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Case No: CO/0198/99

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (QUEEN'S BENCH DIVISION)
DIVISIONAL COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday, 18th March 1999

B e f o r e :

LORD JUSTICE KENNEDY
and
MR JUSTICE BLOFELD

- - - - - - - - - - - - - - - - - - - -

REGINA
THE DIRECTOR OF PUBLIC PROSECUTIONS
Appellant
EX PARTE LEE Respondent

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(Handed-down Transcript of the Stenograph Notes of
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MR J TURNER QC and MR J ROBERTS (instructed by Clarke Kieran, Tonbridge, Kent TN9 1DU) for the
Applicants.

MR J CARTER-MANNING QC and MR C KINCH (instructed by Crown Prosecution Service (Maidstone) Kent) for the Respondents.

JUDGMENT
(As approved by the Court)

Tuesday, 18th March 1999

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LORD JUSTICE KENNEDY:

1. This is an application for Judicial Review of a decision of the Crown Prosecution Service in relation to disclosure of information prior to committal proceedings in a case triable only on indictment.

2. Facts.

On 12th September 1998 at Aylesford, Kent there was violence between this applicant and a man named George Ennis, who died two days later, allegedly as a result of injuries inflicted by the applicant.

On 25th September 1998 the applicant was arrested and interviewed three times. He was charged with murder, and detained in custody. On 28th September solicitors acting for the applicant wrote to the CPS seeking copies of the prosecution witness statements, or at least a summary of the prosecution evidence, so as to enable them to take proper instructions and advise their client. They also asked for information as to his previous convictions if any, and as to the previous convictions of any prosecution witnesses, copies of any statements made by the applicant, or notes ofinterview, and, significantly for present purposes -

"the names and addresses of any witnesses (including their statements if taken) whom you are not calling.

Full unused material."

A second letter of the same date raised a question of a second post-mortem examination of the deceased, and stressed the need for any pathologist instructed on behalf of the defence to have access not only to the Crown Pathologist's report but also to all available evidence from those who witnessed the violence. The letter also asked for details of previous convictions of the deceased.

The CPS initially sent a brief holding letter, and then on 14th October 1998 sent what it described as "a courtesy core bundle" which contained statements from three witnesses and a record of the interviews with the applicant on 25th September 1998. The letter ended-

"disclosure of unused material will take place in accordance with the Criminal Procedure and Investigations Act 1996 following committal proceedings."

On 15th October 1998 the CPS disclosed the post-mortem report which they had obtained, and

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some press material. That letter ended -

"I provide copies of these to you as they are, to a certain extent, 'public documents' but I reiterate the last paragraph of my letter dated 14th October 1998 that disclosure of unused material will take place in accordance with the Criminal Procedure and Investigations Act 1996 following committal proceedings."

On the same day the applicant's solicitors wrote two letters to the CPS to say that following meetings with counsel (in fact it was counsel for the applicant's mother who was also at that time in custody) consideration was being given to making additional voluntary disclosure to the prosecution, but only after the prosecution had itself made full disclosure. The second letter indicated that the defence hoped to be in a position to apply for bail on 19th October 1998, and continued- "it would, of course, be helpful if we could receive the disclosure well ahead of that date".

On 16th October 1998 the defence solicitors wrote to the CPS to point out that the pathologist's report referred to a further neuro-pathological report to follow, and asked when it would be available. The letter also enquired about the possibilty of further disclosure.

On 19th October 1998 the defence solicitors wrote of their concern over "the unusual slowness" with which material was being disclosed and their further concern that the prosecution was going to rely on the 1996 Act "to ensure that disclosure is as limited as possible". The letter therefore asked for -

"a full list of all potential witnesses including names and addresses in order that we may contact these people and take statements from them at this stage just in case the Crown has either not taken a statement or may not release the statement to us. It is quite clear that this is a case where many people have been interviewed by the police and we ought to make our own enquiries without delay."

On the same day a similar request was made direct to the police officer in charge of the investigation.

An application by the applicant for bail had been refused by the Magistrates' Court on 19th October, and on 22nd October it was refused by a High Court Judge. Meanwhile on 21st October the

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CPS replied to the defence solicitors saying-

"The prosecution are not dealing with this case in an exceptional fashion except in so far as I have already provided you with copies of key witness statements in advance of the formal committal papers. Should I receive any further statements from the police upon which the prosecution propose to rely in advance of the committal papers I shall adopt the same practice, bearing in mind Roger Lee is in custody.

I understand that you have been advised that witnesses likely to be prosecution witnesses have been seen by the police and have declined to be interviewed by yourselves. In due course you will receive the list of prosecution witnesses, but that will not include their addresses in accordance with the Magistrates' Courts (Witnesses Addresses) Rules. The names of persons seen by the police who are not treated as prosecution witnesses will be provided to you in due course. If you wish to make arrangements to see any of these persons, whether they be prosecution witnesses or part of the unused material, unless they expressly consent to their addresses being disclosed to yourselves contact will need to be made through the offices of the police."

The defence solicitors maintained pressure for disclosure, and on 29th October 1998 the CPS sent a set of post-mortem photographs under cover of a letter part of which reads-

"We have already made it clear to you that in addition to the disclosure that has already taken place on a voluntary basis such other material as we receive (and upon review decide that we shall rely upon as part of the prosecution case) will also be supplied to you. We are of course under no legal obligation to make any disclosure to you until the service of committal papers, but I would hope that you would agree that by what we have disclosed and a declaration of continuing the same vein we are demonstrating, and indeed actually showing, appropriate and due expedition to the handling of this case."

On 10th November 1998 the CPS sent some more copy documents and expressed the hope of being in a position to serve formal committal papers by 20th November, the relevant custody time limit being due to expire on 7th December 1998. In fact the formal committal bundle was served one day earlier, on 19th November. Initially committal proceedings were to be on 30th November 1998, but they were adjourned to 4th December at the request of the CPS to enable them to deal with matters raised by the defence solicitors in correspondence, which included a request for information as to the outstanding cases against the deceased. On 3rd December 1998 the CPS wrote to say that would be dealt with "if appropriate within the rules of disclosure". The letter ends-

"Disclosure will be dealt with in accordance with the Criminal Procedure and Investigations Act as soon as reasonably practicable after committal."

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On 4th December 1998 there was a further adjournment, and the custody time limit was extended to 21st December. On 14th December the defence formally requested disclosure prior to committal. On 21st December the CPS replied that-

"The disclosure of the unused material in this matter will be provided in accordance with CPIA 1996 as soon as is reasonably practicable after committal has taken place."

On 18th December the committal proceedings were adjourned to enable an application to be made for leave to move for judicial review, and these proceedings then commenced on the following day. Leave to move was granted on 26th January, and on 16th February an appeal against the first extension of the custody time limit was allowed. The applicant was then released on conditional bail.

On 19th February 1999 the CPS made some further disclosure in recognition of the fact that but for these proceedings primary disclosure pursuant to the 1996 Act would have already taken place. They simply listed the names of various persons, no doubt those who had been interviewed, and furnished some information as to the previous convictions of the deceased.

In their reply of 24th February 1999 the defence solicitors pointed out that the lists of names were of little use and continued-

"Presumably there are either statements and/or relevant notes of some sort in respect of the material that has been obtained by the police from each person named on the three pages. Is there any reason why such documents cannot be disclosed to us? We will then be able to take a view as to which, if any, of the persons so named should be interviewed by us."

They also asked for a copy of the police action book, and more information as to the previous convictions of the deceased.

The letter was acknowledged, but only to inform the solicitors that "any further disclosure outside the terms of the CPIA must await the decision of the Divisional Court."

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3. Issue.

The CPS could have argued that this application was not made promptly, and therefore the applicant is not entitled to ask this court to intervene. Sensibly it was decided not to take that course because there is a substantive point which does need to be resolved. The issue in this case is not about what should be disclosed, but about when disclosure should take place. The prosecution accepts that after committal there must be disclosure in accordance with the 1996 Act, but prior to this hearing the CPS was contending that until the committal has taken place the defence is not entitled even to the amount of disclosure which in this case they have had already.

Mr James Turner QC, for the applicant, contends that the obligation upon the prosecution to disclose arises at the outset, when the defendant is taken into custody and charged, and it is continuous thereafter. This does not mean that every item of information must be passed on piecemeal to the defence as soon as it becomes available to the prosecution, but it does mean that the prosecution must be constantly asking themselves "what disclosure does justice require now in all the circumstances of this case?" If the case involves an incident in a street seen by a lot of people the defence solicitors need to know the identities of the eyewitnesses before their memories fade. They may need a good deal of factual information in order to give proper instructions to a pathologist, or to advise the accused as to his plea. Information as to the previous convictions and general reputation of a complainant or a deceased may be highly material in connection with an application for bail so, Mr Turner contends, fairness demands that information such as that is disclosed at an early stage. A trial begins with a charge and ends with a verdict, so the procedure must be fair throughout. The disclosure obligation cannot be locked into one segment of the trial process.

4. Pre-Act Authorities on Disclosure.

Leaving aside for the moment the provisions of the 1996 Act, most of the authorities to which our attention has been invited deal with the extent of the obligation to disclose rather then when disclosure should take place, but, as Mr Turner points out, they show some evolution of the common law, and they explain the obligation of disclosure in a way which throws some light upon when disclosure ought to occur.

For present purposes I can start with the Attorney-General's Guidelines issued in 1981.

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Paragraph 2 provides -

"In all cases which are due to be committed for trial, all unused material should normally (i.e. subject to the discretionary exceptions mentioned in paragraph (6) be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case."

Paragraph 3(a) continues -

"If it will not delay the committal, disclosure should bemade as soon as possible before the date fixed. This is particularly important - and even might justify delay - if the material might have some influence upon the course of the committal proceedings or the charges upon which the justices might decide to commit."

Clearly the Guidelines envisaged disclosure normally taking place before committal proceedings, and indeed "as soon as possible before the date fixed", but that obligation was qualified by paragraph (6) which asserted that there exists a discretion not to make a disclosure - at least until counsel has considered and advised on the matter - in certain circumstances. The circumstances are set out, and they are not limited to sensitive material.

In R v Ward (1993) 1 WLR 619 a good deal was said about the extent of disclosure to be expected, including at 642 H the observation that-

"Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened a new line of defence."

It was also made clear that the Attorney-General's Guidelines did not fully represent the extent of the obligation at common law, and in dealing with scientific evidence the court, at 674 A said that "an incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters". Mr Turner invites us to focus on the word timely. The duty was said by the court to be continuous, applying "not only to the pretrial period but also throughout the trial".

In a summary of its conclusions in relation to non-disclosure the court in Ward made it clear

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that where the prosecution have a statement from a person who they know can give material evidence but who they decide not to call as a witness they should normally supply a copy of that statement to the defence. That is material in relation to the correspondence which has taken place in this case. What has happened so far is only a very limited start to the process of discovery as envisaged by the court in Ward.

In R v Davis (1993) 1 WLR 613 the Court of Appeal Criminal Division recognised that the general common law approach to the question of discovery had been changed by the decision in Ward and at 617 Lord Taylor CJ re-iterated the need to comply, voluntarily and without more, with the requirements in paragraph 2 of the Attorney-General's Guidelines. He also recognised that -

"Open justice requires maximum disclosure and whenever possible the opportunity for the defence to make representations on the basis of fullest information."

In July 1993 the Royal Commission on Criminal Justice reported and in Chapter 5 it expressed concern about the state of the law relating to prosecution disclosure following the decisions in Ward and Davis. Much of the concern related to the proper way to deal with sensitive material, which is not so far as I am aware an issue in this case, but at paragraph 49 the Royal Commission turned to the situation where sensitivity is not in issue, and said -

"We strongly support the aim of the recent decisions to compel the prosecution to disclose everything that may be relevant to the defence's case. But we accept the evidence that we have received that the decisions have created burdens for the prosecution that go beyond what is reasonable. At present the prosecution can be required to disclose the existence of matters whose potential relevance is speculative in the extreme. Moreover, the sheer bulk of the material involved in many cases makes it wholly impracticable for everyone of what may be hundreds of thousands of individual transactions to be disclosed.

In our unanimous view a reasonable balance between the duties of the prosecution and the rights of the defence requires that a new regime be created with two stages of disclosure. The first stage, of primary disclosure, would subject to appropriate exceptions be automatic. The second stage, of secondary or further disclosure, would be made if the defence could establish its relevance to the case. Where the prosecution and defence disagree on this aspect the court would rule on the matter after weighing the potential importance of the material to the defence."

The Royal Commission then went on to deal with the mechanics of its proposal in detail, but did not address the question of when primary disclosure should take place. It is however worth noting

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that what was proposed was not a modification of existing procedures, but the creation of "a new regime". The next decision to which I refer, R v CPS ex parte Warby (1993) 158 JP 190, is a decision of this court upon which Mr Carter-Manning QC for the respondent places considerable reliance. The charge was handling stolen goods. The CPS, and in response to a defence application the Magistrates' Court, refused to order disclosure of unused material prior to committal proceedings. The defendant then sought judicially to review the decision of the CPS, and it is clear from the judgment of Watkins LJ that the Attorney General's Guidelines and the case of Davis, as well as the newly published Royal Commission Report, were considered. The argument in favour of pre-committal disclosure was very much the same as the argument advanced before us, but with stress being laid upon the need to adduce material which might influence the course of the committal proceedings. The court in Warby was obviously concerned about burdening Magistrates' Courts with decisions as to disclosure, especially in relation to sensitive unused material relating to a trial on indictment, and at 196 Watkins LJ said-

"It would be entirely inappropriate for decisions as to disclosure of unused material to be taken at a lower level of judicial activity than the Crown Court."

He then said -

"As to the decision by the CPS to refuse to disclose unused material upon request prior to committal proceedings, I cannot see how that can possibly be reviewable. It is for the court to decide whether the CPS is entitled to withhold unused material. Any challenge, therefore, through non-disclosure can only be made following a court's decision alone. For the sake of emphasis, I should add that by court in this context, I refer exclusively to the Crown Court."

Auld J agreed.

What therefore is clear is that in the end Warby's case did not address the issue of what disclosure should be made by the prosecution prior to committal proceedings. The Divisional Court simply decided that it had no jurisdiction to review the exercise of discretion by the CPS. In later cases this court has shown rather less reluctance to consider the legal basis of decisions by the CPS, albeit the jurisdiction is one to be sparingly exercised (see R v DPP ex parte C (1995) 1 CR App R

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136). It is therefore not surprising that, as I understand the position, Mr Carter-Manning does not submit that we lack jurisdiction in the present case.

In Keane (1994) 1 WLR 746 the Court of Appeal Criminal Division considered the Crown Court's exercise of jurisdiction in relation to sensitive material which the prosecution wished to withhold, and at 752 B adopted what had been said by Jowitt J in R v Melvin 20th December 1993 unreported, namely that the trial judge should only be asked to consider documents which are material, that is to say those which can be seen on a sensible appraisal by the prosecution -

"(1) to be relevant or possibly relevant to an issue in the case;
(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
(3) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

In the present case Mr Turner submits that the Melvin approach should have been adopted by the CPS from the outset.

In May 1995 the Government published its consultation document on Disclosure. That was obviously triggered by the recommendations of the Royal Commission but the Commission had also made recommendations in relation to committal proceedings which were at that time still under consideration.

5. The 1996 Act - Disclosure

Part I of the Act deals with disclosure and applies to offences into which a criminal investigation was commenced on or after 1st April 1997. It is clear that in broad terms it adopts the two stage procedure for disclosure recommended by the Royal Commission, but in the case of an indictable offence the Act does not apply until after committal (see S.1(2a) and, as Mr Turner points out, the obligation upon the prosecutor in S.3 to give primary disclosure clearly envisages the possibility that some disclosure will have already taken place because S.3(1)(a) reads:

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"(1) The prosecutor must -
(a) Disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused ....."

The section then goes on to consider what prosecution material is material for the purposes of disclosure, and in S.3(6) provides that sensitive material must not be disclosed if the court so orders.

Once there has been primary disclosure by the prosecution S.5(5) requires an accused to give a defence statement to the court and to the prosecution within 14 days (see regulation 2 of the Defence Disclosure Time Limits Regulations 1997 (SI 1997 No.684). S.5(6) provides that a defence statement is a written statement -

(a) setting out in general terms the nature of the accused's defence,
(b) indicating the matters on which he takes issue with the prosecution, and
(c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

S.5(7) sets out how a defence statement must deal with the defence of alibi.

Service of the defence statement imposes upon the prosecution the obligation to give secondary disclosure. Subsequent sections make it clear that disclosure is a continuing obligation, and section 17 imposes an obligation of confidentiality in relation to material disclosed, contravention of which is a contempt of court (S.18).

S.21(1) excludes the application of rules of common law as to disclosure from the time of committal for trial, but not, as Mr Turner points out, from the time of arrest. By contrast where pursuant to S.23 and S.25in part II of the Act a Code of Practice has been prepared and brought into operation in relation to criminal investigations S.27(1) provides that the rules of common law "shall not apply in relation to the suspected or alleged offence". The relevant Code of Practice came into force on 1st April 1997, and in paragraph 2.1 it defines the "disclosure officer" as-

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"the person responsible for examining material retained by the police during the investigation, revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this: and disclosing material to the accused at the request of the prosecutor."

Paragraph 6.6 makes it clear that where an offence is triable only on indictment, or is likely to be tried on indictment, the disclosure officer must ensure that a schedule is prepared which lists each item of material. Material is "material of any kind, including information and objects, which is obtained in the course of a criminal investigation and which may be relevant to the investigation." Paragraph 6.9 requires that "the description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed." The schedule is then given to the prosecutor, preferably at the time when he gets the file containing material for the prosecution case. The Code in paragraph 7, also particularises certain information which should pass from the disclosure officer to the prosecutor, and enables the prosecutor generally to inspect and obtain copies. Paragraph 8 provides for the assistance of the disclosure officer in relation to secondary disclosure, and paragraph 10 provides for his assistance in relation to disclosure to the accused. Mr Carter Manning has invited our attention to the Code of Practice as a clear demonstration of the fact that in many criminal prosecutions the CPS prosecutor does not have control of or even immediate access to all potentially relevant material. It's access to the material is regulated by a statutory code framed in such a way as to facilitate the two stage disclosure provided for by the 1996 Act.

6. <u>1996 Act - committal.</u>

The 1996 Act dealt with other matters as well as disclosure, and of particular relevance for present purposes are the changes which were introduced in relation to committal proceedings in magistrates courts. Schedule I of the Act introduced S.5A-F into the Magistrates Courts Act 1980 and the effect is that:

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(1) Only evidence tendered by or on behalf of the prosecutor is admissible;
(2) Witnesses do not have to attend, so there is no cross examination;
(3) If the evidence discloses a case to answer the court will commit for trial.

Clearly the scope for defence activity in relation to committal proceedings has been drastically reduced, and so, Mr Carter-Manning contends, the need for discovery prior to committal proceedings has also been reduced. As the changes to committal proceedings were introduced in the same statute as the two stage procedure in relation to discovery it was clearly the intention of the parliament they should work in harmony.

7. Authorities after 1996 Act

Commentators were not slow to realise that the wording of part I of the new Act in relation to disclosure was such as apparently to leave undisturbed part of the old law. So paragraph 12-47 of the present 1999 edition of Archbold reads-

"The express abolition of the common law rules in relation to the period after the time at which the Act is made to apply, begs the question as to what happens to the common law rules relating to the disclosure of material by the prosecutor before the time when the Act applies. The Act does not purport to abolish any such rules."

As is pointed out in the subsequent paragraph the times from which the Act comes into operation in any particular case are arbitrary points in the committal process, and that paragraph continues-

"The common law duty of disclosure is plainly not dependent on such points in the criminal process being reached. The duty flowed from the general responsibility of prosecuting solicitor or counsel to act fairly, with a duty not to strive for conviction but to act in the character of a minister of justice assisting in the administration of justice ..... his general duty arose at the institution of proceedings and was a continuing duty that lasted until the conclusion of the proceedings."

One of the cases cited in support of that proposition is R - v Brown (Winston) (1998

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AC367) which concerned non-disclosure of material relating to the credibility of defence witnesses. In the House of Lords Lord Hope delivered a speech with which the other members of the House agreed, and at 374G he said:

"The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed."

He then reviewed the authorities and at 380C began his conclusion by saying:
"I would be inclined to attach less weight to the practical problems than that which was given to them to the Court of Appeal. If fairness demands disclosure, then a way of ensuring that disclosure will be made must be found."

In R - v - Stratford Justices ex parte Imbert, 8th February 1999 unreported, this court considered a contention that in summary proceedings the refusal by the CPS to serve in advance of the hearing statements of witnesses on whom the prosecution proposed to rely amounted to an abuse of process. Reliance was placed on the 1996 Act and upon article 6 of European Convention on Human Rights, and at page 15 of the transcript Buxton LJ said

"I of course accept that article 6, although it speaks of the right to a fair trial, is concerned also with the fairness of pre-trial proceedings, including not only disclosure but also investigation and the obtaining of evidence".

Mr Turner, whilst reserving his position as to whether or not Imbert was rightly decided, contends that some obligation must rest upon the CPS in relation to the period after arrest and before committal takes place. In many cases fairness demands there must be some disclosure at that time. Even if the custody time limit is not extended the period prior to committal may be quite considerable, and if the defence does not have access to information which it needs at an early stage it may not be able compellingly to advance points which should be advanced at the earliest possible opportunity (e.g. in support of an application for bail) and efforts to prepare the defence after the trail has gone cold may prove ineffective.

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The last authority to which I need refer is R - v - the Secretary of State for the Home Department ex parte Q, 5th March 1999 unreported, which concerned a challenge to a refusal of the Secretary of State to relocate a prisoner to another prison for the duration of a criminal trial. Although it was accepted that it was open to the Crown Court to stay proceedings where a public authority had acted in such a way as to prevent a fair trial taking place, Richards J found that exceptionally it was appropriate for the High Court to entertain an application for judicial review rather than leave the matter to be dealt with by the trial judge. He said

"Not only does the case concern the lawfulness of the decision of the Secretary of State outwith the trial process, but it also raises issues of principle which are the proper subject of consideration by this court".

Mr Turner admits that we are in a similar position in this case.

8. Further submissions

The principal submissions made on each side have been canvassed in the preceding paragraphs of this judgement, but it was an important part of Mr Turner's case that as the defence is expected to produce a defence statement within 14 days of completion of primary disclosure (even though that period can be extended) fairness does require that the defence should have as much relevant information as possible before time begins to run. He further submits that as the prosecution clearly has power to disclose prior to committal proceedings there must be a corresponding duty to exercise that power in the overall interests of justice. What therefore remains is a decision as to what the interests of justice require.

Mr Carter-Manning rightly points out that it is important for this court not to undermine the two stage disclosure process set up by the 1996 Act, or to ignore the mischief which that two stage process is intended to address, part of which was the burden cast upon the CPS by the pre-existing provisions of the common law. Paragraph 6 of his amended skeleton argument reads -

"It is submitted, in summary, that in matters to be tried in the Crown Court, the common law

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regards pre-committal disclosure as necessary where and only where the needs of the committal proceedings themselves require it to take place. Even then, the decision as to the need to disclose must be one to be taken by the responsible prosecutor."

As the case proceeded before us it was my impression that both leading counsel sensibly and helpfully adjusted their positions. Mr Carter-Manning recognised that his original formulation in his paragraph 6 was untenable, and in his further written submission he drew a distinction between (a) material which is drawn to the attention of the prosecutor during his ordinary work of preparation prior to committal, and which, he recognises he should disclose forthwith, and (b) the prosecutor's exercise of considering the file after committal in order to comply with the requirements of the 1996 Act. As Mr Carter-Manning put it in his final submission -

"The common law does not require full consideration of unused material until that stage. It does remain, however, to the extent, if matters are known by the prosecutor which, under "the old rules" would undoubtedly have been disclosed or information given, that "disclosure" should still take place."

9. Conclusion

In my judgement certain propositions can now be said to have emerged.

Z(1) The 1996 Act considerably reduced the ability of the defence to take an active part in committal proceedings, so the need for disclosure prior to committal was also reduced.

(2) Part I of the 1996 Act introduced a completely new regime in relation to disclosure. It replaces most if not all of the provisions of the common law from the moment of committal with a two stage process set out in sections 3 and 7 of the Act. The second stage only occurs in response to a defence statement.

(3) The disclosure required by the Act is and is intended to be less extensive than would have been required prior to the Act at common law.

(4) Although some disclosure may be required prior to committal (and thus prior to the period to which the Act applies) it would undermine the statutory provisions if the pre-committal discovery were to exceed the discovery obtainable after committal pursuant to the statute.

(5) The 1996 Act does not specifically address the period between arrest and committal,

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and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage. Examples canvassed before us were

(a) Previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail;
(b) Material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process:
(c) Material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all:
(d) Material which will enable the defendant and his legal advisors to make preparations for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye witnesses who the prosecution do not intend to use).

(6) Clearly any disclosure by the prosecution prior to committal cannot normally exceed the primary disclosure which after committal would be required by S.3 of the 1996 Act (i.e. disclosure of material which in the prosecutor's opinion might undermine the case for the prosecution). However, to the extent that a defendant or his solicitor chooses to reveal what he would normally only disclose in his defence statement the prosecutor may in advance if justice requires give the secondary disclosure which such a revelation would trigger, so whereas no difficulty would arise in relation to disclosing material of the type referred to in sub-paragraph 5(a)(b) and (c) above, and I accept that such material should be disclosed, the disclosure of material of the type referred to in sub-paragraph 5(d) would depend very much on what the defendant chose to reveal about his case.

(7) No doubt additions can be made to the list of material which in a particular case ought to be disclosed at an early stage, but what is not required of the prosecutor in any case is to give what might be described as full blown common law discovery at the pre-committal stage. Although the 1996 Act has not abolished pre-committal discovery the provisions of the Act taken as whole are such as to require that the common law obligations in relation to the pre-committal period be radically recast in the way that I have indicated.

(8) Within framework which I have attempted to outline I would accept Mr Turner's submission that even before committal a responsible prosecutor should be asking himself what if any immediate disclosure justice and fairness requires him to make in the particular circumstances of the case. Very often the answer will be none, and rarely if at all should the prosecutor's answer to that continuing piece of self examination be the subject matter of dispute in this court. If the matter does have to be ventilated it should, save in a very exceptional case, be before the trial judge.

10. Remedy

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At the conclusion of the hearing before us the prosecution agreed to give what amounts to full primary disclosure forthwith, and we therefore discharged the stay which has existed in relation to the committal proceedings pending the determination of the matter by this court. The Magistrates Court will soon fix a date for the committal proceedings. As disclosure is now taking place it was agreed that we need make no formal order. In the light of this judgement it will be apparent that in my view the defence asked for too much too soon, and the prosecution offered too little too late (especially in relation to the previous convictions of the deceased.) Hopefully however what we have said may prevent similar clashes in the future.

MR JUSTICE BLOFELD: I agree.

MR CARTER-MANNING QC: My Lord, I indicated to your Clerk one matter which certainly we would seek to bring to your Lordship's attention. It is on page 20 of the judgment, more helpfully, perhaps, starting at the very bottom of page 19.

LORD JUSTICE KENNEDY: It may be quite important that you tell me this by -- it may not. Some of the judgments are slightly more closely typed than others, so which paragraph?

MR CARTER-MANNING QC: It is paragraph 9, "Conclusion", sub-paragraph 6:

"(6) Clearly any disclosure by the prosecution prior to committal cannot normally exceed the primary disclosure which after committal would be required by S.3 ..."

Then after the brackets:

> "... However, to the extent that a defendant or his solicitor chooses to reveal what he would normally only disclose in his defence statement the prosecutor may in advance give the secondary disclosure ..."

We are submitting, if possible, that to clarify that as much as anything the words "if justice requires" could be added after "may" because otherwise it produces a situation where there is clear approach open to the defence to seek secondary disclosure pre-committal in a way which, to some extent, will defeat the Act. It may be that we are being unduly cautious.

LORD JUSTICE KENNEDY: I do see, for my part, what you are concerned about

MR CARTER-MANNING QC: It is the anxiety that clearly the Act requires a system which allows for the defence's case statement to stay in place. If justice requires earlier disclosure,

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then, of course, the spirit of your judgment (inaudible) by those words and it clarifies what might become a litigious issue in other cases and puts the onus firmly on the Crown Prosecution Service.
LORD JUSTICE KENNEDY: Save if I put "if justice requires in advance", otherwise I do not think it works as a matter of English. Mr Turner, what do you say as to that?

MR TURNER QC: My Lord, we are a little concerned about anything that may cut down the obligation to give full and proper consideration to the matter in the light of anything that the defence have disclosed. We are keen that it should be made apparent that if what is, in effect, a defence statement comes at an earlier stage, then so also the prosecution has an obligation at that earlier stage.

LORD JUSTICE KENNEDY: You noticed we used the word "may".

MR TURNER QC: My Lord, yes. It may be that my learned friend's suggestion -- which was, in fact, my decision, but the two of us batted about various alternatives this morning. The words my learned friend put are the least objectionable to us, if I can put it that way.

LORD JUSTICE KENNEDY: On the basis that we do not think it does your submission any damage in any event, after the words "in advance" "if justice requires".

MR TURNER QC: I hope your Lordships have also received a note from us

LORD JUSTICE KENNEDY: We have and those too, subject to anything that Mr Carter-Manning may wish to say, we incorporate and are grateful for. The "bind" in the first one was clearly a typing error, and so is the second one, but the "only" was simply targeted to the facts of this case. If you are content that we should do it on a wider basis, it shall be done.

MR TURNER QC: My instructing solicitor points out one other proposed correction. On page 5, at the top, there is a date "18th December". I am told that Mr Carter-Manning believes, I understand, the date should be 18th January.

LORD JUSTICE KENNEDY: With those corrections, which we incorporate and for which we are grateful, for the reasons set out in the judgment, there will be no Order but there will be judgment accordingly.

MR TURNER QC: My Lord, the only other matter that remains is the question of costs of these proceedings. Costs, of course, usually follow the event. The event here, we submit, is that the Applicant has substantially succeeded. He has achieved something that he would not have obtained were it not for the institution of these proceedings. He has also established certain disputed matters of principle, that there is an obligation on the Crown Prosecution Service to give positive consideration to these matters, not just the "if we happen across" sort of approach that was contended for by my learned friend. The Crown Prosecution Service not only contested the matter substantively, but even opposed the application for the grant of leave, so the Applicant had to come to court to obtain his relief.

My Lord, the other alternative that is available, other than an Order for costs against the Respondent, which is what I primarily seek, is to invite your Lordships to consider making a defendant costs Order pursuant to section 16(5) of the Prosecution of Offences Act 1985. I have copies of that that I can hand you to your Lordship.

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LORD JUSTICE KENNEDY: I will be grateful if we can have it. We have had it most recently, but nonetheless one wants to see it.

MR TURNER QC: I have copied the whole of section 16 from Archbold. It is on the second page at 6-6:

"(5) Where-

(a) any proceedings in a criminal cause or matter ... [and these we submit are clearly in a criminal cause matter] are determined before a Divisional Court of the Queen's Bench Division...

the court may make a defendant's costs order in favour of the accused."

It is right to say that the Applicant is legally aided in this matter, so whatever form of costs Order was made in his favour, it would in a sense be simply a transference of funds from one public pocket to another public pocket, but in this day and age it is important that it should come from the right public pocket given the budgetary requirements and the pressures on the various funds.

Furthermore, your Lordships will be aware from the history of this matter that we have had what can only be described as the devil's own job to persuade the Legal Aid Authority that there was any merit in the proceedings in obtaining the appropriate legal aid cover. If an Order for costs were to be made, it will be easier for us to satisfy them that we had indeed achieved a benefit by these proceedings and, to some extent, establish our credibility in the sense of any future opinions that the matter does have merit.

LORD JUSTICE KENNEDY: We are attracted by the second option, but not the first. Do you want to say anymore, Mr Carter-Manning?

MR CARTER-MANNING QC: My Lord, no.

RULING AS REGARDS COSTS

LORD JUSTICE KENNEDY: Very well, we will make a defendant's costs Order in favour of the Applicant.

I am sorry that we, as it were, called for you at short notice and did not give you the normal amount of time before handing down the judgment, but my Lord, Blofeld J, cannot be here tomorrow and it was rather desirable that we actually got this case dealt with this week. We are sorry for any inconvenience.
MR TURNER QC: We are grateful.

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MR CARTER-MANNING QC: We are grateful.

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