COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF DOWSETT v. THE UNITED KINGDOM

(Application no. 39482/98)

FINAL

24/09/2003

JUDGMENT

STRASBOURG

24 June 2003

In the case of Dowsett v. the United Kingdom,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Sir Nicolas BRATZA,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr V. BUTKEVYCH,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 June 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 39482/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr James Dowsett ("the applicant"), on 20 September 1994.

2. The applicant, who had been granted legal aid, was represented by Ms A. Bromley, a solicitor practising in Nottingham, and Mr A. Masters, a barrister practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

3. The applicant alleged that he had been deprived of a fair trial by virtue of the prosecution's failure to disclose all material evidence in their possession.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. By a decision of 14 May 2002, the Chamber declared the application admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1946 and is currently detained in HM Prison Kingston, Portsmouth.

A. The Crown Court trial

10. On 22 March 1989 at Norwich Crown Court the applicant was convicted of the murder of Christopher Nugent and sentenced to life imprisonment.

11. Mr Nugent had been the applicant's business partner. He was shot and killed at their business premises on 15 December 1987 by Stephen Gray, who left the scene of the crime in a car driven by Gary Runham.

12. Runham and Gray were arrested in January 1988 and the applicant was arrested in February 1988. He was charged with murder jointly with Runham, Gray and two other men who had allegedly provided money to pay for the killing of Christopher Nugent.

13. The Crown's case was that the applicant had paid Runham and Gray 20,000 pounds sterling (GBP) to kill Nugent, because Nugent knew too much about the applicant's involvement in mortgage fraud.

14. The applicant's defence was that he had hired Runham and Gray to break one of Nugent's limbs in order to put him out of action for a few weeks while the applicant effected his own transfer to another branch of the firm. He alleged that he had paid Runham and Gray GBP 7,500 for the assault, but that after Gray had killed Nugent, Gray blackmailed the applicant into paying him more money. The applicant claimed that he would have had no motive for killing Nugent, since the latter was himself involved in the fraudulent activities being perpetrated through the business. The applicant submitted, however, that his representatives felt unable to pursue this line of argument satisfactorily because of lack of evidence of Nugent's dishonesty; the jury were asked to accept the applicant's word alone on this issue.

15. Runham and Gray pleaded guilty to murder. Gray gave evidence for the prosecution against the applicant concerning the alleged murder conspiracy. The two alleged co-conspirators, who according to the

prosecution had, together with the applicant, paid for Nugent to be murdered, were acquitted.

B. The post-trial disclosure

16. Following his conviction, the applicant complained to the Police Complaints Authority (PCA) about Suffolk Constabulary's refusal to disclose material evidence. After investigation, in a letter of 30 October 1992 to the applicant, the PCA reported that it could not support any allegation of perversion of the course of justice but had found various instances of negligence.

17. According to the applicant, in July 1993 he was informed that there were seventeen boxes of hitherto undisclosed material. The applicant contended that some of this evidence would have supported his defence that he had had no need to murder Nugent to ensure his silence since it showed that the latter was also deeply involved in the fraudulent activities perpetrated through the business. The applicant claimed that some of the material from the seventeen boxes was disclosed to him in the week prior to his appeal hearing, while other material from the boxes remained undisclosed.

18. According to the Government, the evidence which was not disclosed at first instance, but which was disclosed prior to the applicant's appeal, fell into two categories. The first type of evidence derived from the Holmes computer system used by the police officers conducting the murder inquiry to store and cross-reference all the information obtained in the course of the inquiry. The computer data included documents known as "messages" which recorded information when first received by an officer, and documents known as "actions" which recorded the steps to be taken by an officer in response to a message and the result of any such further inquiry. At the time of the trial, the prosecution took the view that the computer system was being used as a tool for the police investigation and that the data contained in it was not subject to disclosure under the Attorney-General's Guidelines (see "Relevant domestic law and practice" below), although any witness statements or exhibits obtained in response to a message or action should be, and were, disclosed as "unused material".

19. The Government submitted that, following the applicant's conviction, and in the light of developments in the common-law duty of disclosure (see below), the prosecution reviewed their position and decided that the data stored on the computer system did amount to disclosable material. Prior to the applicant's appeal, therefore, the prosecution disclosed the messages and actions held by the police. Some 4,000 actions had been disclosed, one of which was referred to by the applicant in support of his appeal.

20. In the Government's submission, the second category of evidence undisclosed at first instance related to the parallel investigation into mortgage fraud by a number of people, including the applicant and Nugent. At an early stage, the prosecution decided to keep the murder and fraud investigations separate and that there was no duty under the Attorney-General's Guidelines to disclose the material gathered in the fraud inquiry to the defendant charged with murder. Following the applicant's conviction and the development of the common law, the prosecution reconsidered their decision and, prior to the applicant's appeal, made full disclosure of the material obtained in the fraud inquiry.

C. The undisclosed material

21. Prior to the hearing before the Court of Appeal, the prosecution served on the applicant a schedule indicating what material was still being withheld following the review of the prosecution's duty of disclosure. In respect of some of the items in the schedule, the reason given for non-disclosure was "legal and professional privilege"; in respect of other items it was "public interest immunity"; and in respect of certain other items, for example document no. 580, no reason was given to explain the decision to include the document in the list of withheld evidence. Counsel for the defence was in contact with the prosecution concerning possible further disclosure. A letter dated 23 March 1994 from the Branch Crown Prosecutor indicated that a number of documents, including document no. 580, were on the list of withheld material.

22. Document no. 580 subsequently came into the applicant's possession. It is a letter, dated 12 April 1988, from a firm of solicitors acting for Gray addressed to Detective Chief Inspector Baldry of the Suffolk Constabulary, and reads as follows:

> "...
>
> Further to our several discussions concerning Mr Gray, you will of course be aware that I did visit him in Leicester Prison on 26 March.
>
> He has requested a transfer either to Brixton Prison or Wormwood Scrubs if this is at all possible and I should be grateful if you would let me know whether there is any possibility of Mr Gray receiving a transfer.
>
> Secondly I now understand that apparently Mr Gray understands that you would be willing to support him receiving a straight term of life imprisonment and an application for early parole.
>
> Obviously I have explained to Mr Gray the position concerning sentencing but perhaps you would set out your position so far as possible concerning these matters.

Thirdly I understand that Mr Gray's wife is to be produced at fortnightly intervals to Leicester Prison for visits and perhaps again you could clarify the position.

I look forward to hearing from you ..."

D. The appeal

23. The hearing of the applicant's appeal took place on 28 and 29 March 1994. Non-disclosure of evidence at trial, particularly evidence discovered in the parallel mortgage fraud investigation, was one of the applicant's grounds of appeal to the Court of Appeal, but no mention was made of document no. 580 or of the other documents which continued to be withheld by the prosecution. The applicant also relied on the fact that the trial judge had omitted to direct the jury that a person may lie for reasons unconnected with his guilt in relation to the offence with which he is charged (a "Lucas" direction), and that the fact that, during interviews with the police the applicant had denied all knowledge of any plot to harm Nugent, did not mean that he had been involved in his murder.

24. Dismissing his appeal on 29 March 1994, the Court of Appeal remarked that in the course of his summing-up the judge had not suggested that the applicant's lies could amount to corroboration of the other evidence, and had reminded the jury of defence counsel's submissions in relation to the applicant's lies. Although the summing-up should have included a "Lucas" direction, no miscarriage of justice had occurred. On the question of non-disclosure the court observed:

"... As the trial was conducted, Nugent's dishonesty was made perfectly plain to the jury. The appellant himself had admitted being dishonest, and had said in the course of his evidence that Nugent was party to all the dishonest resorts to which he had lent himself in making false representations and forging documents. Accordingly it was fully before the jury that Mr Nugent was dishonest. ...

We have been taken through various parts of the evidence ... and we are quite satisfied that ... Mr Nugent's involvement in the deep dishonesty of this business was fully canvassed before the jury. ... Accordingly, although ... the stricter regime of prosecution disclosure which now prevails might well have required further disclosure than was actually made, we do not consider that this ground is one which has any substance in regard to the outcome of the case. ..."

The Court of Appeal concluded:

"There was overwhelming evidence that the appellant initiated a plot against the victim Nugent. There was likewise strong evidence that he had indicated what he wanted was to get rid of Nugent. The money actually paid, and indeed even the sum mentioned by the appellant was in our view out of proportion to a plot simply to 'duff up' the victim. Moreover, on analysis such a plot made no sense. Each member of this Court is of the clear opinion, despite the blemishes in an otherwise impeccable summing-up, that no miscarriage of justice has actually occurred. ..."

E. The alleged significance of document no. 580

25. The applicant believed that an inducement was promised to Gray by the prosecuting authorities in exchange for his testifying against him. In addition to the above letter, which the applicant claimed supported his hypothesis, he referred to the fact that his tariff of imprisonment (that is, the period to be served before review by the Parole Board) under the life sentence had been set at twenty-five years, but was subsequently reduced to twenty-one years. Runham, who had provided the murder weapon and drove the get-away car, received a tariff of sixteen years. Gray, who had shot and killed Nugent, had his tariff set at eleven years and was released in 1999. In April 1999 the Home Office wrote to Runham, refusing to reduce his tariff:

> "The Secretary of State holds Stephen Gray to be as culpable as you are, even though he fired the murder weapon and you did not. When the tariff was set for Stephen Gray, the then Secretary of State took into account that he had, like you, pleaded guilty to murder but had in addition been '... a very important witness for the prosecution'. ..."

26. The Government denied that any inducement was offered to Gray. Under cover of a letter dated 27 June 2001, they sent to the Court undated statements from three senior officers in the Suffolk Constabulary who had been involved in the murder investigation.

(a) The statement of Chief Superintendent Green reads:

> "I have seen a copy of the letter dated 12 April 1988 from Ennions, Solicitors ... to my then colleague, Mr Baldry. I can confirm that this letter is genuine and was recorded as Document D-580 during the course of the investigation into the murder of Mr Nugent.
>
> I have no recollection of this letter after thirteen years and I cannot remember ever discussing it with Mr Baldry. At no time was I ever involved in any debate regarding the issue of Mr Gray receiving a 'straight term of life imprisonment and an application for early parole'.
>
> I can confirm that I did not offer Mr Gray any form of inducement to give evidence against Mr Dowsett or other defendants. To the best of my recollection, Gray's motives were that he was simply attempting to 'clear his plate' by telling the whole truth about the circumstances of the case, whilst at the same time ensuring that Dowsett and others faced their share of the responsibility for the crime. I do recall that Mr Gray hoped that his honesty at the trial would one day assist him to make a successful application for parole.
>
> I would like to emphasise that I spent six days with Mr Gray at Winchester Prison during the preparation of his statement and can categorically state that all one hundred and one pages of the document were written with Mr Gray's consent and without any form of inducement."

(b) The statement of Detective Chief Inspector Baldry, now retired, reads:

> "This murder happened in 1987 and is not now fresh in my memory.

However I do remember clearly that I gave no indications to interviewing officers or to Gray himself that in return for his support we would aid an application for a shorter sentence. Gray was a very dangerous murderer who I considered enjoyed carrying out his 'murder' contract with Mr Dowsett. This matter was so grave that no such undertaking could honestly have been given.

I do remember that Gray at one time was on hunger strike in prison and that we helped his wife to visit him in prison. How this help was given I do not remember - it may have been in the role of carrying messages to and from."

(c) Detective Chief Inspector Abrahams, also now retired, said in his statement:

"Concerning the letter Document D-580 I can categorically state that I did not personally offer Gray any inducement or arrangement relating to his sentence. Nor did I have any discussions with his legal representative with regard to his sentence. Equally, I did not instruct any of my subordinate officers including the interview team questioning Gray so to do.

As far as I am aware Gray throughout his detention and taped questioning was dealt with in accord with the Police and Criminal Evidence Act.

I have been unaware of this letter until now but I am sure Chief Inspector Mike Baldry (now retired) may be of some help to you.

I would point out that Gray was arrested at Mildenhall Police Station on 23 January 1988 after which the murder management team was joined by Mr Christopher Yule of the Crown Prosecution Service, Ipswich, who advised on all legal aspects of the case. He was later joined by Mr (now Sir and a High Court Judge) David Penry-Davey QC and Mr David Lamming of Counsel, who advised on what was to be a complex case not only involving murder, conspiracy to murder but also large scale mortgage fraud.

I am not aware that any representations were made to the trial judge concerning any reduction in Gray's tariff. If this had been the case then the application would have had to be made through prosecuting counsel.

For your information I include below some relevant dates and points that you may already be aware of in relation to the murder, but I think they are worth emphasising:

15 December 1987: Christopher Nugent found murdered at his business premises that he owned with his partner Dowsett.

23 January 1988: Gray gave himself up at Mildenhall Police Station and admits the offence naming Dowsett, Runham and others as part of a murder conspiracy.

26 January 1988: Gary Runham arrested for the murder. He admits the offence naming Dowsett, Gray and others. Runham did the groundwork in planning Nugent's murder and propositioned Gray at a later stage to do the actual killing.

1 February 1988: Dowsett and others arrested for the murder.

17 February 1988: I was withdrawn from the everyday management of the inquiry and returned to Force Headquarters. DCI Baldry took over this role.

December 1988: Gray and Runham appear at Crown Court, plead guilty to the murder and are sentenced to life imprisonment.

January 1989: Gray agrees to become a witness for the prosecution and Detective Inspector Green (now Chief Superintendent) obtains a witness statement.

30 January 1989: Trial of Dowsett and others commences. ...

Gray appeared as a prosecution witness. Runham did not. The jury unanimously found Dowsett guilty of murder and he was sentenced to life imprisonment.

Prosecution witness O'Dowd gave evidence to the fact that Dowsett admitted the murder to him and stated that Dowsett had said that 'if Abrahams gets too close then he'll get the same' (or words to that effect).

16 December 1990 Dowsett made a formal complaint against me, other officers and Mr Yule [Crown Prosecution Service] that we perverted the course of justice in relation to his trial. The matter was investigated by an outside Police Force and was found by the DPP [Director of Public Prosecutions] and the PCA to be totally unsubstantiated.

Dowsett latter appealed against his conviction to the Court of Appeal but the Judges were unanimous in their judgment to disallow his application.

The above is to the best of my recollection. I do not know what tariffs were set by the Judge in his sentencing of all three defendants but I assume credit was given for Gray and Runham's guilty pleas."

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty also extends to statements of any witnesses potentially favourable to the defence.

28. In December 1981 the Attorney-General issued guidelines, which did not have the force of law, concerning exceptions to the common-law duty to disclose to the defence certain evidence of potential assistance to it ((1982) 74 Criminal Appeal Reports 302 – "the Guidelines"). According to the Guidelines, the duty to disclose was subject to a discretionary power for prosecuting counsel to withhold relevant evidence if it fell within one of the categories set out in paragraph 6. One of these categories (6(iv)) was "sensitive" material which, because of its sensitivity, it would not be in the public interest to disclose. "Sensitive material" was defined as follows:

"... (a) it deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those services once his identity became known; (b) it is by, or discloses the identity of an informant and there are reasons for fearing that the disclosure of his identity would put him or his family in danger; (c) it is by, or discloses the identity of a witness who might be in

> danger of assault or intimidation if his identity became known; (d) it contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he is a suspect; or it discloses some unusual form of surveillance or method of detecting crime; (e) it is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier – e.g. a bank official; (f) it relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matters prejudicial to him; (g) it contains details of private delicacy to the maker and/or might create risk of domestic strife."

29. Subsequent to the applicant's trial in 1989 but before the appeal proceedings in March 1994, the Guidelines were superseded by the common law.

30. In *R. v. Ward* ([1993] 1 Weekly Law Reports 619), the Court of Appeal dealt with the duty of the prosecution to disclose evidence to the defence and the proper procedure to be followed when the prosecution claimed public interest immunity. It stressed that the court and not the prosecution was to be the judge of where the proper balance lay in a particular case:

> "... [When] the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. Policy considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence. If, in a wholly exceptional case, the prosecution are not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned."

The Court of Appeal described the balancing exercise to be performed by the judge as follows:

> "... a judge is balancing on the one hand the desirability of preserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed."

31. The Court of Appeal's judgment in *R. v. Davis, Johnson and Rowe* ([1993] 97 Criminal Appeal Reports 110) set out the procedures to be followed if the prosecution wished to withhold unused material from disclosure on grounds of public interest immunity including, where appropriate, making an application to the court *ex parte*.

32. In *R. v. Keane* ([1994] 1 Weekly Law Reports 747), the Court of Appeal emphasised that, since the *ex parte* procedure outlined in *R. v. Davis, Johnson and Rowe* was "contrary to the general principle of open justice in criminal trials", it should be used only in exceptional cases. It would, however, be an abdication of the prosecution's duty if, out of an abundance of caution, it were simply "to dump all its unused material in the court's lap and leave it to the judge to sort through it regardless of its materiality to the issues present or potential". Thus, the prosecution should

put before the court only those documents which it regarded as material but wished to withhold. The test of "materiality" was that an item should be considered as disclosable if

> "[it] can be seen on a sensible appraisal by the prosecution:
>
> (i) to be relevant or possibly relevant to an issue in the case;
>
> (ii) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or
>
> (iii) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (i) or (ii)".

If the prosecution was in any doubt as to the materiality of any such evidence it should ask the court to rule on the question.

33. In 1996 a new statutory scheme covering disclosure by the prosecution came into force in England and Wales. Under the Criminal Procedures and Investigations Act 1996, the prosecution must make "primary disclosure" of all previously undisclosed evidence which, in the prosecutor's view, might undermine the case for the prosecution. The defendant must then give a defence statement to the prosecution and the court, setting out in general terms the nature of the defence and the matters on which the defence takes issue with the prosecution. The prosecution must then make a "secondary disclosure" of all previously undisclosed material "which might reasonably be expected to assist the accused's defence as disclosed by the defence statement". Disclosure by the prosecution may be subject to challenge by the accused and review by the trial court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 3 (b)

34. The applicant alleged that the proceedings before the Crown Court and the Court of Appeal, taken together, violated his rights under Article 6 §§ 1 and 3 (b) of the Convention, the relevant parts of which state:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

..."

A. The parties' submissions

1. The applicant

35. The applicant submitted that non-disclosure of evidence which was acknowledged to be relevant and material undermined the right to a fair trial and in particular the principles of equality of arms and the rights under Article 6 § 3 (b) to adequate facilities for the preparation of the accused's defence. Where, as in this case, evidence was withheld by the prosecution at trial and on appeal, without the approval of any judicial authority, there was no safeguard against abuse and the procedure was plainly incompatible with Article 6. Although it was its duty to do so, the prosecution made no application at the trial or during the appeal *ex parte* to obtain the courts' ruling on the withheld items. The defence could not be criticised in the circumstances for not pressing for the Court of Appeal to conduct a review. In any event, the procedure in *R. v. Keane* (see paragraph 32 above) whereby it was for the prosecution to assess whether evidence was material or relevant was inadequate as it provided no basis on which the defence could properly scrutinise or challenge its assessment. The applicant invited the Court to reconsider the arguments for special counsel to review undisclosed material.

36. In this case, there was evidence not disclosed at trial but disclosed on appeal and evidence neither disclosed at trial nor on appeal, such as document no. 580. The Court of Appeal acknowledged that the withholding of the material was unsatisfactory but went on *ex post facto* to substitute its view for that of the jury. The applicant denied that document no. 580 was disclosed by the prosecution before the appeal, and referred to his own counsel's recollection and to a letter from the Branch Crown Prosecutor, dated 23 March 1994, refusing the disclosure of a number of documents, including no. 580, as "withheld material". Document no. 580 had been sent to him anonymously in prison in late 1997 and was relevant to the issue of Gray's credibility as a prosecution witness. He contended that there might be other material evidence which remained undisclosed. He relied on the Court's judgment in *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), where it was emphasised that the trial court,

and not the prosecution, should be the ultimate judge on questions of disclosure of evidence.

2. The Government

37. The Government submitted that the proceedings taken as a whole were fair and in accordance with Article 6 § 1. They contended, relying, *inter alia*, on *Edwards v. the United Kingdom* (judgment of 16 December 1992, Series A no. 247-B), that the prosecution's failure at first instance to disclose the actions and messages held on the Holmes computer system and the materials gathered during the fraud inquiry did not deprive the applicant of a fair trial because this material was disclosed in time for the hearing in the Court of Appeal. His representatives could have asked for an adjournment if they had thought it necessary in order fully to consider the newly disclosed evidence.

38. The Government further submitted that, prior to the hearing in the Court of Appeal, the prosecution served on the applicant a schedule indicating what material had been withheld from disclosure following the review by the prosecution of its duty of disclosure. The schedule included documents nos. 375, 572, 573, 580, 590, 614, 620 and 625. In the event, the prosecution did not place this material before the Court of Appeal or apply for an *ex parte* hearing to decide whether or not it should be disclosed. Instead, the prosecution applied a test of "materiality" similar to that set out by the Court of Appeal in *R. v. Keane* (cited above), and concluded that the items in question were not "material" and thus did not have to be disclosed or placed before the court. The applicant's counsel could have discussed this point with the prosecution before the appeal hearing and, if necessary, could have applied to the Court of Appeal for a review of the prosecution's decision and for disclosure of any of the documents listed in the schedule.

39. The Government could not explain how document no. 580 came into the applicant's possession, but considered that it must have been disclosed to the applicant by the prosecution shortly before the appeal hearing in March 1994, as the prosecution continued to reassess its duty of disclosure in the light of developments in the common law. The schedule marked by junior prosecution counsel showed that this document had been ticked for disclosure, and on a later schedule it no longer appeared as being withheld. Disclosure was the only sensible explanation for the applicant's possession of the letter.

B. The Court's assessment

40. As the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set out in paragraph 1 (see *Edwards,* cited above, p. 34, § 33), the Court has not examined the applicant's allegations separately from the standpoint of paragraph 3 (b). It has addressed the

question whether the proceedings in their entirety were fair (ibid., pp. 34-35, § 34).

41. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria,* judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67). In addition Article 6 § 1 requires, as indeed does English law (see paragraphs 27-33 above), that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see *Edwards*, cited above, p. 35, § 36).

42. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused (see, for example, *Doorson v. the Netherlands,* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see, for example, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Doorson* and *Van Mechelen and Others*, both cited above, p. 471, § 72, and p. 712, § 54 respectively).

43. In cases where evidence has been withheld from the defence on grounds of public interest immunity, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see *Edwards*, cited above, pp. 34-35, § 34). Instead, the Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms, and incorporated adequate safeguards to protect the interests of the accused.

44. The Court observes that this case has strong similarities to *Rowe and Davis* (cited above). As in that case, during the applicant's trial at first instance the prosecution decided, without notifying the judge, to withhold

certain relevant evidence on grounds, *inter alia*, of public interest immunity. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information for the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1; nor is it in accordance with the principles recognised in English case-law from the Court of Appeal's judgment in *R. v. Ward* onwards (see paragraphs 30 et seq. above).

45. While at the commencement of the applicant's appeal prosecution counsel disclosed some previously withheld material, it notified the defence that certain information remained undisclosed, but did not reveal the nature of this material. Unlike in *Rowe and Davis*, however, the Court of Appeal did not proceed itself to review the remaining material in an *ex parte* hearing.

46. As regards the material disclosed by the prosecution prior to the appeal, the so-called "actions" and the materials in the fraud inquiry, the Court observes that the applicant was able to make use of it to support his arguments before the Court of Appeal and that the Court of Appeal was assisted by defence counsel in its assessment of the nature and significance of this material in reaching its conclusion as to whether or not the applicant's conviction should stand. This procedure was, in the Court's view, sufficient to satisfy the requirements of fairness as regards the material disclosed after the first-instance hearing (see *Edwards*, cited above, §§ 36-37).

47. There is a dispute between the parties as to whether one particular item, document no. 580, which contained material possibly relevant to discrediting Gray, was in fact disclosed to the defence shortly before the appeal (see paragraphs 22, 36 and 39 above). The Government on the one hand pointed to the prosecution schedules which they interpreted as indicating that document no. 580 had been removed from the list of withheld material and asserted that disclosure was the only sensible explanation for the applicant's possession of the document; the applicant on the other hand provided a letter from his counsel stating that the prosecution did not provide the defence with the document and put forward his own account of being sent the document anonymously. There was also a letter from the prosecution dated 23 March 1994, some five days before the appeal hearing, which indicated that document no. 580 continued to be withheld from the defence. There is therefore unambiguous evidence showing that the letter concerned had not been disclosed by the eve of the appeal hearing and only indirect, circumstantial evidence that the prosecution might have changed its mind at the last moment. The Court is not persuaded therefore that the Government have shown that this letter, relevant to the applicant's defence, was made available to his counsel in time for use at the appeal. This finding is not however essential to the reasoning in this case as in any event it is not in dispute that other

documents were not disclosed at this time, on the basis, *inter alia*, of the prosecution's assessment that public interest immunity was applicable to them.

48. The Government have pointed out that the applicant could himself have requested the Court of Appeal to review this material. This is no doubt true and might in theory have resulted in the court overruling the prosecution's view and making further documents available at the appeal. However, the Court notes that in *Rowe and Davis* (cited above, § 65) it did not consider that the review procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge:

> "Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defence case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal *ex post facto* and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence."

49. In this case, in deciding whether the material in issue should be disclosed, the Court of Appeal would neither have been assisted by defence counsel's arguments as to its relevance nor have been able to draw on any first-hand knowledge of the evidence given at trial. An application to the Court of Appeal in those circumstances could not be regarded as an adequate safeguard for the defence.

50. In conclusion, therefore, the Court reiterates the importance that material relevant to the defence be placed before the trial judge for his ruling on questions of disclosure at the time when it can serve most effectively to protect the rights of the defence. In this respect the instant case can be distinguished from *Edwards* (cited above), where the appeal proceedings were adequate to remedy the defects at first instance since by that stage the defence had received most of the missing information and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence (p. 35, §§ 36-37).

51. In light of the above, the Court finds no reason to examine the applicant's argument that the procedure set out in *R. v. Keane* fails to satisfy the requirements of Article 6 in placing an obligation on prosecution counsel only to place material it considers relevant before the court for its ruling on disclosure, or to reconsider the arguments militating in favour of

special counsel reviewing undisclosed material as an additional safeguard (see, for example, *Fitt v. the United Kingdom* [GC], no. 29777/96, §§ 30-33, ECHR 2000-II).

52. It follows that the applicant did not receive a fair trial and that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

54. The applicant claimed 2,675 pounds sterling (GBP) in respect of pecuniary damage for costs incurred by him or on his behalf while in prison from March 1989 to September 2002 (including postage, telephone calls, photocopying, text book and stationery costs). He asked the Court to award a fair and equitable amount in respect of non-pecuniary damage.

55. The Government submitted that it was not apparent how the items listed in respect of pecuniary damage related to his application to the Convention institutions, and that there was no supporting evidence for his claims (as, for example, an estimated hundred letters a year over thirteen years). As regarded non-pecuniary damage, they noted that the applicant had been convicted of a very serious crime and there could be no speculation as to the result of the applicant's trial if there had been no breach of Article 6. They argued that a finding of violation would constitute sufficient just satisfaction.

56. The Court notes that it cannot deduce from the applicant's submissions what items of expenditure relate to the substance of his complaints under the Convention, or can be attributed to the process of exhaustion of domestic remedies in that regard. In any event, this item may be more appropriately considered under the heading "Costs and expenses" below.

Concerning non-pecuniary damage, the Court has had regard to similar cases and concludes that the finding of a violation in this case constitutes in itself sufficient just satisfaction.

B. Costs and expenses

57. The applicant claimed GBP 15,505.63 for costs and expenses in bringing the application, which included GBP 7,960.33 for counsel's fees, inclusive of value-added tax (VAT).

58. The Government considered that the claim was excessive for a case that had not gone beyond the written stage. It noted that the solicitors were charging more than three times the rate applicable under the legal-aid scheme and that the amount of work claimed for particular items seemed unnecessary (for example, seventeen hours by counsel to prepare a five-page letter in November 2001 and twenty-five hours by counsel and solicitors to produce a three-page letter on 30 September 2002).

59. Having regard to the subject matter under the Convention and the procedure adopted before it in this case, the Court finds that the amount claimed by the applicant cannot be regarded as either necessarily incurred or reasonable as to quantum (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). Making an assessment on an equitable basis, it awards 14,000 euros (EUR), plus any VAT that may be payable, for costs and expenses incurred by the applicant's legal representatives. Furthermore, finding that part of the applicant's own claims for expenditure may be regarded as related to the pursuit of redress for the violation in this case, it awards to the applicant personally the sum of EUR 1,500.

C. Default interest

60. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b);

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to

Article 44 § 2 of the Convention, EUR 15,500 (fifteen thousand five hundred euros) in respect of costs and expenses, to be converted into pounds sterling, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Sir Nicolas Bratza joined by Mr Costa is annexed to this judgment.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE SIR NICOLAS BRATZA JOINED BY JUDGE COSTA

I fully share the conclusion and reasoning of the Chamber that there has been a violation of Article 6 § 1 of the Convention in the present case. I only wish to add a few supplementary remarks because of the importance of the issues raised by the case and, more particularly, the question whether the appeal proceedings were adequate to remedy the lack of fairness at first instance.

As is noted in the judgment, the facts of the case bear a strong resemblance to those examined by the Grand Chamber in *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/95, ECHR 2000-II), in which documents had similarly been withheld by the prosecution at trial on the grounds of public interest immunity, without notification to the trial judge. At the commencement of the appeal in that case, the prosecuting counsel had notified the defence that certain materials had been withheld, without however revealing the nature of the materials in question. On two separate occasions, the Court of Appeal had reviewed the undisclosed evidence and, following *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, had ruled in favour of non-disclosure.

For the reasons set out in paragraph 65 of that judgment (quoted in paragraph 48 of the present judgment), the Grand Chamber held that such a procedure was insufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. The Court emphasised that, unlike the trial judge who saw the witnesses give their testimony and who was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the relevance of the undisclosed material on the transcript of the Crown Court hearing and on the account of the issues given to them by the prosecution in the *ex parte* hearings.

The Court went on in the following paragraph of the same judgment to distinguish *Edwards v. the United Kingdom* (judgment of 16 December 1992, Series A no. 247-B) on the grounds that at the appeal stage in that case the defence had received most of the information which had been missing at trial and the Court of Appeal was able to consider the impact of the new material on the safety of the conviction in the light of detailed and informed argument from the defence.

In the present case, following the review of the prosecution's duty of disclosure, full disclosure was made before the hearing of the applicant's appeal of two categories of documents, but other documents continued to be withheld from disclosure. As appears from the judgment, these documents were listed in a schedule. In respect of some of the items in the schedule, the reason for non-disclosure was stated to be "legal and professional privilege" and, in respect of other items, "public interest immunity"; in respect of

certain other items in the schedule (including document no. 580) no reason was given for the non-disclosure of the document.

In contrast to what occurred in *Rowe and Davis*, the prosecution made no application to the Court of Appeal to rule on the question whether the material listed in the schedule had been legitimately withheld. Equally, however, as pointed out by the Government, the defence did not apply to the Court of Appeal to review the material, the consequence of which application might have been either that the prosecution consented to further disclosure or that further disclosure was ordered by the Court of Appeal itself.

The central question is whether this omission on the part of the defence to use a procedure which offered the possibility of obtaining the release of the documents serves to distinguish this case from *Rowe and Davis*. In my view, it does not. It seems to me that where material is withheld from the defence on grounds of public interest immunity the burden must in principle lie on the prosecution to place it before the court for a ruling on whether it is properly withheld. The onus cannot rest on the defendant to take steps to compel disclosure. This is more particularly so where, as in the present case, the existence of the material is not made known to the defence until the appeal proceedings. In such a case the deficiencies at first instance are only capable of being cured if the material in question is disclosed to the defence by the prosecution in advance of the hearing of the appeal or if the material is placed before the Court of Appeal for a ruling on its disclosure in proceedings in which the procedural rights of the defendant are fully protected.