Mohammed Ashraf Choudhery, Mohammed Warris Ashraf, Sadaat Maqsood Ahmed, Jameel Akhtar, Hussain Shah v The Crown

Case No: 199703120 D1

199703122 D1

199806422 D5

200403106 D5

200405541 D5

Court of Appeal (Criminal Division)

27 October 2005

[2005] EWCA Crim 2598

2005 WL 2706897

Before: The Right Honourable Lord Justice Hooper The Honourable Mr Justice Roderick Evans and The Honourable Mr Justice Pitchers

Thursday, 27 October 2005

On Appeal from

The Crown Court at Manchester H. H. Judge Morris

The Crown Court at Harrow H. H. Judge Sanders

The Crown Court at Birmingham H. H. Judge Geddes

The Crown Court at York H. H. Judge Myerson Q.C

Representation

- James Wood Q.C , T Mylvaganam & Ruth Brander (Instructed by Keith Dyson & Co Solicitors, Manchester) for the appellant Mohammed Choudhery.
- R. Leighton Davies Q.C & Paul Marshall (Instructed by Keith Dyson & Co. Solicitors, Manchester) for the appellant Mohammed Ashraf.
- Geoffrey Cox Q.C. M.P. & Daniel Friedman (instructed T. Osmani & Co. Solicitors, London) for the appellants Sadaat Ahmed, Jameel Akhtar & Hussain Shah.
- Anthony Arlidge Q.C , Nigel Ingram , Jonathan Ashley-Norman , Andrew Bird & Quentin Hunt (instructed by Revenue and Customs Prosecutions Office) for the Crown.
- Michael Egan appeared as Special Counsel (nominated by the Attorney General).
- Sasha Wass QC & Stephen Thomas (instructed by CPS , York) for " operation Brandfield" .
- Gavin Irwin (instructed by Kingsley Napley Solicitors, London) appeared for interested parties Anthony Barker and John McElligott.

Judgment

Lord Justice Hooper:

1 These are our reasons for two decisions which we announced on the day of the hearing. The two decisions were: • 1. The respondent is to pay 70% of the appellant's costs in the appeal;

• 2. Any claim for damages for breach of Article 6 is to be pursued in the High Court, presided over by either Mr Justice Roderick Evans or Mr Justice Pitchers if possible.

Costs

2 At the conclusion of our judgment on the appeals we set out our concerns about the delay and costs. After the judgment had been sent to the parties in draft, applications were made on behalf of some of the appellants for an order under regulation 3 of the Costs in Criminal Cases (General) Regulations 1986 SI 1986/1335 (made pursuant to section 19 of the Prosecution of Offences Act 1985). The other appellants then made their applications. The regulation provides that if a criminal court is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, the court may order that all or part of the costs so incurred by that party shall be paid to him by the other party. In DPP v. Denning [1991] 2 Q.B. 532 at 541, 94 Cr. App. R. 272 at 280 (DC) Nolan L.J., said that the word " improper" in the context of regulation 3 does not necessarily connote some grave impropriety. It is intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly.

3 Sub-paragraph (2) provides that the court shall take into account any other order as to costs including any legal aid order which has been made in respect of the proceedings. The appellants are legally aided. We take the view, given the substantial amount of money involved, that the Legal Services Commission should not be required to meet the costs out of its strained budget if the provisions of regulation 3 are satisfied. It is important for prosecutors to realise that if the provisions of regulation 3 are satisfied, then a costs order may well be made.

4 Sub-paragraph 3 provides that an order made under paragraph (1) shall specify the amount of costs to be paid in pursuance of the order. Mr Arlidge QC for the respondent agreed that it would not be practicable to specify the amount at this stage prior to assessment. Specifying the amount will be done at a later stage.

5 The respondent provided us with substantial submissions seeking to justify the manner in which the appeals had been handled.

6 In the case of Choudhery and Ashraf (Northstar and Helvellyn) leave to appeal conviction was sought in 1997, was refused by the single judge on 5 February 1998 and was granted by the Full Court on 3 May 2000. Ahmed (Acidity) was convicted on 25 February 1998, leave to appeal was refused by the single judge on 25 February 1999 and was also granted by the Full Court on 3 May 2000. He was released on bail on 6 May 2004. The respondent, in its submissions, states:

> " 29. The initial appeal process was … run from Manchester. By January 2000 the appeal in Acidity had been linked with Northstar / Helvellyn. Though a London case, the Acidity appeal was initially run from Manchester.
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> 30. By late 2001, the two Manchester-based lawyers primarily responsible for the day to day conduct of the litigation had been transferred to, or were seeking a transfer to other parts of RCPO. Changing personnel requirements made it increasingly apparent that the size of the exercise was too great for the management of the appeals to be conducted from Manchester. The decision was therefore made that they should be transferred to London. By April 2002 the control of the appeals had passed to a single lawyer. He quickly appreciated that the work was too much for one person, and by the summer a small team had been set up in RCPO London."

7 As we said in our judgment on the appeals: " 22. … by 1996– 1997 the use of controlled deliveries from Pakistan had become a matter of parliamentary and public concern as a result of prosecutions being stayed. This led to the Fletcher Raynes Report, known after its authors Mike Fletcher (" Fletcher") and David Raynes (" Raynes"), both HMCE officers. Fletcher had been involved in a number of the CDs. The report was produced in November 1998 and identified various problems. Further concerns led to operation Brandfield. This is an operation conducted by the West Midland

> Constabulary which came to include an enquiry into controlled deliveries from Pakistan. It has led to the prosecution of Barker, Peter Robinson (" Robinson") and David Platt (" Platt"), also HMCE officers at the time, for what happened during operation Serin.
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> 23. Meanwhile in December 1997 the trial in operation Oystercatcher collapsed, the prosecution offering no evidence after the judge had ruled that the true role of Hussein Shah, now a defence witness, had to be disclosed for the purposes of the trial. In February 1998 the operation Serin trial collapsed again because of Hussein Shah. Mr Christopher Knox, experienced counsel for the HMCE in a statement to operation Brandfield made it plain that Hussain Shah's involvement in Serin had been hidden from him, causing him to be " seriously misled" :

" … My not being fully briefed about Hussain Shah was potentially the cause of a flawed prosecution case, which can only lead to injustice and damage to confidence in the system of justice … I was nominated by the Attorney General to prosecute and was entitled to expect candid , truthful and complete instructions.

> … the very factors that are attributable to the role of Hussain Shah make it, in my mind, an absolute that I should have been fully briefed on all the information about him."
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> 24. In June 1998 HMCE offered no evidence in operation Abrade, due to concerns about the PI Mark. The appeal in Foula was not resisted. The prosecution in Kyanize was withdrawn."

8 In addition Hussein Shah (Woodchat) had made damaging allegations about the manner in which CDs were being handled.

9 By the time that leave to appeal was granted in these three appeals in May 2000, there was ample material which should have given rise to serious concerns about these cases. According to the submissions:

> " 149. Another meeting took place on the 14 March 2000. HMRC and RCPO were represented. Counsel in Operation Northstar / Helvellyn were present, were shown certain transcripts and were briefed by ACC Foster, the police officer in charge of Operation Brandfield. Counsel are recorded by ACC Foster as having advised that " *there was no good reason or duty to disclose any material at this stage, mainly because he had yet to receive full details and grounds of appeal* ." He made the point that the Appellants had pleaded guilty, and that the grounds would have to infer an abuse of process."
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> 10 During the course of the hearing we asked for more details about this meeting and called for the minutes which the respondent did not then produce. What transcripts were provided? What did ACC Foster say? Fortunately Miss Wass QC appearing for Operation Brandfield provided us with the minutes. The minutes show the meeting starting at 4.00 pm. They read: " The meeting opened with the agreement that the ' Teak' tape extracts would only be provided for reading and not for retention. In addition, the contents would not be discussed outside of those now present.
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> I [ACC Foster] explained my understanding that Mr Newsom had taken the decision to notify Mr Brighouse of the existence of the Teak tapes and the potential relevance of at least one ' extract' to the appeals in relation to the Northstar, Helvelyn and Parvenue operations. This was confirmed.

I then explained that I felt my possession and knowledge of certain documents required me to inform the NIS of matters I felt should be considered for disclosure based on my limited knowledge of the recent Appeal Court Hearing. I continued by stating my view was that the following needed to be recorded in

this category; • 1. The extract of Teak tapes re Operation Serin of a conversation between John Barker and Peter Robinson.

• 2. Undercover office tape extracts (Op Brandfield). • 3. The letter dated 6.3.98 from Alison Graham Wells, to whoever, based upon the Keith Dyson letter and the Neil Keeping report.

I then explained Operation Serin and described how I felt each document was, in my view, relevant to the Appeals. In essence as follows;

Document 1 Shows a willingness to use malpractice by the DLO in Islamabad assisted by the operational team in the UK to achieve arrests and convictions. The content of the Raynes report corroborates the content of the tape and Document 2 reinforces the deliberate intention to mislead the courts. In effect there are potential criminal conspiracies to pervert the course of justice and supply a controlled drug.

Document 3 On the face of it, based upon the uncorroborated statement (verbal) of PI Mark in the Raynes report, the letter from Alison Graham Wells based upon the Keeping Report is wrong and should be addressed.

John Brighouse said he felt the main issue here was timing, as the defence had not yet disclosed the full grounds of appeal. He also felt there was the potential for the defence to attempt to delay the Appeals pending the result of the Operation Brandfield investigation.

In addition there had been indications that the defence teams in other controlled delivery operations were attempting to join in the process. He felt the two main areas for Appeal were;

a) That it was always the same DLO's involved, that there had been a series of prosecutions ' stayed' and criticism of the DLO and CD process.

b) It would be the appellants case that in Pakistan existed a ' gentleman club' of suppliers in PI's acting together with the benefit of each other, that led to corrupt practice by the DLO's.

He also felt there would be a series of less significant but consistent areas of concern raised on the grounds for appeal.

Mr Brighouse concluded by saying that given this, the material on the tape could only be seen as " manner (sic) from heaven" .

I then raised one further issue that I felt was a matter for the NIS. In the light of the discovery of this material and factors raised in the Raynes Report, someone had to consider those currently serving custodial sentences be it on guilty plea or otherwise.

Mike Newsom said it was a matter for consideration but he felt that if they had pleaded guilty then that was a factor.

I said I understood that, but the issue was really whether they could have committed the offences in the first place. The problem in all this was we have limited material that ' suggests' malpractice, the problem is we do not know what else happened before in other operations or later.

Mr Brighouse said he felt they had to await the full grounds of the current appeals before giving further consideration to this.

5.20 pm Joined by Peter Birkett QC and Counsel Phillip Cattan.

Mr Brighouse detailed the reason for the meeting with Counsel and reinforced the sensitivity of the material. I handed both Counsel the Teak tape transcripts and explained how the conversation had been recorded.

Mr Birkett requested information on the approximate timing/date of the conversation with regard to the Operations subject of the appeals. This was provided from my documentation and specifically the Anacappa chart featuring information for the Raynes Report.

I then explained the issues of disclosure and what I felt fell to me based upon a limited knowledge of the Appeals. I referred again to the documents referred to above and documents 1, 2 and 3.

Mr Birkett said he recognised the situation and asked for some idea of what Operation Serin was all about. I described the arrests and then informed him of the possible criminal elements based upon the findings to date. I emphasised the fact no one had yet had the opportunity to give explanation.

After further discussions it was agreed that a key factor was that DLO John Barker was a witness in the original trials, albeit conditional. Mr Birkett said he was content there was no good reason or duty to disclose any material at this stage mainly because he had yet to receive the full details and grounds of appeal. He said there is a duty to consider disclosure before and/or after knowledge of the lines the appeal will take. He also made the point that they did plead guilty and really the grounds would have to infer an abuse of process, e.g. the defence saying in effect, had we known this, had we known that etc …"

I then emphasised the role of PI Mark and the tenuous link and knowledge, still to be explored, he has of those operations subject of appeal.

After further discussion Mr Birkett said it may be necessary in taking account of the ongoing sensitivity of this investigation (Brandfield) that he may have to consider seeing Lord Justice Rose (Appeal Court Chairman) but he felt that was some way down the road and again subject to the grounds of appeal.

Towards the end of the meeting we were joined by Alison Graham Wells who did not read or hear the contents of the transcripts. Mr Brighouse asked me to reiterate the issue about her letter of 6 March. She confirmed it was to the Appeal Court and stated it was being reviewed now in view of the appeal. I pointed out to her my concerns that the content, according to PI Mark was incorrect and could have a bearing on the Appeals.

In conclusion, all agreed to await the next step form the defence in preparation for the 2 May hearing.

6.10 pm Meeting closed."

11 We find it very unfortunate that the written submissions glossed over this vital meeting and that the minutes were not made available. According to the written submissions what was being shown were " certain transcripts" . Given that there were hundreds of transcripts (a matter relied on by the respondent), the written submissions should have made it clear that the transcript which we set out in our judgment on the appeals was being shown and that the police officers realised the serious consequences for the safety of the convictions of those still in prison. Reliance is placed in the submissions on the advice of counsel. Whether that advice was good advice or bad (and we would need to know far more about counsel's state of knowledge), what is clear is that ACC Foster was telling the respondent that DLOs were involved in criminal conspiracies to pervert the course of justice and to supply a controlled drug.

12 Against the background of what had happened in the latter part of the previous decade, the revelation of this should have led to an immediate, urgent and major investigation into the handling of CDs and into those cases where there had been convictions. The ongoing duty to disclose should have resulted in either disclosure of the material or, given the ongoing investigations, a PII application to the Court of

Appeal by the respondent. Those cases where defendants had been convicted after a trial, for example Jameel Akhtar (Pappus) and Ahmed (Acidity) should have received the highest priority. What happened in fact is revealed by the respondent's submissions:

> " 150. On the 14th April 2000 the view of RCPO was expressed that it was unlikely that any person was not safely convicted."

13 We are at a loss to understand how anyone could have reached that view.

> 14 The story continues, according to the respondent's submissions: " 151. In November 2000 Matthew Johnson (RCPO) considered the safety of the convictions in Dire; Foula; Pappus and Woodchat (the CCRC cases). He subsequently instructed David Howker QC in relation to the CCRC cases on the 5th April 2001. It was Howker's view that disclosure should be made of the contents of the Teak tapes.
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> 152. In 2000 it is therefore clear that some within HMRC were aware of the existence of the Teak tapes, and their contents, but a decision on disclosure was deferred. At one stage in 2001 HMRC had temporary possession (for internal disciplinary purposes) of the transcripts made by Operation Brandfield but they were returned on the insistence of ACC Foster."
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> 15 We do not understand the relevance of the second sentence of paragraph 152. From March 2000, the respondent knew what the relevant tape contained. The by now sorry tale continues: " 152. On the 15 January 2001, Operation Brandfield was ordered by the Court to prepare an impact report charting the significance of Operation Brandfield to the instant appellants. A report was prepared dated 31 May 2001. It did not refer directly to the Teak tapes. It stated that there was evidence ' that practices adopted in order to put this operation [Operation Serin — where the drugs were allowed to run] into effect were unsound and done knowingly without proper sanction or authorisation' . There is a footnote reference at this point but no corresponding footnote. However, it can now be seen that this was a reference to the Teak tape transcript.
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> 153. The report was served on all parties. Also prepared by Operation Brandfield was a file of attachments which included the most important Teak tape transcription. This was not disclosed to the Crown or defence. The Crown called for it, and the Court ordered its disclosure to the Crown on 15 June 2001, but otherwise upheld an order for PII sought by Operation Brandfield. The RCPO were therefore at this point in possession of important Teak transcripts but unable to disclose it because of a PII order made at the behest of Operation Brandfield.
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> 155. …
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> 156. At a meeting between RCPO and Peter Birkett QC on the 10th April 2002 counsel expressed the view that the tapes were " obviously relevant and would have to be disclosed" but he stressed the need to obtain full transcripts of all the tapes. Now properly seized of the matter, the RCPO London team tried to take the matter forward. They asked Op Brandfield for their transcripts, but this request was refused. They were permitted by Cleveland Police to take copies of the tapes (but Cleveland had no transcripts).
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> 157. On 25 June 2002, RCPO recorded copies of 321 Teak tapes each of 90 minutes duration. They were sent to the HMRC transcription service in Liverpool. It was found the copy tapes were of poor quality, presenting problems with their transcription. Operation Brandfield were asked if the transcripts prepared by HMRC could be compared with those which had

already been prepared by Operation Brandfield. By letters dated 6th and 13th September 2002 Op Brandfield said they were not prepared to release copies of their transcripts.

158. The tapes were returned to RCPO from Liverpool on the 19th September 2002.

159. A team of four junior Counsel were instructed to listen to the tapes on 23 September 2002, which review was completed towards the end of October 2002. They highlighted certain concerns. The process was to some extent frustrated by counsel's lack of knowledge of HMRC terminology and slang.

160. In order to deal with this, two officers assisting RCPO were asked to commence a re-review of 139 tapes which counsel had identified as of potential relevance. That request was made on 29 October 2002, and the officers were supplied with the copy tapes. Due to the inaudibility of some of the tapes, it was agreed between those officers and RCPO that efforts would be made to obtain first generation tapes from the Cleveland police. There was correspondence in this regard in early 2003, and eventually 139 original tapes were collected on 10 April 2003. They were passed to the relevant officers.

161. Due to other commitments to the CCRC and Operation Brandfield the designated officers were not able to complete their review until 26th January 2004. There is correspondence between the officers and RCPO about this in the intervening period.

162. The Crown did not await the completion of that work before disclosing the important passages of the Teak material included in the attachments to the initial Brandfield impact report. These were served on 6 November 2003."

16 Thus it took over three years for the respondent to disclose to the appellants what it knew by March 2000 (if not earlier). As the respondent now concedes:

" 164. Standing back from this detail, it is now plain that the Crown could and should have made reached a different decision as to the potential impact of the Teak tape transcripts in early 2000."

17 We agree.

18 According to the submissions:

" 9. … the view was taken that Northstar / Helvellyn and Acidity could be ' ring-fenced' from the effect of allegations concerning the relationship between Barker and McElligott and Mark and others."

19 That view was fundamentally wrong. It reflected the erroneous view of those who had presented to the courts cases involving CDs during the 1990s.

20 Throughout the history of these appeals there has been a fundamental failure to stand back from all the detail and look at the CDs in the way which we have done in the first part of our judgment on the appeals. The respondent states:

" Until all of the material was gathered in and analysed in the light of the Appellants' and other submissions, the Crown considered the convictions to be safe" .

21 It was not necessary, in our view, to gather in all the material and analyse the material in the light of submissions. This approach was fundamentally misconceived.

The convictions should have been recognised as unsafe by no later than early 2001. By then it should have been realised that the CDs had probably (if not certainly) been carried out in breach of the guidelines and that a false picture had been presented to trial courts.

22 Over and over again the respondent made it clear that it wanted to call Barker and McElligott. Because it took this view, there had to be significantly more disclosure than otherwise might have been the case and the inevitable eventual outcome of the appeals was delayed. In the light of the recorded telephone call (if for no other reason), the respondent should have realised by early 2001 (if not earlier) that they could not be called as credible witnesses. The tape spoke for itself. It was not necessary to wait on Operation Brandfield. We remember junior counsel for the respondent telling us that the prosecution opening against the officers was, in effect, only the prosecution case: in other words, the Court of Appeal might reach a different view about the tape and about Serin. The Court of Appeal might conclude, so it must have been thought, that Barker and McElligott were witnesses whose evidence was so overwhelmingly credible that non-disclosure at the trial stage could have been remedied at the appellate level. That shows a failure to understand how the Court of Appeal functions. The appellant relied very largely on contemporaneous documentation to support their case that there had been significant and deliberate non-disclosure. From that documentation the appellants asked the Court to draw conclusions of fact. The appellants needed only to show that a judge in an abuse application or a jury at trial could have (not must have) properly drawn those conclusions (in fact we found that there was (at the least) strong support for many of the conclusions). If the evidence of Barker and McElligott was to persuade the Court that those conclusions could not properly be drawn, it would have to be evidence so strong and convincing that this Court concluded that no judge or jury could properly draw those conclusions. That would have been a well nigh impossible task even without the evidence arising from the investigation of Operation Serin. With it, it became completely impossible. The respondent should have recognised that by no later than early 2001, given what happened in the last part of the previous decade and what it was told in March 2000. It seems to us that the respondent acted improperly in taking the view that it could take a different view of Operation Serin to that of the Crown Prosecution Service.

23 We were also concerned about the approach taken by the respondent to the CCRC investigations into the cases of Akhtar and Shah. According to the written submissions:

> " 118. It is understood that the CCRC first became involved in the ' controlled delivery' cases from Pakistan in March 1998 upon receipt of Hussain Shah's letter (Operation Woodchat) from prison to Robin Cook the then Foreign Secretary. The case was closed by the CCRC on the 6th October 1998.
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> 119. By 2002, a total of 8 cases had been referred to and accepted by the CCRC. The CCRC lawyers charged with the responsibility for the controlled delivery cases referred to the CCRC have been in regular correspondence with the London RCPO team. The CCRC have, pursuant to their duties and in the exercise of their powers, sought disclosure of material from the London RCPO team. Disclosure effected to the CCRC by HMRC was unredacted. The CCRC was also able to garner material from various other sources, including Operation Brandfield, and did so.
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> 120. As a result of that disclosure, the CCRC were able to create the Statements of Reasons in relation to Operation Pappus and Operation Woodchat which have formed a part of the disclosure in the instant appeals. Those documents have been informative to all of the appellants and indeed the Crown.
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> 121. Just as Operation Brandfield have found this a piece of litigation which has been extremely time consuming, so the CCRC. A measure of that

complexity may be discerned from the time required from referral to Statement of Reasons in the cases presently before the Court."

24 In our view the respondent should have taken a proactive role with the CCRC. That overworked body should not have been expected to undertake over a period of 3– 4 years the laborious and difficult task of untangling the evidence about CDs. The respondent should have done that and finished the task by about early 2001, thus saving the CCRC from spending so much time on these cases. It was the respondent's task, on the unusual facts of this case, to assess the safety of the convictions, not to allow another body to carry out the task for it.

25 We have no doubt that the respondent has not conducted these appeals properly within the meaning of the Regulation. That has had two consequences. A huge amount of the time of this Court has been wasted- it has taken more than more than 20 hearings to dispose of these appeals. For that there is no remedy. The second consequence is that the legal aid fund has been significantly depleted when it ought not to have been. We chose the figure of 70% doing our best to reach a rough " ball park" figure. If the figure is wrong, then it is too low rather than too high.

26 The appellants submitted that the Court should decide on a figure of 100% rather than 70% of the costs. Mr Cox submitted that a figure of 100% would reflect the failure to disclose at trial with the consequences to which we have referred. It seems to us that the proper approach in this case is to look at the costs incurred during the appeal and that is what we have done.

Damages

27 This Court does not have the power to award damages. Mr Cox sought a declaration from us that there had been a breach of the " reasonable time" provisions of Article 6. It will be for the judge on a trial of an article 6 damages claim to look at the case of any claimant and resolve this issue. What we have said in this judgment will no doubt be of assistance to him.

28 Furthermore he asked us to quash the convictions of Choudhery and Ashraf on this basis alone. The convictions having been quashed it is not necessary for us to decide this further issue. Crown copyright