

Michael George Davis

Raphael George Rowe

Randolph Egbert Johnson

Case Nos: 99/2239/S3

99/2240/S3

99/2241/S3

Court of Appeal Criminal Division

17 July 2000

JUDGMENT

Lord Justice Mantell:

Mr Martin Membury used to own a green Triumph Spitfire motorcar. It was distinctive only in that it had a union jack painted on each of its two front wings. The Triumph Spitfire was habitually parked outside Mr Membury's home in Sydenham. Sometime during the night of Monday 12th and Tuesday 13th December 1988 the Triumph Spitfire was stolen. The thieves were two young men called Griffin and Duncan. Griffin took the car whilst Duncan kept watch. Half a pair of scissors was used to start it. It was driven to 25 Laurie Park Road also in Sydenham. That is where Griffin and Duncan were living. At that time also living at 25 Laurie Park Road were Michael George Davis, Raphael George Rowe, Jason Cooper and a young man called Jobbins. Jobbins was a particular friend of Griffin and Duncan.

Sometime between about 1:50 and 3:40 am on 16th December, that is three days after the Triumph Spitfire had been stolen, an Austin Princess motor car was parked in a field not far from the White Bear public house in Fickleshall. Inside the Austin Princess were two men. One was Mr Hurburgh, the owner, and the other, a much younger man, Mr Alan Eley. They were making love. Their love-making was interrupted by three masked men. One carried a knife and another a gun. Mr Eley was pulled from the car and £10 taken from him. The man with the knife stood over him. It was clear that the three men were intending to steal the Austin Princess. Mr Hurburgh objected. He was attacked. By this time both Mr Hurburgh and Mr Eley were on the ground. One of the men spread petrol around both of them. Someone lit a cigarette. Mr Eley passed out. When Mr Eley came to he found that Mr Hurburgh was dead. He had been savagely beaten. Five ribs had been fractured, as had the sternum. The heart was bruised. He had died from a heart attack.

The Austin Princess had gone. Not far away, however, was an abandoned Triumph

Spitfire. It was the Triumph Spitfire belonging to Mr Membury.

Oxted is a little less than ten miles from Fickleshall. That is where Mr and Mrs Napier lived with their son Timothy. At about 3:40 am that same Friday morning their house was invaded by three masked robbers.

One had a knife and one had a gun. The third robber was armed with a revolver. At first the Napiers resisted but were told they would be shot if they did not co-operate. There was a struggle. Timothy Napier's arm was cut and an artery severed. The Napiers were overpowered. Mrs Napier was instructed at knifepoint to remove her rings and jewellery. She was told that if she refused her fingers would be cut off. The house was ransacked. The robbers then left, taking Timothy Napier's Toyota motor car which had been parked near the house. Timothy Napier was taken to hospital. He was operated upon and has made a successful recovery.

The robbers were in the house for between 20 to 30 minutes.

Later the Austin Princess was found abandoned 100 yards from the Napier's house.

About 5:00 am on Friday 16th December Mrs Spicer and Mr Peter Almond were in bed together in an upstairs bedroom at 100 Hilley Field in Fetcham some twenty miles from Oxted. They woke to find three masked men in the room. One was holding something which both took to be a gun. They were told to be quiet. They were asked for money, jewellery and car keys. They were tied and gagged and the house was ransacked. After they had gone one of their own kitchen knives was found in the bedroom. The robbers were there for about three-quarters of an hour to an hour. They drove off in a Renault and a Vauxhall Cavalier. Timothy Napier's Toyota was found nearby.

On 19th December police raided 25 Laurie Park Road and also 71 Adelaide Road which is the home of Bernadette Roberts, the then girlfriend of Jobbins. In both places they found property which had been taken from the Oxted and Fetcham robberies. A number of arrests was made. Those arrested included Rowe and Davis and also Cooper, Jobbins and Griffin. Duncan was already in police custody. Randolph Egbert Johnson was not arrested until 6th January 1989 when he was found to be in possession of a revolver.

Plainly, the police took the view that the same three men were involved in each of the three incidents. It is not difficult to see why. They believed that the three men were Davis, Rowe and Johnson. Davis, Rowe and Johnson were charged with various offences arising out of the three incidents, including murder.

The trial took place in January and February 1990 at the Central Criminal Court. The judge was Mr Justice Auld, now Lord Justice Auld. In the result all three were convicted of the murder of Mr Hurburgh, causing grievous bodily harm with intent in relation to Timothy Napier and the several robberies. Each was sentenced to life imprisonment for the murder and substantial terms were imposed for the other offences. Davis had previously pleaded guilty to robbery and Johnson to robbery and

rape. Those were offences committed on a quite separate occasion whilst the two of them were engaged in a burglary. Davis was sentenced to ten years and Johnson to a total of 12 years for the offences to which they had pleaded guilty. All sentences were concurrent.

It was obvious to prosecuting counsel, as it must have been to everyone else that the raid on 25 Laurie Park Road had been as a result of information supplied. The police were not asked to name the informant but it seems to have been assumed that it was one of Jobbins, Griffin and Duncan.

Jobbins, Griffin and Duncan gave important evidence at trial. It was to the effect that Rowe had asked Jobbins and Griffin to steal an MG. Instead of stealing an MG, Griffin and Duncan had taken Mr Membury's Triumph Spitfire. It had been parked at the rear of 25 Laurie Park Road in the early evening of 15th December. On that day Rowe asked Jobbins if he could use it. Also present was a man in a black cap said to be Johnson. That man, called Ronnie, backed up the request to Jobbins. There was difficulty in starting the Spitfire but Jobbins, Griffin and Duncan helped to bump start it between 7 and 8 pm and again between 11 pm and midnight, both times at the request of Rowe, Davis and the man in the cap. Jobbins further gave evidence that Ronnie was present and asked the three of them how to start the Spitfire. Duncan gave him a half pair of scissors to put in the ignition. In the presence of Davis and Johnson, Rowe had asked Duncan and then Jobbins for balaclavas.

There was also evidence from what may be called the "Jobbins group" about Rowe and Davis returning on the Friday morning with the Renault and the Vauxhall Cavalier and a quantity of property which the "Jobbins group", between them, helped to unload and stash. Jobbins said that about 5:00 pm on the Friday Rowe, in the presence of Davis, had asked him to get rid of the Renault and Vauxhall Cavalier saying that they were a "bit warm" and that they would have to be burned completely so as to remove all identification and that it was too risky for them, that is Rowe and Davis, to do it. Duncan had said much the same except he put the conversation at about 10:00 or 11:00 in the morning.

Other important evidence came from Kate Williamson. Kate Williamson was a sixteen year old school girl and an intimate friend of Rowe. She had arrived at Laurie Park Road at about 8:00 pm on Thursday 15th December.

She, with Rowe, left at about half past ten that evening. The two of them went to the house of someone called Pooley where they stayed with friends until, at about 12.30 am on the 16th of December, Jason Frost, a solicitor's clerk, drove her and Rowe back to Laurie Park Road. The two of them went to Rowe's room, where they stayed until Rowe left between 1:30 and 2:30 am. He returned at about 6:30 am, wearing different jeans and shoes but the same top. He was carrying a Sainsbury's bag. Two Sainsbury's bags were taken in the Spicer/Almond robberies. According to Williamson, Rowe took from the bag, a pendant with a gold chain which was never found, a watch which came from the Spicer robbery, various papers, and some muddied jeans and boots. Soon afterwards the intercom buzzer was pressed and

Rowe left for about 5 minutes. Upon his return he mentioned that the police were outside. Kate Williamson noticed that he was wearing two rings. They had come from the Napier robbery. To discover whether one were a true diamond, Rowe scratched a window. The landlord Mr Smith, and Police Constable Hoar, each gave evidence that there was a small 1 inch scratch upon the glass when the window was examined on the 30th March.

Kate Williamson said that Rowe had mentioned two cars, one being a Renault. He had told her that she could see them from the window which overlooked the back of the house. According to Jobbins and Duncan, the cars had been parked at the rear of the premises. She had left on Friday morning, taking with her the Napier rings, and had had them valued. She had kept the wristwatch given to her by Rowe. On Sunday she had gone to Laurie Park Road and acquired a watchstrap from Rowe, which came from the Napier robbery. On Monday after speaking to her parents she handed the two Napier rings, the yellow watchstrap, and the watch from the Spicer robbery over to the police.

She also said that when Rowe had left her on the Thursday night, having changed his clothing he was wearing "Zoo" boots. Kate Williamson's evidence as to Rowe's anxiety about the police being outside, and as to the incident concerning the trousers, was supported by Joanne Cassar, a woman she did not know. Her evidence as to the scratch on the window was supported by the landlord. The scientist who examined footprints at the Napier robbery, found a print in a rear flowerbed, and a print in blood in the hall. Each matched the other, and also the distinctive "Zoo" imprint on the sole of a sample boot which Kate Williamson had said was similar to the boot worn by Rowe. Duncan, Jobbins and Griffin supported her evidence as to the location of the parked cars. Her sighting of a pendant on a chain was consistent with Mrs Spicer's evidence of such a piece of jewellery being stolen that night, but never found. There was evidence from a police officer about the finding of a brooch in Rowe's waste paper basket which had been taken in the Spicer/Arnold robbery.

Kate Williamson was cross-examined about a letter written to Rowe which she had never posted in which she apologised for lying to the police. Kate Williamson's response was to say that the letter had been written under pressure from Nancy Stanley, another girl friend of Rowe's.

Joanne Cassar gave evidence of Davis having given her a Marks & Spencer's Amaryllis plant similar to one stolen in the robberies. There was evidence from the landlord of Davis having had a key to the room which contained the cupboard which in turn contained some of the stolen property. There was also evidence of Davis' fingerprints having been found on porcelain figures stored in the same cupboard.

Johnson had not been identified by any of the Jobbins group. However, the landlord did identify him as someone who helped with the electrics at 25 Laurie Road and he himself had admitted having been there on the Thursday evening and having the revolver with him at the time. He also admitted being known as "Ronnie" or sometimes "Ron" and that he often wore a black leather cap. Indeed he had been wearing

a black leather cap when arrested. There was evidence of his having given an account of an alibi for his movements that night which could be and had been proved to be false. A man called Todd gave evidence of having been a fellow prisoner of Johnson's following his arrest in January 1989. He said that Johnson had admitted his involvement in the offences. He said that Johnson had told him that he, Johnson, was "involved in it". Todd said that Johnson described one of his accomplices as a "redskin". That is an expression common enough in Jamaica to describe someone with lightly coloured skin. It was also an expression which Johnson employed when interviewed by the police. Rowe is lightly coloured.

Rowe and Davis gave evidence, Johnson did not. Rowe rejected the evidence of Jobbins, Griffin and Duncan and, through counsel, suggested that it was they who had carried out the murder and the robberies. He claimed to have been with Kate Williamson the whole of the night of the 15th/16th December and attributed her account to jealousy on account of his relationship with Nancy Stanley. The brooch found in the waste paper basket had been planted. Davis, similarly, claimed that the evidence of Jobbins, Griffin and Duncan was false and refuted the evidence of Joanne Cassar. He said he had spent the whole night in his room at 25 Laurie Park Road. He could not explain how his fingerprints came to be on the porcelain figures in the cupboard in the storeroom where some of the stolen property had been found.

A Mr Peter Fyffe was called for the defence. He had come forward in response to the publicity given to these crimes. He had made a statement to the police. For some reason, so far unexplained, the Crown Prosecution Service and prosecuting counsel were never supplied with a copy of the statement. However it was made available as part of the unused material supplied to the defence representatives. His evidence was in line with the statement.

He said that on Thursday night, the 15th, he with family and friends had been to the Horse of the Year show at Olympia. Agreed evidence was that the performance ended at 11:00 pm. He said that he had left by car at about 11:30 pm. He had first dropped off one of his passengers, and then taken a route home, which passed by the junction where the Triumph Spitfire had been found. He thought he had reached that junction at or about 12:30 am on the 16th.

His headlights picked up a Spitfire parked in the field opposite. It seemed to him to be dark green, with a Union Jack on its wing. As reference points for his timing he used his departure from Olympia and his arrival home. He thought he arrived home before 1:00 am, and his home was 5 to 10 minutes drive from the White Bear. Mrs Fyffe, who was with him that evening, thought they reached home at perhaps 12:40 to 12:45 am. Mrs Stammers, who was the first of Mr Fyffe's passengers to be dropped off, reported that she was in her home by about 12.15 am. Her home was about 15 minutes drive from the Fyffe home. It was accepted by the Crown that the Spitfire seen in the field in the headlamps of Mr Fyffe's vehicle must have been the one stolen from Mr Membury.

The judge summed up over four days in what has been acknowledged to have been a

Careful, fair and wholly accurate reflection of the evidence and the issues. His directions in law were impeccable. He drew attention to the weaknesses in the prosecution case as well as its strengths. Having directed the jury as to the burden and standard of proof he said:

“That test is particularly important in a case such as this when so much of the evidence is disputed, where much of the prosecution evidence is itself tainted for one reason or another and where there is considerable uncertainty and inconsistency in important areas.”

In highlighting the frailties of the prosecution case the judge had in mind particularly the evidence of the “Jobbins group” who, on any view, were accomplices, the fact that Kate Williamson was, on her own account, a handler of stolen goods, the fact that Todd had interests of his own to serve, the discrepancies between the appearance of the three defendants and the descriptions given by witnesses and the evidence of Mr Fyffe and his passengers.

As to the descriptions of the robbers the judge reminded the jury that Mr Eley had said that because all three men were wearing balaclavas he could not see their faces or the colour of their skin and he could not help about their height or their build. He had said that from the way they spoke he felt that two of them sounded “sort of alike” and “like dark people”. But in cross examination he had been reminded that immediately after the incident he had told Mr Gentles at 2 Ox Cottages from whom he had sought help that one of the attackers was black and the other two were white and he had repeated that to the police constable who first came on the scene. He had also said in his witness statement that he had noticed that one of them was definitely white skinned as could be seen through the eyeholes of the balaclava. And in re-examination he had said that he saw the man who appeared to be white skinned lighting the cigarette after the petrol had been scattered around and that his lips seemed to be a pinky colour.

The judge also reminded the jury that Mr Richard Napier had said that the man he saw on the landing with the knife seemed to have fair hair on the nape of his neck and, as he thought, blue eyes. The judge told the jury that if Mr Napier were right about that it could not have been any of these defendants. Mr Napier had also said that he thought another of the men was white but he had nothing to go on and it was merely a hunch. The judge mentioned that Mrs Napier had said that she thought that one of the men who was wearing a dark woollen black balaclava was white. She was not sure why she thought so but she had said that she thought the eyeholes were larger on that particular balaclava than on the others.

The Judge also reminded the jury that Mrs Spicer had said the three men were all similarly dressed with balaclavas and dark clothing. In her statement to the police she had said that she could not tell if they were black or white but had come to the conclusion that they were white or at least the one who did the talking was white

although she could not say for sure. At the trial she had added "I cannot say why I came to that conclusion. May be it was because of the voice." Mr Almond had seen one robber with a gun but could not see his skin.

The judge also dealt fully with the "Fyffe" or timing point. The judge reminded the jury of the evidence from Kate Williamson and others that Rowe and Davis had not arrived back at 25 Laurie Park Road until about 12:30 am and that, according to Kate Williamson, Rowe had not left that address until sometime after 1:30 am. He went on to remind the jury that Griffin had said that the Triumph Spitfire had been moved from where he had last seen it parked by at the latest 12:30 am. Mr Fyffe and his passengers had claimed to pass by where the Triumph Spitfire was eventually found at about 12:30 am. Mr Fyffe had claimed to have seen a Triumph Spitfire bearing a union jack on its flank. The judge explained to the jury that if those timings were to be regarded as firm or as he said a "strait jacket" Rowe, at any rate, could not have been in the Spitfire when it was driven to Fickleshall and on the prosecution case that meant that he could not have been involved in any one of the three incidents. Any doubt with regard to Rowe's involvement would have an obvious knock -on effect on the cases against Davis and Johnson. At the same time the jury was reminded of the evidence which pointed to the attack on Hurburgh and Eley having taken place at some time after 1:50 am and it was left open to the jury to consider whether or not it was likely that the murderers or robbers would have waited around in a field for something over an hour and a quarter.

Following conviction the three defendants appealed. At some stage during the trial it had become apparent to Julian Bevan QC and Mr Waters QC, as then but a junior, that the 'informant' must have been Duncan. Early on in the trial the defence had asked to see Duncan's custody record. It was then examined for the first time. It appeared to confirm that Duncan had been arrested on 22 December and that he had been interviewed at Reigate Police Station but not before he had been in the presence of interviewing officers for 38 minutes of which of no record had been taken or kept. In cross-examination Duncan had said that during the 38 minutes he had been denying any responsibility for stealing the Spitfire or setting fire to the other two cars. Otherwise the 38 minutes had not loomed large in the trial and in summing up the judge said:

"At the end of the day nothing very much seems to have turned on it — certainly no criticism of the police, which you might have considered was one possibility at the time it was examined in cross examination."

However, having already formed the view that the informant must have been a member of the "Jobbins group" the conclusion that it was Duncan can hardly be described as a leap in the dark. However, counsel did not ask to have their suspicions confirmed and neither did they communicate them to any of the defence counsel although it might well have been assumed that defence counsel had reached the

same conclusion for themselves.

Now in 1990 there was a duty to disclose material information subject to certain exceptions which were contained in the Attorney General's Guidelines (Disclosure of Information to the Defence Cases to be tried on Indictment) laid down in 1981 (74 Cr.App.R 302). Amongst the exceptions were cases where a statement disclosed the identity of an informant and there were reasons for fearing that disclosure of his identity would put him or his family in danger. There can be no doubt in this case that there were "reasons for fearing" that disclosure of Duncan's identity would put him or his family in danger. In those days the decision perforce, had to be made without reference to the court. There was no provision for the Crown to have ex parte access to the trial judge. Had it been sought it would almost certainly have been refused. If an application had been granted it would almost certainly have been viewed as a material irregularity. Then came the decision of this court in Ward (1993) 96 Cr.App.R 1. Consequently, Mr Bevan deemed it proper to seek the Court's guidance as to whether or not the fact of Duncan's status ought to be disclosed to the appellants prior to hearing of the substantive appeal. That led to two hearings before the court presided over by, Lord Taylor, Lord Chief Justice, which in turn led to the guidelines issued in Davis & Others (1993) 97 Cr.App.R 110. Suffice it to say that the court upheld the Crown's submission that it was unnecessary for the fact to be disclosed. On 22 June 1993 a different division of the CACD presided over by the Deputy Lord Chief Justice declined to order disclosure of a report to the Police Complaints Authority and also information concerning a reward or rewards paid to Duncan. On 23 July 1993 the same court heard and dismissed the substantive appeals against conviction of all three appellants. Johnson's grounds of appeal had been based on the fact that he had not been identified by anyone including Jobbins, Duncan and Griffin, the evidence from eye witnesses about the colour of the attackers, the unreliability of Todd and the improbability of the accounts given by Jobbins, Duncan and Griffin. For Davis and Rowe it was advanced that there was a lurking doubt about the soundness of the convictions and that the judge should have found that there was no case to answer on any of the charges at the close of the Crown's evidence and certainly in the case of the murder count. Further it was argued that the evidence of Jobbins, Duncan and Griffin was so inherently unreliable that it should have been excluded and in any event that the jury should have been told to disregard it. Reliance was also placed upon the evidence of the eyewitnesses as to colour and the inconsistency between Kate Williamson's evidence and that of Mr Fyffe. Having reviewed the evidence in some detail the court said that it was, G

"in the aggregate inexplicable except on the basis that Rowe and Davis were implicated in the robberies and the associated violence. Taking all the evidence relating to the timing and events on the Thursday night and the succeeding days into account we conclude that, on the whole of the material we have reviewed, there is no basis for saying there is even a lurking doubt about the safety of the convictions of Rowe and Davis, the same applies to Johnson. On the contrary, the case against them all was,

and remains, a formidable one.”

On 30 September 1993 the same court declined to certify a point of law of general public importance.

In 1994 Davis and Rowe made an application to the European Court of Human Rights.

In April 1997 the Criminal Cases Review Commission (CCRC) exercised its powers under section 19 of the Criminal Appeal Act 1995 and following discussions with the Surrey Police in August 1997 appointed an investigating officer from the Greater Manchester Police to carry out enquiries at that time into the cases of Rowe and Davis only. In December 1997 the terms of reference were extended to include Johnson. In January 1999 the investigating officer submitted his report as required by section 12 (6) of the 1995 Act. The report contains a great deal of material. Two matters in particular were highlighted. The first was that Duncan was a registered informant who had contacted his handler on 18 December 1988 with the result that he had been housed at Reigate police station from that day until Sunday 20 December. As a result of what took place between Duncan and police officers during that period a message had been originated which suggested that the three robbers were not Rowe Davis and Johnson but Rowe, Davis and Jason Cooper. Also during the same period there had been discussions between Duncan and the investigating officers about the possibility of a reward being paid to him at the conclusion of the case. It is apparent that prosecuting counsel were aware of the possibility of rewards being paid as early as 9 June 1992 and before the ex parte applications made prior to the first appeal. That was as a result of a report submitted by a Detective Inspector Arnold on 9 June 1992 which also recorded the fact that Duncan had been a voluntary inmate at Reigate police station from late on 18 December until sometime after the raid on 25 Laurie Park Road. What had not been made known to prosecuting counsel in 1992 was the fact that Duncan seemingly had first of all implicated Cooper rather than Johnson.

On 29 March 1999 Mr Bevan applied to this court presided over by the then Lord Chief Justice Lord Bingham for the Public Interest Immunity Certificate in relation to Duncan to be lifted. This court acceded to the applications. There has since been a number of interlocutory applications to this court relating to enquiries which might be made of jurors at trial and orders have been made permitting such enquiries in approved terms.

On 7 April 1999 the CCRC referred the matter to this court together with a detailed statement of reasons. In the case of Johnson the Commission was particularly concerned about the failure to disclose the message which recorded that Duncan had pointed to Cooper rather than Johnson. Also the fact that the defence were not informed that Duncan had been in receipt of a reward. This, the Commission considered, along with the fact that not one member of the “Jobbins group” had been

prosecuted, might have deprived Johnson's counsel of a profitable line of defence. The Commission also noted that Jason Cooper was himself a practised burglar and had one conviction for robbery. Further the statement of reasons mentions the possibility of a juror having visited the site of the murder. There were also concerns expressed about the evidence of Todd and the lack of any hard evidence to link Johnson to any of the scenes of crime or to any property stolen from them. The Commission also underlined the fact that the evidence suggests that at least one of the robbers was white. So far as Rowe and Davis were concerned the Commission pointed to the conflict between the evidence of Kate Williamson and others as to when it might have been that Rowe left number 25 Laurie Park Road and that of Mr Fyffe and his passengers. The Commission also raised the possibility of the persons responsible for the attack upon Mr Hurburgh and Mr Eley having returned to number 25 in the Austin Princess before the same vehicle set off for the Napiers with a different team inside. In conclusion at paragraph 21.71 of the Statement of Reasons the Commission said this:

“The new evidence and arguments rehearsed in paragraphs 12.1 to 12.61 create a real possibility that Mr Johnson was not one of those three persons. Whilst there is evidence specifically linking Messrs Rowe and Davis to the robberies, if the prosecution against one of the three, Mr Johnson, might no longer be sustainable, in the Commission's view the Court of Appeal ought at the same time have the opportunity to consider whether the case can still be sustained against Messrs Rowe and Davis.”

On 16 February 2000 the European Court of Human Rights (ECHR) gave judgment in respect of Davis and Rowe. Its decision was that there been a violation of Article 6 (1) of the European Convention of Human Rights at trial which had not been cured by the Appeal process. The decision focused entirely upon the failure to disclose Duncan's status as an informant prior to trial together with the fact that he had become eligible for a reward and may have nominated Cooper as one of the robbers before pointing the finger at Johnson.

On 6th March 2000 the Crown made a further application in relation to undisclosed material which the court entertained in private notwithstanding objection taken by Mr O'Connor QC for Rowe. In consequence of that hearing a great deal of further material was made available to the appellants. A short judgment was delivered in open court and is now available. On 3 May 2000 the court rejected an application that those members of the court then sitting should disqualify themselves because in the course of the Public Interest Immunity application they had seen material prejudicial to Rowe. Reasons were given on 12 May 2000 which are also now available.

The substantive appeal was listed to begin on Monday 12 June 2000. In fact it started on Wednesday 14 June. In the days preceding the hearing of argument a

reply was received from the foreman of the jury to the effect that during the trial he had indeed visited the site of the murder. The Commission had already passed on a letter from another juror indicating that it was that juror's belief that the foreman may have made such a visit.

And that brings the matter up to date, that is to the hearing of the reference by this court. What has gone before has been merely a thumbnail sketch of the background intended to make what follows the more readily comprehensible to those unacquainted with the case. As we proceed it will be necessary to refer to certain aspects in somewhat greater detail. To begin with, however, we should explain our approach.

We are required to review the safety of convictions resulting from a trial which the ECHR has adjudged to have been unfair. It may be the first case of its kind; it will certainly not be the last.

How should we proceed? First of all we are invited to do so as if the Human Rights Act 1998 were already in force. We accept the invitation for the reasons advanced by Lord Bingham, Lord Chief Justice and Lord Steyn in *R -v- DPP, ex parte Kebilene & Others* (1999) 3 WLR 175, 187C and (1999) 3 WLR 972, 982 A-C.

The Court of Appeal (Criminal Division) is a creature of statute and must carry out its duties accordingly. Section 2 of the Criminal Appeal Act (1968) 1995, as amended, provides:

- “(1) Subject to the provisions of this Act the Court of Appeal —
- (a) shall allow an appeal against conviction if they think the conviction is unsafe; and
 - (b) shall dismiss an appeal in any other case.”

Section 3 (1) of the Human Rights Act 1988 requires the court so far as possible to read and give effect to primary and subordinate legislation in a way which is compatible with convention rights.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms confers on everyone the right to a fair trial.

We see no difficulty in giving effect to the ‘right to a fair trial’ when discharging our duty to consider the safety of a conviction.

Although there are authorities which suggest that the safety of a conviction is to be considered irrespectively of the trial process by which it was procured (see *R -v- Chalkley & Jeffries* (1998) 2 Cr.App.R 79 and *R -v- Clarke & Hewins* (1999) (6 Archbold News 2 CA (9704882W3)), we prefer the approach taken by this court in *R -v- Mullen* (1999) 2 Cr.App.R 143 CA and *R -v- Smith (Patrick & Others)*, The Times May 31st 1999. In the latter case the court stated:

"Now that the test for allowing an appeal is simply the safety or otherwise of the conviction, is it competent for the court to consider evidence entertained after the wrongful rejection of a submission of no case to answer? Formerly the position was judged at the time of the submission (*R -v- Cockley* 79 Cr.App.R 181 CA). In *R -v- Berry* 98 Crim.L.R 487 (transcript 20th January 1998) this court seems to have considered that the approach remains unchanged following the amendments made to section 2(1)(a) of the Criminal Appeal Act 1968 by the Criminal Appeal Act 1995. However in *Berry* the point was not crucial. So it is still open and, once again, not altogether straightforward. What if a submission is wrongly rejected but the defendant is cross-examined into admitting his guilt? Should the conviction be said to be unsafe? We think it should. The defendant was entitled to be acquitted after the evidence against him had been heard. To allow the trial to continue beyond the end of the prosecution case would be an abuse of process and fundamentally unfair."

We are fortified in our view by the decision in *R v Weir*, *The Times*, June 16th 2000. There, DNA evidence linked Weir to a murder by the profile extracted from an earlier saliva sample in a case which had been discontinued. The Crown accepted that the profile should not have remained on the database. Quashing the conviction, Swinton Thomas LJ said:

" This appellant was convicted of a brutal murder on the compelling evidence of the DNA sample."

So, a material irregularity resulted in the quashing of a conviction when evidence as to guilt was overwhelming.

Prior to amendment in 1995 the Act required the court to allow an appeal where it considered the verdict was unsafe or unsatisfactory, or there had been any wrong decision in law, or there had been a material irregularity in the course of the trial, save that the court might dismiss the appeal if it considered that no miscarriage of justice had occurred. The approach was set out by Viscount Simon LC in *Stirland v DPP (1944) AC 315* at p.321

"When the transcript [of the C of A] is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to S4(1) Criminal Appeal Act 1907 should be applied. The passage in *Woolmington v DPP (1)* where Viscount Sankey LC observed that in that case if the jury had been

properly directed it could not be affirmed that they would “inevitably” have come to the same conclusion should be understood as applying this test.”

It seems to be generally accepted that the 1995 amendment was not intended to disturb the previous practice of the Court. That was certainly the view of the Royal Commission on Criminal Justice (CM 2263 1993), which recommended the change, and of the then Secretary of State for Home Affairs and the Lord Chief Justice see Hansard (House of Commons) (6 March 1995) columns 53–55 and Hansard (House of Lords) (15 May 1995) columns 310–312. The reformulation was the subject of comment in *R -v- Graham & Others (1997) 1 Cr.App.R 302*. Giving the judgment of the court Lord Bingham LCJ stated at p.308:

“This new provision, the subject of a penetrating analysis by Sir John Smith QC in (1995) Crim.L.R 920, is plainly intended to concentrate attention on one question: whether in the light of any arguments raised or evidence adduced on appeal the Court of Appeal considers a conviction unsafe. If the court is satisfied despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe. The court is then subject to a binding duty to allow the appeal.”

As was stated by Roch LJ giving the judgment of the court in *Hickey & Others CA 30/7/97*:

“This court is not concerned with guilt or innocence of the appellants; but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.

This court is a court of review. The court reviews the trial process to equip itself to answer the question “do we think that the conviction appealed is safe or do we think it unsafe?”

The court is not a court of trial or re-trial. Persons accused of serious crimes are tried by juries in the Crown Court.”

In *R v Martin* [1998] 1 Cr App R 347, the House of Lords was considering the proposition that denial of the right to trial by jury in favour of Court Martial was an abuse of process. At p.353 Lord Lloyd of Berwick said:

“It could not possibly be said that the decision not to stay proceedings by Court Martial in Germany, where the crime was committed, was contrary to the rule of law, or that it deprived the appellant of any of his basic human rights. Nor could it be said to be “something so unfair and wrong” (see per Lord Lowry in *Hui-Chi Ming v R* (1992) 94 Cr App R 236) that the courts ought to intervene.”

And at p.355:

“Finally, I should also mention that even if the Courts-Martial Appeal Court has been satisfied that there was an abuse of process, it would still have been necessary for the court to dismiss the appeal, unless it was persuaded that the conviction was unsafe.”

At p.356 Lord Hope of Craighead said:

“In the ordinary case the Appeal Court exercises its jurisdiction by examining the effect of the point raised in the appeal on the course of the trial. Defects or insufficiency in the evidence and errors of law and procedure at the trial must be assessed in the context of the whole trial before the court can be satisfied the conviction is unsafe.

... the Appeal Court ... ha(s) power to declare a conviction to be unsafe and to quash the conviction if they find that the course of proceedings leading to what would otherwise have been a fair trial has been such as to threaten either basic human rights or the rule of law.”

In *R v CCRC ex parte Pearson* (2000) 1 Cr App R 141, at pps. 146–7 Lord Bingham LCJ said:

“The expression “unsafe” in s 2(1)(a) Criminal Appeal Act 1968 does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, ... Cases however arise in which

unsafety is much less obvious: cases in which the Court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done ... If, on consideration of all the facts and circumstances of the case before it, the Court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the Court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances."

The following is not intended to be an exhaustive statement of the principles involved. We simply extract the following. The Court is concerned with the safety of the conviction. A conviction can never be safe if there is doubt about guilt. However, the converse is not true. A conviction may be unsafe even where there is no doubt about guilt but the trial process has been "vitiating by serious unfairness or significant legal misdirection" as in *Smith (Patrick and Others)* and in *Weir*. Usually it will be sufficient for the court to apply the test in *Stirland* which, as adapted by Mr Perry, might read:

"Assuming the wrong decision on law or the irregularity had not occurred and the trial had been free from legal error, would the only reasonable and proper verdict have been one of guilty?"

That being so there is no tension between section 2 (1)(a) of the Criminal Appeal Act 1968 as amended and section 3 (1) of the Human Rights Act 1998.

The ECHR has declared the trial of these appellants to have been unfair. The material passages in the judgment are contained in paragraphs 62 to 67 inclusive. They read as follows:

"62. In cases where evidence has been withheld from the defence on public interest grounds, 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 the above-mentioned judgement, &sec; 34). Instead, the European 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.

63. During the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to 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. Indeed this principle is recognised by the English case law from the Court of Appeal's judgment in Ward onwards (see paragraph 37 above et. seq.).

64. It is true that on the commencement of the applicant's appeal prosecution notified the defence that certain information had been withheld, without however revealing the nature of this material, and that on two separate occasions the Court of Appeal reviewed the undisclosed evidence and in *ex parte* hearings with the benefit of submissions from the Crown but in the absence of the defence, decided in favour of non-disclosure.

65. However, the Court does not consider that this 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 hearing and on the account of the issues given to them by prosecuting counsel. In addition, the first 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.

66. In conclusion, therefore, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial. The facts of the present case set it apart from those of the above-mentioned Edwards judgment, 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 (*op. cit.*, § 36–37)

67. It follows that there has been a violation of Article 6 § 1 of the Convention.”

Are the conclusions and more importantly the reasons for them binding upon this court? Mr O'Connor QC for Rowe submits that they are. He is supported by counsel for the other two appellants.

So far as is material section 2 of the Human Rights Act 1998 provides:

“(1) a court or tribunal determining a question which has arisen in connection with a convention right must take into account any —

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ...

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which the question has arisen.”

There is no doubt that the judgment is relevant to the proceedings in which the question has arisen and it would be difficult to go behind an ECHR decision arising out of the same factual background without doing serious injury to the intent and purpose of the Act. At the same time the obligation is to “take into account” which would seem to be something less than an obligation “to adopt” or “to apply”. Happily it is not necessary to decide to what extent the judgment of the ECHR is binding upon this Court because in spite of remaining puzzled by the suggestion that the Court of Appeal may have been unconsciously influenced by the jury's verdict, and without necessarily accepting that a failure to disclose at the trial stage cannot be cured on appeal, we have come to the same conclusion, namely that the failure to make known Duncan's status as an informant together with the fact that he had received a reward and the content of message 111 was a material irregularity rightly condemned by the ECHR as a violation of Article 6.

But Mr O'Connor and Mr Blaxland for Johnson go further. Whilst accepting that ‘fairness’ and ‘safety’ are separate concepts Mr O'Connor submits that the finding by the ECHR raises a “strong presumption” that the convictions are unsafe. Mr Blaxland submits that the court can only give effect to the Convention right under Article 6 (1) by quashing the convictions.

For the Crown Mr Perry's response is to say that the ECHR is principally concerned with interpreting an International Treaty and as such does not express any opinion on the question of whether a conviction in domestic law is safe or unsafe. He has referred the court to *Murray -v- United Kingdom (1966) 22 EHRR 29* at para's 56 and 74–76 and *Saunders -v- United Kingdom (1997) 23 EHRR 313* and in particular to paragraph 86 of the Saunders' judgment where the court observed that it could not speculate as to whether the outcome of the trial would have been any different absent a breach of Article 6.

On this we find ourselves in agreement with Mr Perry.

The duty of the ECHR is to determine whether or not there has been a violation of the European Convention or in this case, more particularly, of Article 6 (1). It is not within the remit of ECHR to comment upon the nature and quality of any breach or upon the impact such a breach might have had upon the safety of the conviction. We note that in *Condron -v- United Kingdom* ECHR 2 May 2000 the court seems to have questioned the competence of the Court of Appeal to assess safety against the background of an unreasoned verdict. But on our understanding the distinction between 'fairness' and 'safety' was recognised in paragraph 65:

"The Court must also have regard to the fact that Court of Appeal was concerned with the safety of the applicants conviction, not whether they had in the circumstances received a fair trial. In the Courts' opinion the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any inquiry into the issue of fairness."

And at paragraph 68 the Court simply concluded that the applicants were denied a fair hearing in violation of Article 6.1 of the Convention.

We are satisfied that the two questions must be kept separate and apart. The ECHR is charged with inquiring into whether there has been a breach of a convention right. This court is concerned with the safety of the conviction. That the first question may intrude upon the second is obvious. To what extent it does so will depend upon the circumstances of the particular case. We reject, therefore, Mr Blaxland's contention that a finding of a breach of Article 6.1 by the ECHR leads inexorably to the quashing of the conviction. Nor do we think it helpful to deal in presumptions. The effect of any unfairness upon the safety of the conviction will vary according to its nature and degree. At one end of the spectrum Mr Perry cites the example of an appropriate sentence following a plea of guilty passed by a judge who for some undisclosed reason did not constitute an impartial tribunal. At the other extreme there may be a case where a defendant is denied the opportunity to give evidence in his own behalf. In both cases there might well be a violation of Article 6. Is each to be treated in the same way? Not in the opinion of this court.

Before leaving this topic we ought to mention Mr O'Connor's invitation to the court to state as a rule that a participating, informant witness should never be accorded protection under the public interest immunity procedure. He argues, persuasively as always, that such a witness has accepted the risk of reprisals by offering to give evidence for the prosecution and non-disclosure of his informant status would do nothing to improve his security. Whilst seeing the force in the submission we consider that it is simply another factor, albeit important, to be taken into account by the judge in balancing the public interest in keeping material confidential against the

public interest in securing a fair trial. Therefore, we decline the invitation.

Unsurprisingly the grounds argued on the first appeal are reinstated. They are common to all three appellants and depend upon the lurking doubt said to arise out of the "colour question" and "timing question". Then there are grounds common to all three resulting from the disclosures and investigations post-trial including Duncan's status as an informant, the internal message which referred to Jason, the fact that a juror had carried out his own investigations and the pronouncement by the ECHR that the trial process had violated Article 6 (1). In addition Johnson and Davis have grounds of their own. Johnson relies upon Todd's so called retraction, information that a small white car containing three white men had been seen near to and about the time of the Spicer/Almond robbery, the finding of a Union key in the dash of the Triumph Spitfire, the wrongful reception of evidence of the revolver, and the failure to disclose the contents of a police log recording the fact that three white men had been responsible for the Spicer/Almond robbery. Davis has as a separate ground the fact that Joanne Cassar has conceded in interview with the Greater Manchester Police that it was possible for Cooper to have left her room whilst she was asleep and without her knowing. We take each of those grounds in turn.

The colour question.

The evidence on this aspect of the case has remained unchanged since the trial. We have already attempted a summary. We can do no better than reiterate what was said by this court on the first appeal.

"There was some evidence, therefore, from the victims of the attacks that one or more of the assailants could have been white. The jury had to weigh the evidence carefully especially in the light of the circumstances in which the victims saw their attackers. All the assailants were wearing head covering of the balaclava type and Duncan's evidence was that all three were wearing dark gloves on the Thursday evening at number 25. The evidence was consistent in showing that very little of the assailants skin was exposed to view. The area of the evidence was explored carefully with the witnesses in cross-examination and the judge laid it out carefully for the jury in his summing up. It was for the jury to weigh the evidence that one or more of the attackers may have been white along with all the other evidence in the case and decide whether it raised any doubt upon the Crown case that all three assailants were coloured and were the defendants."

The court then cited a passage from the judgment in *Cooper (1969) 53 Cr.App.R 82* in which Widgery LJ (as he was) in delivering the judgment of the court said this:

"It has been said over and over again ... that this Court must recognise

the advantage that a jury has in seeing and hearing the witnesses and if all the material was before the jury and the summing up was impeccable this court should not lightly interfere”.

This court concluded that as matters then stood the discrepancies between the descriptions given by the witnesses and the actual appearances of the robbers was not such as to give rise to a lurking doubt as to the safety of the convictions. Of course, the court reached its conclusion after a full consideration of the prosecution case and in particular what the court considered to be the overwhelming evidence against Rowe. In any event the point was of little value to Rowe. In difficult conditions he could easily be taken to be white and on any view there was room for at least one black man in the team. We can well see that at a superficial level the point might have some popular attraction. In our view, standing alone it has little weight and would not persuade us to differ from the view expressed by this court in the first appeal. But, naturally, it does not fall to be considered alone. It has to be taken into account along with other grounds. It is their cumulative effect which matters.

The timing point.

As with the previous ground we have briefly reviewed the evidence in an earlier part of the judgment. Once again this matter was fully investigated before the jury. It certainly did present the Crown with a difficulty. On the previous occasion this court came to the conclusion that Kate Williamson and the others who had taken part in the visit to the Pooley's must have been mistaken first of all as to the time of their arrival back at 25 Laurie Park Road and secondly, so far as Kate Williamson was concerned, as to the time when Rowe left the house. There were, of course, other possibilities. Mr Fyffe and his party might have been wrong about the time they passed by the place where the Triumph Spitfire was parked. Mr Fyffe may have been wrong in thinking that he had seen the Triumph Spitfire at all. Both Kate Williamson and the witnesses from her end and Mr Fyffe and his party might have been wrong in their evidence. Or, it might have been a different team involved in the attack upon Mr Hurburgh and Mr Eley. If the latter, it is possible that the Criminal Cases Review Commission are right in suggesting that the Austin Princess might have been driven back to 25 Laurie Park Road before going on with either the same or a different team to the Napier house.

In the previous appeal the court took the view that the one firm time was that of the 999 call made to the police after Mr Eley had sought succour at a nearby cottage. That was 2:52 am. The court also took the view that the evidence showed that the attack on Mr Hurburgh and Mr Eley must have taken place between 1:19 am and 2:52 am. That is because the service station which Mr Eley visited closed at about 1:19 am. Adopting the same approach as the court on the previous occasion we

conclude that the evidence pointed to the attack having taken place at roundabout 2:00 am. It does seem to us inherently unlikely that a group of robbers would wait around in a field for approximately 1½ hours. Accordingly, it seems to us much more likely that if anyone has made a mistake it is Mr Fyffe. We consider there may well be force in the Crown's submission made to us, though not on any earlier occasion, that Mr Fyffe had seen a motor car and following the publicity given to this attack and having seen the photographs of the Triumph Spitfire which had been in the papers he assumed that the motor car he had seen and the Triumph Spitfire were one and the same. But once again the evidence was fully and fairly laid before the jury, the difficulties were adverted to in the summing up and it was a matter which the Court of Appeal on the previous occasion did not consider such as to undermine the safety of the convictions. Again we find ourselves unable to differ from that approach. There was ample evidence against all three appellants and it was particularly strong against Rowe so far as the second and third incidents were concerned. The case for the Crown and of all three defendants was that the same trio was involved in all three incidents. That is supported by the evidence as to where Mr Hurburgh's and Mr Napier's motor cars were abandoned. That being so, the jury were entitled to come to the conclusion that Rowe was one of the robbers involved in the attack on Mr Hurburgh and Mr Eley and, therefore, the others were also. It would follow that either Kate Williamson or Mr Fyffe and his party must have been wrong about the times. So standing on its own the "timing point" would not lead us to conclude that any of these convictions are unsafe.

The informant point.

We have mentioned this matter briefly in recording the history. Norman Duncan provided the information which led to the raid on 25 Laurie Park Road. At the start of the trial neither the Crown nor the Defence were aware of that fact. As time went by the Crown did become aware as a matter of inference that Norman Duncan had been the informant and we take it that defence counsel were capable of making the same deduction. What neither prosecuting nor defence counsel knew until after the trial was that Duncan had gone to see his handler on 18 December 1988 and that he had remained voluntarily at Reigate police station from late on 18 December until Sunday 20 December. The prosecution was not aware until after the trial that during that period there had been a number of conversations between Duncan and police officers in which the question of a reward had been discussed and, so it appears, Duncan had named a man called Jason rather than Johnson as being the third member of the team otherwise consisting of Rowe and Davis. We have already referred to the fact that the 'naming of Jason' came to light during the Greater Manchester Police Investigation. The information was not available to the Crown when Mr Bevan made either of his two applications for public interest immunity to the Court of Appeal. It was information obtained by the Greater Manchester Police from the Holmes Computer and has become known as message 111. Mr Bevan has told this court that

had he known of message 111, even in 1990, he would have deemed it his duty to make known its existence at least to counsel acting for Johnson and thereby, he concedes, Duncan's status as an informant would have become known to all as would the fact that he was eligible for and did in fact receive a reward and the fact that he had been a voluntary inmate at Reigate police station for two days. It is not necessary, therefore to consider what the position might have been had message 111 not emerged in the course of the CCRC investigations. It is enough to say this is a material irregularity. It is also a violation of Article 6 (1) as the ECHR has found. However, we do not say that every violation of Article 6 (1) will necessarily amount to a material irregularity. But as we have seen that is not the end of the matter. We still have to consider the effect of that material irregularity upon the safety of one or more of the convictions. That in turn involves some consideration of the use to which such information might have been put at trial. It may be, as has been suggested, that the Crown would have elected to dispense with Duncan as a witness. If called however, the fact that he had informed would not necessarily have impeached his credit. Rather the opposite. If, as suggested at trial, he had been one of the robbers. It was a remarkably bold move on his part to present himself to the police together with the evidence which might have led to his conviction, before, so far as he knew, the police had any kind of lead. Nor would the fact that he was expecting a reward have provided much ammunition especially as he proposed to decline the reward offered by the victims of the crimes. Moreover, we are extremely doubtful whether counsel for Rowe and Davis would have wished much of the background information to emerge in the trial. After all Duncan was consistent throughout as to Davis and Rowe being involved in these offences. On the other hand we can well see how the information might have been exploited on behalf of Johnson. Duncan may well have been vulnerable as to how it came about that he mentioned Jason rather than Johnson when first speaking to the police and although we have seen his explanation offered to the Greater Manchester Police it is by no means certain that he would have had available the same ready answers at trial. And we can also see that if the switch from Jason to Johnson could be used to undermine Duncan's credibility some advantage might have accrued to Davis and Rowe. There is also the point made by Mr Mansfield QC on behalf of Davis that if this information had been available it would have been possible to cross examine the police and Duncan as to whether Duncan had been offered immunity from prosecution. It was, after all, the fact that Jobbins, Duncan and Griffin were never charged with any offence.

There is another aspect to this, though not formulated as a ground of appeal. Duncan told the jury that he was not arrested until 22 December. He did not tell the jury anything about his earlier sojourn at Reigate police station. Because he was concealing his status as an informant he was also forced to lie about what had taken place in the 38-minute interview. That could only have been in collusion with the police. It amounts to no less than a conspiracy to give perjured evidence. That is something that Mr Bevan and Mr Waters would not have countenanced at any cost. We find the fact profoundly disturbing. It must dent the credibility both of Duncan and the police officers directly involved. It is possible to present it either as fresh

evidence or a further material irregularity. Either way the "Duncan factor" should make a significant contribution to our decision.

The Juror point.

This is of some importance and deserves our close attention.

During the investigations of the CCRC, a suggestion emerged that a member of the jury on his own initiative might have visited one or more of the scenes of crime. Directed by the Court of Appeal, the Commission wrote to each juror, posing questions drafted by the Court. They were as follows:

1. Did you, at any stage during the trial, visit any place mentioned in the evidence?
2. If yes,
 - (i) where did you visit?
 - (ii) did you visit alone or with others?
 - (iii) if with others, please say how many and identify them if you can.
3. If the answer to 1 is no, are you aware that any other juror visited such a place?
4. If the answer to 3 is yes, please identify if you can the place(s) visited and the juror(s).

One juror having been discharged, there was a total of 11 to whom the Commission attempted to address those enquiries. Seven jurors replied; six answering all relevant questions "no" and the seventh, No 2 answering as follows:

"I did not at any stage during the trial visit any place mentioned in the evidence but the jury were aware that one juror had. From the seating plan of the jurors which you enclosed, to the best of my recollection the juror was No 3 who was also the foreman of the jury. The jury discussed the journey he had made to various sites mentioned in the evidence including distances and timing between the garage, the pub, the field, and routes taken etc. However for specific identification of places and journeys made I feel he would be the person to give you more detail."

There was difficulty in tracing juror no. 3, the foreman. Eventually he was found and replied to the following effect. He had during the trial visited places mentioned in the evidence. He had gone by car to the street in which Davis and Rowe had lived. From the roadway he had looked at the house for about one minute. He had then driven to a road near to the public house close to the field in which Mr Hurburgh had died. He had stayed there for one or two minutes. He had been alone at all times. So far as he knew, no other juror, had visited any of the places mentioned in the evidence.

We were invited by Mr Bevan to require the jurors, or at least nos. 2 and 3 to attend

for further questioning. We refused the application. Section 8 of the Contempt of Court Act 1981 prohibits any enquiry which might lead to disclosure of matters discussed in the jury room. Historically, this Court has been vigilant to preserve the sanctity of a jury's deliberations. In our judgment, to ask any further questions would be to risk contravention of Section 8.

It is apparent on the face of the letters from jurors 2 and 3 that their recollections differ. We have been reminded that this was an alert jury, (It was the jury who picked up the relevance of the Marks and Spencer's amaryllis plant as a birthday gift to Joanne Cassar) and confident enough to send a number of notes to the Judge during the trial. Many of those notes were penned by the foreman, juror no. 3 That he wielded some authority cannot be ruled out. Juror no. 2 volunteered the information that there had been some discussion. None was mentioned by no. 3

In R -v- Gurney (1976 Crim.L.R) at 567 the judge decided that it would cause too much trouble and expense for the jury all to have a view to consider the quality of the street lighting in a particular street where the defendant was alleged to have committed the offence of dangerous driving. He authorised one juror who lived near the scene to view it and describe it to others. It was held on appeal that the judge broke the rules which required the jury to stay and hear all the evidence together and that there was no place in the jury system for apportioning work between jurors. The prosecution did not press for the application of the proviso and the conviction was quashed.

In R v Smyth, Aspinall and Aspinall CA 67 (1988) the court considered the appropriate criteria when considering individual knowledge acquired by one juror. It concluded "we think the correct question to ask when considering whether such an incident renders a conviction unsafe, is whether what was done could have affected in a significant way an issue the jury had to determine."

The fact that he went to where Mr Hurburgh was killed suggests to us that juror no. 3 was concentrating on the mystery of the timing. We remind ourselves that he drove from 25 Laurie Park Road to a field near the White Bear, but drove no other part of the journeys taken by the robbers that evening. He may have been considering the line of sight enjoyed by Mr Fyffe. He may have been considering the time taken to achieve the journey. We cannot be sure that he viewed the correct area, let alone from the correct angle.

Might he have gone back to the jury with his own solution to "the mystery"? If he did, then there is no guarantee of the basis upon which the jury reached its verdict. A cogent though not conclusive test for the effect of this disclosure is the approach which each member of this Court would have adopted if sitting as the trial Judge and equipped with the information which has subsequently emerged. Dependent upon the timing of the juror's visit, it might have been possible to "cure" the difficulty by arranging a controlled view for the whole jury. Were that not possible, then one of two things would have happened. Either juror No 3 alone would have been discharged, on the basis that no discussion had taken place with the other members of

the jury or the trial would have been aborted.

The area of fact which this jury must, in our judgment, have been considering, is crucial. Either, as Mr Mansfield put it, the Crown comes up against the block of the Fyffe body of evidence, or, it comes up against the block of the Kate Williamson evidence. The two are irreconcilable. In our judgment, this visit by juror No 3, was another material irregularity in the course of the trial and a serious one at that.

Before leaving this matter it may be appropriate to say something about the instructions which are routinely given to jurors in waiting. We understand that they are shown a video which describes their duties in some detail. In addition they are told by the jury bailiff about the domestic arrangements and the facilities available to them. They are informed that they are not to talk to people outside their own number about the case which they are trying. Something similar is said by the judge at intervals during a trial. In *R -v- Oliver* (1996) 2 Cr.App.R 510 at 520 the court said:

“The jury must decide the case on the evidence and the arguments they have seen and heard in court and not on anything they may have seen or heard or may see or hear outside the court. That the evidence has been completed and that it would be wrong for the jury to seek for or to receive further evidence or information of any sort about the case.”

It does not seem to be the common practice to warn jurors not to visit the scene of crime unless a view has been organised for that purpose. In future Judges would be wise to consider whether or not in the particular case there might be a risk of a juror acting on his own initiative as appears to have happened here and to give some further appropriate direction. Finally, we would like to say that nothing in this judgment is intended to reflect upon the integrity of the particular member of the jury and neither should it be taken to be any criticism of what he did.

We turn next to the additional and separate grounds of appeal raised on behalf of Johnson and Davis.

Martin Todd.

Although there was evidence at trial from the “Jobbins Group” of Johnson being involved in preparatory acts the only evidence which put Johnson at the scene of any of these crimes came from Martin Todd who spoke of Johnson having admitted his involvement. His account was circumstantial and, on its face, entirely credible. He made notes of his conversation shortly afterwards from which he was permitted to refresh his memory. When seen by the Greater Manchester Police he expressed concern that in his evidence he might have attributed a more definite role to Johnson than was warranted by what Johnson had told him. He wanted to make it plain that

what Johnson had said did not amount to any more than an admission of some involvement. That is in fact what Todd had said in evidence although the notes he made did attribute to Johnson an admission that "he did it". That was by no means a "retraction" and in our view does not constitute fresh evidence capable of throwing any doubt upon the safety of Johnson's conviction. However, Mr Courtney Griffiths QC also relies on an alteration to the notes made by Johnson consisting of the crossing out of the word 'white' describing Johnson's accomplice or accomplices which Todd has initialled. It is accepted on all sides that that alteration must have been made, to put it no higher, at the suggestion of a police officer. That the word 'white' was crossed out is evident to the untutored eye but the fact has been confirmed since trial by an expert. It seems to us that the point was available to be taken at trial. It does not surprise us that defence counsel was not prepared to run the risk of the document becoming an exhibit. Had that happened the jury would have seen recorded the words "he told me he was scared as he did do it." That was stronger than anything Todd had said in evidence. In our view the ground now raised has little merit. The only conceivable point which might be made on appeal is that the crossing out of the word 'white' is of a piece with the suppression of message 111 and suggests an attempt by the police to doctor the evidence. If so, it was a very clumsy attempt given the obvious nature of the alteration and the fact that presumably, Todd had been asked, to initial the alteration. Mr Courtney Griffiths also takes the point that the Crown should have led Todd's criminal convictions rather than oblige defence counsel to put them to him and so risk Johnson's character going before the jury. Mr Bevan has told us that there would never have been any question of him seeking to put in Johnson's character as experienced Counsel for Johnson must have appreciated. Moreover, we have no doubt that if asked to do so Mr Bevan would have led Todd's criminal record in chief. It has also emerged through the Greater Manchester Police enquiries that Todd misled the jury, as he had the prison authorities, by claiming to be suffering from multiple sclerosis. It seems that this had been said simply to obtain a place in the hospital wing of Brixton prison and was quite untrue. So he told a lie not only to the prison authorities but also on his oath. Given Todd's record and the fact that the lie was in no way directed at Johnson we consider this piece of "fresh" evidence to be wholly irrelevant.

The small white car.

An alternative side heading might have been "message 90". It has emerged during the enquiries and was recorded in message 90 that a Mr Roger Cole saw three white men in a small white vehicle not far from the Spicer/Almond household. It is postulated that the small white car might have been the Renault 5 stolen after the robbery. Mr Cole thought it was a white Peugeot. He recorded the registration as UUF 408Y. That registration number belonged to a Triumph Acclaim the owner of which lived in Brighton. Moreover, it does not correspond in any way with the registration number of the Renault which was E546 MOW. Perhaps even more importantly three

white men in one motor car does not accord with the three robbers leaving the Spicer/Almond home in a Renault and a Vauxhall Cavalier. The "fresh" evidence is of no assistance either way.

The revolver.

It will be remembered that when Johnson was arrested he had with him a revolver. He admitted having had it with him on the evening of 15 December. It became an exhibit at trial. Richard Napier said that it was the same gun as has been pointed at him. It is accepted that Richard Napier could not safely identify it as the same gun because it was a popular model without any distinguishing features. No objection was taken at trial to the admission of the evidence. Nevertheless Mr Courtney Griffiths argues that the evidence should have been excluded by the judge on his own initiative. He submits that the prejudicial effect of allowing it in far outweighed the probative value of the evidence, given that it could not sensibly be said to have been the same gun which was used by one of the robbers. We disagree. The evidence was plainly admissible to show consistency and, in the absence of objection, there was no reason for the judge to exclude it.

The Union key.

This had been found in the dash of the Triumph Spitfire. It was not known at trial but has been discovered since that it was capable of being used to start the Triumph Spitfire. It is not suggested that it was designed for that purpose and Mr Membury, the owner, had said that he had retained all the keys for the car. However, Mr Courtney Griffiths submits that if available at trial the evidence might have cast doubt upon the evidence of the "Jobbins Group" that Johnson had asked for some means of starting the car. Why should he do that if the means was already to hand? We recognise that it is the sort of jury point which is sometimes made in cases of this kind but we cannot think it is of any importance in the context of this case as a whole.

The Police log.

It seems that a police incident log had recorded that the three robbers in the Spicer/Almond robbery were white. Had that been known at trial, as it was not, Mr Courtney Griffiths submits that it might have provided some ammunition for cross-examination. The actual words recorded "three males believed white" is no more than a reflection of the evidence which Mrs Spicer gave at trial. We cannot see that

the point is of any significance.

Joanne Cassar.

This is a separate ground of appeal taken on behalf of Davis. In interview with the Greater Manchester Police Joanne Cassar accepted the possibility of Cooper having absented himself for a time without her having been aware of the fact. At trial she had said that she and Cooper had slept in the same room that night thus providing an alibi for Cooper and removing him from the list of possible suspects. As Mr Bevan points out Jason Cooper was wont to brag about his nefarious exploits and there was absolutely no reason for him to be other than entirely open about his comings and goings. It is, Mr Bevan submits, extremely unlikely that he could have escaped for a period of some hours and returned without Joanne Cassar being aware of the fact. In any event it was open to defence counsel to pursue that point in cross-examination had he so desired. In our view the point is no more than a trifle.

In resisting the appeals Mr Bevan has reminded the court of the strength of the prosecution case particularly as against Rowe. He suggests that it is essential to begin with an appreciation of the evidence which connects Rowe to the Napier and Spicer/Almond incidents. He points to the fact that property from both robberies had come into his possession by the early hours of 16 December. There is no explanation offered save for a fanciful suggestion that there had been a conspiracy between the police, the "Jobbins Group" and Kate Williamson. Whilst a ready motive might be found for the "Jobbins Group" on the assumption that they themselves were responsible for these crimes and Kate Williamson was said to have acted out of jealousy, there seems to have been little reason for the police to go against Rowe, Davis and Johnson rather than the easier target of Jobbins, Duncan and Griffin. Further, Mr Bevan asks rhetorically, how did it come about that Kate Williamson and the "Jobbins Group" were able to put their heads together when she and they were barely acquainted. And why, would a frightened 16-year-old girl make up such a story anyway. It is absurd to suggest that she would run the risk of offending Rowe and laying herself open to criminal charges if what she said was not the truth. Then she is supported by the scratch on the window and the finding of the brooch in Rowe's waste paper basket. Although Mr Bevan cannot and does not pray in aid any of the material researched by the Greater Manchester Police which might positively assist his case he does point to the fact that nothing has been turned up to support the conspiracy theory for which Rowe contends. He submits that if it is accepted that the fact that Rowe was involved in the second and third incidents is overwhelming then, given the general acceptance that the same trio was involved in all three, it must follow that Rowe was also involved in the Hurburgh/Eley incident. We interpose the comment that by the same reasoning if there is doubt that Rowe was involved in the first incident then there must be doubt about him having been involved in the second

and third. However Mr Bevan continues; if Rowe was properly convicted the conspiracy theory falls apart. The three robbers were not Griffin, Jobbins and Duncan. That has implications for the other two appellants. Davis' case is closely intertwined with that of Rowe. There is the evidence of the "Jobbins Group", Joanne Cassar and the Amaryllis plant and the fingerprints on the porcelain figures. On his own admission Johnson was at 25 Laurie Park Road on the evening of the 15 December; he had a revolver in his possession; he was concerned to know how to start the Triumph Spitfire; he made admissions to Todd; he gave a false alibi; he did not give evidence.

In our view the case against all three appellants was formidable. The evidence against Rowe on counts 9, 10 and 11 was overwhelming. However we are bound to follow the approach set out earlier in this judgment, namely assuming the irregularities which we have identified had not occurred would a reasonable jury have been bound to return verdicts of guilty? In all conscience we cannot say that it would. At this distance we simply cannot assess the impact which the undisclosed material might have had on the case for and against Johnson. Nor can we be certain that the results of the juror's private investigations, whether or not communicated to the others, might have played a part in resolving the timing mystery in favour of the prosecution. Accordingly we cannot say that any of these convictions is safe. They must be quashed and the appeals allowed. Ten years on it is not appropriate to order a retrial. For the better understanding of those who have listened to this judgment and of those who may report it hereafter this is not a finding of innocence, far from it.

MR BLAXLAND: My Lord, we have a very simple application for a defendant's costs order under section 16(4) of the Prosecution of Offences Act, which provides the court with a power to make such an order where an appeal against conviction is allowed. Can I make it plain that legal aid was granted very shortly I think after this case was referred to the court by the Criminal Cases Review Commission. The purpose for applying for a defendant's costs order is simply this, that my instructing solicitor conducted a lot of work on this case prior to the case being referred, indeed was involved in making submissions to the Criminal Cases Review Commission on behalf of the appellant, Mr Johnson. The application is for a defendant's costs order to be taxed in the normal way. That is the extent of the application.

LORD JUSTICE MANTELL: Where ought we to look in the red book?

MR BLAXLAND: In Archbold it is at Chapter 6, paragraph 5.

LORD JUSTICE MANTELL: This is for the additional work done, is it, Mr Blaxland?

MR BLAXLAND: That is right.

LORD JUSTICE MANTELL: What would that consist of?

MR BLAXLAND: The representations made to the CCRC. I do not have chapter and verse as to how long they went on for, which is why I make the application that the costs be taxed. But there was work undertaken by my instructing solicitor.

LORD JUSTICE MANTELL: You are asking for an award of costs out of central funds to cover that additional work if it is found to merit remuneration on assessment?

MR BLAXLAND: Yes.

LORD JUSTICE MANTELL: I understand that. Yes. Mr Mansfield, do you have a similar application?

MR MANSFIELD: My Lord, in my case my instructing solicitors appeared at the trial and have appeared on behalf of Mr Davis ever since, and Mr Young in particular has done a considerable amount of work on the case. He made representations to the Home Office in the 1993 to 1997 period before the CCRC took over. He made prison visits. He cooperated fully with the CCRC and continued prison visits and read all the material and made submissions to the CCRC.

LORD JUSTICE MANTELL: Your application is similar. You are only seeking an order for costs in so far as your solicitors have not been sufficiently remunerated by reason of their legal aid certificate?

MR MANSFIELD: Yes.

LORD JUSTICE MANTELL: Is that it?

MR MANSFIELD: It is.

LORD JUSTICE MANTELL: And that would come out on assessment? Yes. Yours is the same application, Mr O'Connor?

MR O'CONNOR: Mine is the same. The proposition that Mr Nichols has not done work *pro bono* would be rejected as incredible by the courts. He has, as ever, done a considerable amount of work before legal aid was granted but from 1997 onwards which is when he started to act in particular therefor with the CCRC, so the principle is the same.

LORD JUSTICE MANTELL: Yes.

MR JUSTICE BLOFELD: May I ask one question. If the CCRC come in and there are solicitors, is there any provision for payment then, or none?

MR O'CONNOR: My Lord, none, except for this retrospectively. The solicitors themselves take the chance and it is a critical part of the system as we have seen in many cases that they do.

LORD JUSTICE MANTELL: You have come across a similar order being made in the past have you, Mr O'Connor?

MR O'CONNOR: Yes. My Lord, exactly the same order was made in the Hickey and

Robinson cases and the Bridgewater case. Exactly the same.

LORD JUSTICE MANTELL: I do not imagine, Mr Waters, you want to say anything?

MR WATERS: My Lord, no.

LORD JUSTICE MANTELL: The court is minded to make an order to be expressed in the same terms as were employed in the Hickey case in relation to all three appellant's solicitors. Does that satisfy you, Mr Mansfield?

MR MANSFIELD: My Lord, yes. I wonder if it might be extended to my junior. In fact he has also done a considerable amount with the solicitor. It may require a separate application for him but there was work done prior—

LORD JUSTICE MANTELL: My Lady thinks that the same application will cover both. If not, Mr Mansfield, then liberty to apply.

MR MANSFIELD: Thank you very much.

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