that it was an abuse of process, this Court would be most unlikely to conclude that if there was a conviction despite this fact, the conviction should not be set aside.

34. This brings into focus the particular feature of these appeals, namely the pleas of guilty that were entered by the appellants. It was strongly argued on their behalf that if Turner J's decision was right, the same decision would have been reached in their cases on the Madrid Indictment as was reached on the Frugal Indictment. They were not aware of the matters upon which a stay of the other indictment was ordered until after they pleaded guilty. This meant they were not in a position to make an application to stay the Madrid Indictment.

35. Here it is relevant to refer to the decision in R v Rajcoomar [1999] Crim LR 728, of which we have a transcript dated 18 February 1999. In that case, Rajcoomar was alleging abuse of process, entrapment and unfairness. However, the judge investigated the allegations fully, including holding a *voir dire* . He concluded that there was no unfairness and no abuse of process. Rajcoomar then pleaded guilty. On his appeal, Richards J in giving the judgment of the Court, referred to Chalkley and Jeffries and cited one part of a passage from the judgment of Auld LJ at p. 94D which is excerpted in paragraph 12 above.

36. We would not wish to question this passage in the judgment of Auld LJ. However, it cannot be applied to the situation which exists here, where the defendants were unaware of the material matters alleged to amount to an abuse of process. If they could establish an abuse, then this Court would give very serious consideration to whether justice required the conviction to be set aside. We would, however, emphasise that the circumstances where it can be said that the proceedings constitute an abuse of process are closely confined. The reason for this is that the majority of improprieties in connection with bringing proceedings can be satisfactorily dealt with by the court exercising its power of control over the proceedings. It has to be a situation were it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand.

37. The Judgment of Turner J

38. We now turn to the judgment of Turner J. The first section of the judgment deals with the question of delay. Here the judge rejected the application for a stay, because the Court of Appeal had already dealt with the question of delay when they ordered a retrial.

39. Turner J then turned to the allegation of abuse of process. He pointed out that the defendants only advanced this argument on the second day of the hearing before him. He ‘condensed' the submissions into the proposition that material had been made available by the prosecution to the defence teams, but this was not until after the order for retrial was made by the Court of Appeal. The material did not relate to any issue of fact in the trial which had taken place,

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> but it was submitted, was so intricately bound up with matters that went essentially to the issue of the credits of the extensive surveillance and investigation which lay behind the prosecution, that it was capable of throwing into doubt its very integrity."

40. The judge records that the submissions were advanced on the basis that,

> before, during and after the trial, and continuing up to date, there had been a serious misleading of all the defence teams by not only Customs and Excise but also the Crown prosecution team (or at least individual members of it) and even by the trial judge himself."

41. Turner J explains that the non-disclosure related to the generation of 57 tape recordings of conversations of certain of the defendants covertly recorded by Customs and Excise in the course of their surveillance in connection with the facts which were the subject of the Madrid proceedings. The tapes were not made available to the defence until mid-way through the second Frugal trial.

42. After the tapes had been revealed the judge records the defence made an application to be permitted to see the guidelines issued by Customs and Excise which cover the use of electronic evidence gathering equipment. The defence required the guidelines in order to ascertain whether the appropriate internal authority had been granted for the surveillance. In addition the defence wanted to investigate whether or not the hotels at which the surveillance operations were conducted had given permission for those operations. As Turner J stated:

> In short, the defence claimed to be entitled to ascertain the legality of those activities of Customs and Excise, with a view to showing that they had been illegally conducted, to the knowledge of responsible officials conducting Operation Steeler [the name given to the surveillance operation], whose overall credit could thereby be impugned."

43. Turner J described the action which should have been taken if authority had been properly given in accordance with the guidelines. He pointed out that if the guidelines are not observed there is an unchecked exercise of executive power which infringes the liberty of the person.

44. As to the hotel where the surveillance had taken place, the judge records that there was no written authorisation produced emanating from the hotels. The only written documents relied upon were letters written by Customs and Excise to the hotels thanking them for their assistance. These "letters of gratitude" did not refer to the use of covert listening and recording equipment.

45. Basing himself upon the material which was placed before him, Turner J concluded that there was no evidence that any valid authorisation was ever issued and no evidence that the Customs and Excise obtained any permission for electronic surveillance equipment to be deployed and for surveillance to take place at the various hotels. (In fact this overstates the position since it was always the prosecution's case that oral permission had been given.)

46. The judge then referred to the various public interest immunity applications which were heard by Judge Foley. Customs and Excise were not then represented by the counsel who appears

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on their behalf on this appeal. In particular, he referred to submissions made by junior counsel on behalf of the prosecution, the effect of which Turner J could justifiably conclude indicated that counsel was in fact giving assurances to Judge Foley both at hearings at which the defendants were and were not represented that permission had been obtained orally although there was no written confirmation. In addition, the same counsel assured the judge that the appropriate authorisation required by the Home Office guidelines had been obtained by Customs and Excise.

47. In addition, Turner J referred to Judge Foley's indication that he had been provided "with the documentation which authorises these tapes" and the same junior counsel's unsupported confirmation that this was right. It was, as Turner J stated, "highly unfortunate" that this should happen. Turner J added,

> The defence were thus deprived of a point which they were entitled to make as part of a broad attack on the character of the conduct of the investigation."

48. The ability to attack the prosecution was particularly important to Mr Togher because it was his case that Customs and Excise had framed him by planting damning evidence upon him. He said they did so, for example, by inserting Caribbean map co-ordinates in his personal organiser.

49. This point was also important to Mr Doran's case. He wished to attack the credit of a Customs Officer named Beer "who was the officer in the case". It was her evidence (disputed by Mr Doran) that she had seen Mr Doran at the Tate Gallery in London in the company of a man whose presence would be inconsistent with Mr Doran's innocent explanation as to why he was there.

50. However, the officer's evidence of identification was already open to challenge because it was clear that it had ‘improved' in the course of the prosecution.

51. Turner J had before him a memorandum from the junior counsel who had given the assurances to the judge. In that memorandum, counsel took personal responsibility for the deficiencies which had occurred. However, as Turner J pointed out, counsel was not in a position to explain why counsel had only been provided with the Home Office and not the Customs and Excise guidelines. Furthermore, as Turner J pointed out, the counsel gave no explanation for his failure to appreciate that there was no proper documentation of the authorisation.

52. Based on this Turner J stated:

> the only reasonable inference is that he was most imperfectly instructed in regard to a matter which, so far as the prosecution were concerned, was not just sensitive in the terms of immunity, but also potentially embarrassing to the integrity of their case".

53. Turner J then referred to a memorandum signed for counsel of the new prosecuting team. This states:

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> It is not and never has been the prosecution case that any of the hotels gave any written authorisation for surveillance by Customs and Excise".

54. To this the judge says:

> This is in direct conflict with pronouncements made by the judge in open court and not controverted by or on behalf of any member of the team of Crown counsel. It may be stretching the limits of credulity to accept that no person within the team of those instructing counsel was aware, or was subsequently made aware, of the striking and uncorrected inaccuracy of the judge's pronouncement. If so, it demonstrates, at first reading, a degree of incompetence in regard to such an important and delicate area of modern criminal process that is hard to comprehend".

55. Having said that the judge rejected the suggestion that the grave failings meant that counsel and the judge and Customs and Excise were involved in an unlawful conspiracy. He indicated that he accepted the truth of what counsel had written and the belief expressed by the judge. He regarded the conspiracy allegation as wild and farfetched. Turner J then went on to say that the officers who were in charge at the operational level and their superiors had the responsibility for honest and complete instructions being provided to their legal team. He then added:

> On the material placed before me, there has to be serious doubt that either of them or their superiors complied with the obligation of honesty and integrity, by which they were and are bound."

56. Finally, with regard to the facts Turner J referred to evidence of an identification by another officer called Dick. The judge says, he was informed, without contradiction, that Dick could not in fact have made the identification.

57. Turner J then referred to the relevant authorities on abuse of process and relied particularly upon the decision in Bennett.

58. Having done so, he concluded that:

> by abuse of executive authority, the prosecution, viewed as a single entity, have, by means which are at the least arguably unlawful, deprived the defence of its strategic ability to mount the challenge to the integrity of the prosecution case when looked at in the round."

59. Turner J added:

> If this trial were to be allowed to continue on the state of present disclosure, the defence would, in my judgment, have withheld from it the opportunity properly and effectively to challenge the integrity of the three witnesses whom I have identified, but there may well be others. In this situation, where challenge has been made to the legality of conduct and the response has been the self serving assertion "I was authorised", it is not sufficient, without some explanation which has not been forthcoming, that there has been no disclosure by way of statement or document to verify that authority has in fact been given, or at least, properly given . . . What has happened has had a significant impact on the ability of the defendants properly to defend themselves, and to that extent, and as a matter of probability, they have been

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> seriously prejudiced in the conduct of their defence. The prosecution witnesses, whom I have identified, as well as those others who may exist, have been accorded an unfair advantage by the protection of their credibility and integrity which the conduct in withholding disclosure has achieved. These are not matters which by proper judicial control of the trial process can be mitigated, let alone avoided. This, in my judgment, is one of the 'cases few' referred to by Lord Lowry . . .
>
> It is in these circumstances that I hold that no retrial can be fairly conducted, and further that it would be unfair that the defendants should be retried."

60. Additional Evidence

61. During the hearing of these proceedings, the prosecution sought leave to adduce fresh evidence. It was contended that the effect of that evidence was to show that although the guidance laid down by Customs and Excise at the relevant time had not been strictly complied with, everything that happened has been authorised informally both by Customs and Excise and by the hotels at which the surveillance took place. Leave was not granted for this evidence to be given. Surprisingly, in view of the history, the application bore all the hallmarks of being prepared at the last minute. It was not in the correct form and was made late. In any event the evidence should have been adduced before Turner J. We did, however, refer to the report of the inquiry into the prosecution of these proceedings by His Honour Gerald Butler QC. We used the report only as background material. We did not rely on the conclusions to which he came. Nor did we rely on the evidence he received since the appellants were not involved in the inquiry.

62. Conclusions

63. The present appeals are not appeals of the decision of Turner J and we do not suggest that he was not entitled to come to the conclusions which he did. However, in order to decide the present proceedings, it is necessary to form our own judgment as to what should have been the result of the application before Turner J. Having examined very carefully the reasoning of this very experienced judge, it is the view of this Court that failures on the part of the prosecution did not amount to the category of misconduct which has to exist before it is right to stay a prosecution.

64. This Court does not condone what happened at the previous trial. However, the judge was being asked to stop a retrial ordered by this Court. As Turner J recognised, on the authorities which he cited it is only in very exceptional circumstances that it is right to order a stay. The matters relied upon before Turner J could, in our judgment, be dealt with by the trial judge on the retrial by taking the action which was appropriate. It was undesirable for Turner J to seek to decide the issues on the basis of submissions of counsel and written material. Evidence from the officers who were in charge of the prosecution was required before adverse comments about the motivation of the prosecution could be made, counsel having accepted responsibility for what had happened. That evidence was not tendered to Turner J. However, in fairness to the prosecution, it has to be said that as the application was being made primarily on the ground of delay, they could reasonably assume the application was not one on which oral evidence would be required. Oral evidence would more

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appropriately be given at the retrial on a *voir dire* . Oral evidence was essential before a proper assessment of an alleged improper motive on the part of the prosecution could be made. Without hearing that evidence on the material before Turner J we do not consider it would be right to do more than say that there had been regrettable muddle and confusion and incompetence on the part of the prosecution and short comings on the part of the trial judge. In our opinion, it could not be said at that stage that a fair trial would not be possible. The defendants had not lost the ability "properly to defend themselves" at a retrial when they would be well aware of the failures on the part of the prosecution. The failures, as Turner J acknowledged, went only to the credit of the prosecution witnesses. The defendants could, if they were prepared to take the possible consequences of so doing, exploit the earlier non-disclosure to challenge the bona fides of the officers in charge of the prosecution or the prosecution "viewed as a single entity".

65. The shortcomings on the part of the prosecution are not of the category of misconduct which would justify interfering with the defendants' freely entered pleas of guilty. We see this case as being in a wholly different category from the exceptional case Lord Lowry was considering in his speech in Bennett. When the appellants pleaded guilty they were not aware of the matters relied upon before Turner J for obtaining a stay of the retrial, but they were aware that they were appealing against their conviction. They therefore should have appreciated that the appeal against their conviction might succeed. If this had happened they would still be bound by their pleas of guilty. They were never ignorant of any evidence which went directly to their innocence or guilt. They were only unaware of material which could, but for their pleas, have been used in order to attack the credibility of the prosecution witnesses. Ignorance of this nature does not justify reopening their pleas of guilty. While there was an irregularity in their trial on the Frugal Indictment, the appellants' pleas to the Madrid Indictment were not ‘founded upon' and were independent of that irregularity.

66. It is for these reasons that we dismiss the appeals against conviction.

67. We have already given our reasons for dismissing the appeals against sentence. Subsequent to our doing so, further representations were made on behalf of Mr Doran and Mr Togher. It is submitted that the fact that they spent a substantial period on bail means that the dismissal of their appeals against sentence will involve a harsher penalty than would have been the case if they had not been granted bail. In particular, reliance is placed upon the fact that because these appellants were on bail for longer than anticipated they lost the opportunity of being released on parole. However, the appellants having decided to seek and to take advantage of bail, they are not entitled to suggest that they should have perfectly appropriate sentences reduced because of the adverse consequences which inevitably flow from the fact that they were on bail. They made their choice and they must stand by it. There is nothing in the subsequent submissions on sentence which would justify our altering our previous decision.

68. As to the appeals against the confiscation orders which were made, we have also already given our decision. However, here the appellants rely on the recent decision of the High Court in

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McIntosh v Her Majesty's Advocate (13 October 2000). There are other cases now before this Court raising the same point. We understand the decision is to be the subject of an appeal to the Privy Council. If this is the case, then if, when the outcome is known, it is appropriate to do so, we would be prepared to consider allowing our decision as to confiscation to be reopened. Subject to this, our decision on confiscation stands.