

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2011

Before :

THE LORD CHIEF JUSTICE OF ENGLAND & WALES
MR JUSTICE TREACY

and

MR JUSTICE CALVERT-SMITH

Between :

David Robert Barkshire and Others
- and -
The Queen

Appellant

Respondent

Hearing dates: 19 July 2011

1. These 20 appellants were convicted by a jury at Nottingham Crown Court on 14th December 2010 of conspiracy to commit aggravated trespass. It is a case which has given rise to a great deal of justifiable public disquiet, which we share. Something went seriously wrong with the trial. The prosecution's duties in relation to disclosure were not fulfilled. The result was that the appellants were convicted following a trial in which elementary principles which underpin the fairness of our trial processes were ignored. The jury were ignorant of evidence helpful to the defence which was in the possession of the prosecution but which was never revealed. As a result justice miscarried. Accordingly, at the end of the hearing yesterday, the convictions were quashed. These are our detailed reasons.
2. The convictions arose out of a political protest. The appellants intended to invade a power station at Ratcliffe-on-Soar to protest against climate change. This power station discharges about 150,000 tonnes of carbon into the atmosphere each week. That is why it was chosen, and protesters came from all over the country either in furtherance of or to consider participation in a sophisticated plan to enter and occupy the power station for a week. During the occupation the discharge of carbon would be significantly diminished, and the power station possibly shut down. Transport, rations, and equipment were organised. Ten vehicles were hired for transportation purposes. Sophisticated climbing equipment, safety helmets, maps mobile phones and walkie-talkies were arranged. Once entry into the power station was effected, one team was to close down the coal conveyors and immobilise them by securing themselves to the machinery, another team was to climb the chimney and occupy the flue,

yet another team was to fence themselves to the base of the chimney to protect the team which was occupying the flue, and yet another team was to occupy the gates and prevent entry to the police and indeed to those with responsibility for the power station.

3. The prosecution evidence against the appellants was unchallenged. The essential facts were not in dispute. In reality, subject to the specific defences advanced at trial, the ingredients of the conspiracy, and the individual involvement of each of the appellants was not in question.
4. When the judge came to sum the case up to the jury, in a written “route to verdict”, repeated orally, it was recorded that:

“Each of these defendants admit that they have committed all of the acts which are necessary for the prosecution to prove the case against each of them. In other words, in the absence of a defence, they admit they have committed the offence but say they were justified in doing what they did”.

5. The defence was described as the “justification and necessity” and the jury was directed:

“Each defendant is innocent of this offence if they reasonably believed (even if mistakenly):

1. That it was necessary to do what they were doing in order to avoid the imminent threat of serious injury to himself/herself or others, and
2. That in the circumstances that they believed them to be, it was reasonable and proportionate to do what they were going to do.

So the prosecution have to make you sure that:

Either: doing what they planned to do was not necessary for the above purpose

Or: that it was *unreasonable* and *disproportionate* for them to do what they were going to do.

If the prosecution have not made you sure, then the defendant is not guilty.”

6. During the course of the summing up, the judge directed the jury that it was enough for the purposes of the defence if the defendant in question reasonably, even if mistakenly, “believed that the commission of the crime was necessary for the purpose of avoiding the imminent threat of serious injury to himself or herself or somebody else...to anyone anywhere in the world”.
7. The way in which the judge directed the jury was consistent with the decision of Flaux J in the course of a preparatory hearing under section 29 and 31 of the Criminal Procedure and Investigations Act 1996. In his ruling he rejected a contention by the prosecution that in law no defence was available to the appellants, first, on the basis that their intended conduct was justified or excusable on the basis of necessity or duress of circumstances under common law, arising because they were impelled to act as they did in order to prevent imminent death and serious injury to others as a result of the burning of coal, and the emission of carbon into the atmosphere at the power station, and second, that they intended to use reasonable force to prevent crime under section 3 of the Criminal Law Act 1967, the crimes intended to be prevented being criminal damage, public nuisance, and offences under various sections of the Wildlife and Countryside Act 1981. In reaching this conclusion Flaux J found himself unable to follow observations by Lord Hoffmann (with whom Lord Rodger of Earlsferry, Lord Carswell, and Lord Mance agreed) in *R v Jones(Margaret)* [2007] 1 AC 136, in which he suggested that defence of justification required that the acts of the defendant:

“must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and dispute over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury.”

8. The Crown did not appeal Flaux J’s ruling. The trial proceeded on the basis that it was correct, and the judge (HH Judge Teare) rightly directed the jury accordingly. Given the particular and unusual circumstances in which these appeals are brought, it would not be appropriate for this court to start an examination into the safety of the convictions by going behind Flaux J’s ruling. Nevertheless we entertain reservations about it. The circumstances in which what would otherwise amount to criminal conduct may be justified on the basis of the honestly held, political beliefs of the perpetrators, will need reconsideration in this court on another occasion.
9. We are here concerned with critical aspects of the trial process, and in particular the obligations of the prosecution to ensure the disclosure of material which, in the words of section 3 of the Criminal Procedure and Investigations Act 1996 “might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused”. The principle is reflected in the observations of the House of Lords in *H and C* [2004] AC134 that:

“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant...should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.”

That material includes anything available to the prosecution which may undermine confidence in the accuracy of evidence called by the prosecution, or which may provide a measure of support for the defence at trial.

10. At the heart of the prosecution's failure to comply with its disclosure obligations was a police officer, PC Kennedy. Under the assumed name, Mark Stone, he was authorised to act undercover and to infiltrate extreme left wing groups in the United Kingdom. Common sense suggests that the object was to enable him to acquire and pass on information about the criminal activities or proposed criminal activities which any of the groups he had infiltrated might intend, with a view, if possible, to prevent the commission of crime. To fulfil this role he made contemporaneous notes and recordings of various meetings which he attended.
11. Kennedy was not authorised to take part in any occupation of the power station until 9 April 2009, and the authorisation included the requirement of his handler, DI Hutcheson, to liaise with the Crown Prosecution Service:

“UCO133 (that is Kennedy) will decline the offer for a solicitor. UCO133 will be engaged in driving and dropping off of activists prior to them committing offences. UCO133 will withdraw from the vicinity of the power station to avoid arrest and avoid becoming a witness to offences. SIO Inspector David Hutcheson will be regularly informed of the situation of UCO133 and in the event of ...arrest will be immediately informed in order to liaise with the Nottinghamshire Senior management and the Criminal Prosecution Service.”

12. By 2009 Kennedy, apparently convincingly, purported to be a supporter of the beliefs of those who later became involved in the plot with which we are now concerned. In this capacity he personally participated in the first

reconnaissance carried out at the Radcliffe-on-Soar power station in January 2009, and indeed in subsequent reconnaissances. He gave every impression of enthusiastic participation in the objectives of, among others, the appellants.

13. When the protesters started to congregate together just before the proposed occupation it appears that Kennedy went much further than his authorisation. For example he participated in briefings with those who were to take part: he was one of two people who were responsible for checking in the surrounding area for possible police activity: he agreed to act as a member of the team of climbers on the basis that he had already attracted attention as one of those with particular skill in this role. In this context, it is conceded by the prosecution that it is “at least arguable...that he was regarded as something of an eminence grise by some of the younger activists upon whom they relied for advice and support”. In short, it appears that he played what can fairly be described, in the submission of Mr Matthew Ryder QC on behalf of the appellants, “a significant role in assisting, advising and supporting...the very activity for which these appellants were prosecuted”.
14. On 12th April itself, after many of the protesters had congregated together, and shortly before the proposed occupation was about to begin, Kennedy recorded some of the briefings which then took place. The transcripts of the recordings, unknown to either the judge or the jury at trial, reveal that the course of the briefings tended to undermine at least part of the prosecution case.
15. One of the contentions advanced by the Crown at trial was that the protesters main objective was “publicity” for their cause, rather than a genuine, if mistaken, attempt to address any imminent problem arising from carbon

emissions. However the transcripts of the recordings made by Kennedy show that during the course of briefings on 12th April one of the appellants, Spencer Cook, and indeed another person who was never prosecuted, show they placed great emphasis on the objective of the intended actions. This was to bring about an enormous reduction in carbon emissions by keeping the power station closed for seven days. In other words, this material tended to show that this was not a mere publicity stunt. It is also clear that during the course of the briefings those who were present were advised that they did not need to get involved if they did not wish to do so. The importance of safety and non violence and the avoidance of criminal damage to property were underlined.

16. Kennedy was one of 114 people arrested at the school just after midnight on 13th April. He was held in police custody and then bailed. He continued to be part of the group of campaigners, and continued to provide information to his police handler about how the suspects who had been bailed were responding to their arrests. He was required to “take all steps necessary to avoid being in receipt of (legally privileged) information”. It appears that the 114 campaigners shared information about the case through an email address. Some of that information appears to have been privileged, although we have not seen it, and there may be some question whether sharing information on an email address would constitute a waiver of any such privilege. More important, it is not presently known whether Kennedy passed on information from the email address to the prosecuting authorities or his handler.

17. On 23 September 2009 Kennedy signed a police statement which consistently with the recordings, appeared to provide a similar measure of support for the defence. Again, however, this document was not disclosed until after the trial.
18. From this material two features are apparent. First, Kennedy was involved in activities which went much further than the authorisation he was given, and appeared to show him as an enthusiastic supporter of the proposed occupation of the power station and, arguably, an agent provocateur. Second, the recordings made of the meetings on 12th April supported the contention of the appellants that their intended activities were directed to the saving of life and avoidance of injury, and that they proposed to conduct the occupation in a careful and proportionate manner. None of this information emerged at trial.
19. The trial therefore proceeded with the defence in ignorance of important evidence which served to undermine the prosecution case that the defence they intended to and were permitted to advance at trial was ill-founded, and which whatever the merits in law, they were entitled to advance with the benefit of material in the possession of the Crown which assisted them. For the same reason they were not in any position to advance submissions based on potential entrapment by a participating informer, or to address these issues.
20. On 19 December, a few days after the conclusion of the trial, the Sunday Times published an article about the role of Mark Kennedy in this protest movement. By early January 2011 there were widespread reports in the national press about Kennedy's role as an undercover officer generally, and in particular about his involvement at the proposed occupation of the power station at Ratcliffe-on-Soar.

21. In the meantime, the trial of six further defendants who, although present at the meetings on 12 April, denied involvement in the conspiracy, on the basis that they had still not made up their minds and agreed with the occupation, was due to take place on 10 January. On 7 January the present appellant's solicitors, who were also acting for the defendants in the second trial, were informed:

“Previously unavailable material that significantly undermines the prosecution's case came to light on Wednesday 5 January. In the light of this information, the Crown will not proceed with the trial and are discontinuing the case. We shall be offering no evidence on Monday 10 January.”

22. Gradually the facts as we have outlined them emerged. Mr Ryder invited us to adjourn the hearing of the appeal so that the full process of disclosure which should have taken place before the trial should take place now. He submitted that the process would enable the appellants and the public to be better informed about the facts. In other words although we were, for the reasons given, satisfied that the conviction was unsafe, we should continue the appeal against conviction by conducting what would amount to an inquiry into what went wrong with the disclosure process, and why, and who should bear what responsibilities for what had happened. This would be the only forum in which the appellants would be fully engaged as parties to the proceedings.
23. There are cases, where the course proposed by Mr Ryder would be appropriate. This emphatically is not one of them.
24. Shortly after some of the troublesome factual background became public the Nottinghamshire Police conducted their own review of the disclosure and compliance with the provisions of the 1996 Act between the Police, the CPS

and the defence and to look at the conduct of the inquiry and its management.
This review is completed.

25. On the 11th January the Nottinghamshire police commissioned an investigation by the IPCC. The terms of reference were simple. The investigation was to examine whether

(a) There was a failure to disclose relevant material to the CPS by the Nottinghamshire police prior to the trial of the six defendants whose trial was due to start on 10th January which collapsed on 7th January.

(b) Whether, if there was a failure to disclose, whether this had a bearing on the collapse of the criminal proceedings.

(c) If there was a failure to disclose resulting in the collapse of the proceedings, whether this was as a result of misconduct by any police officer or police staff member employed by the Nottinghamshire police.

(d) If there was misconduct, the nature of that misconduct, those involved in it and the gravity of the matter.

26. Just a few days later, on 18th January 2011 a review by Her Majesty's Inspectorate of Constabulary under the leadership of Bernard Hogan-Howe QPM was announced. The review related to the operational accountability of undercover police work and how the gathering of intelligence activity was authorised in accordance with law. This review is ongoing. Following this announcement, on 21st March 2011 it was announced that an external reference group has been established. Its role was to challenge the HMIC

review terms of reference, as well as the final report and the conclusions it reached.

27. On the same date as the HMIC review was announced, the Serious and Organised Crime Agency announced a review which looks into the deployment of an undercover police officer for six to seven years during the time when he was under cover. The terms of reference were:

(a) To identify whether the actions of Kennedy were consistent with those authorised for his deployment and if found to be inconsistent, to report upon the nature and seriousness of any breach.

(b) To establish if the management and records relating to his overall deployment against environmental extremism and in particular this investigation were in accordance with the relevant codes and legislation and that appropriate records were made by the appropriate authorising authorities. This review will run parallel to the HMIC review, and there is every likelihood that a joint report will be available for publication in September.

28. The CPS has conducted its own independent internal review of the way in which this particular police investigation was handled, “with particular reference to the handling of unused material relating to the undercover officer and to the event which lead to the collapse of the trial on 7th January”. This inquiry was conducted by a distinguished Queens Counsel, Miss Clare Montgomery, and she reported in March. The result was that the Director of Public Prosecutions wrote to those acting for the appellants that he considered that:

“The safety of the convictions should be considered by the Court of Appeal as soon as possible. As you know, the prosecution cannot lodge an appeal to the Court of Appeal save in very limited circumstances and I therefore invite you to lodge an appeal and to include the issue of non-disclosure of material relating to the activities of an undercover police officer in any grounds of appeal...the CPS will assist in any steps you may wish to take in expediting the appeal.”

29. Effectively the material on which the present successful appeal has been based was provided in Miss Montgomery’s review.
30. We can pass briefly over an informal internal disciplinary inquiry and come to an announcement by the Director of Public Prosecutions himself on 9th June 2011 that “in light of growing concerns about the non-disclosure of material relating to the activities of an undercover police officer in the Ratcliffe-on-Soar power station cases, I have decided that I will set up an independent inquiry...to work in tandem with the IPCC inquiry into the matter which began in January 2011. The two inquiries will have full access to all the available evidence, whether held by the police or the CPS, and will share information. They will also share their provisional findings before final reports are drawn up. This arrangement will provide independent scrutiny of the actions of both the police and the CPS in relation to disclosure issues. It is an arrangement supported by the IPCC and the Chief Constable of Nottinghamshire”. The chairman of this inquiry, recently announced, will be Sir Christopher Rose, a retired Lord Justice of Appeal and former Vice-President of the Court of Appeal Criminal Division. The terms of reference require an examination whether:

(a) the CPS approach to charging in this case was right, bearing in mind the known existence of an undercover police officer in the operation.

(b) the CPS and prosecution counsel complied with their disclosure duties properly in relation to the known existence of an undercover police officer in this case.

(c) the CPS arrangements in place for handling the known existence of an undercover police officer, including arrangements between the police and the CPS, the CPS and counsel and the local prosecuting team and the national co-ordinator, were adequate and properly followed in this case.

(d) the CPS followed all relevant guidance and policy in relation to the known existence of an undercover police officer in this case.

2. The Independent Inquiry will also make such recommendation it feels appropriate in light of the examination and findings set out above, including, if appropriate, recommendations about CPS policy and/or guidance and CPS arrangements for handling cases involving undercover police officers.

31. This long list demonstrates that there has been no lack of enthusiasm either in the Inspectorate of Constabulary, or the Police Complaints Commission, or the Director of Public Prosecutions and Crown Prosecution Service, or the Nottinghamshire Police, for a detailed examination of the facts which have culminated in the quashing of these convictions, and the decision by the

prosecution not to proceed with the trial which collapsed on 7 January before it even started. Each of the investigations which has not yet been completed will represent a continuing drain on the resources of the authority which commissioned it. Much of the ground to be covered will be common to each inquiry. Given the parlous state of the national economy, we cannot avoid reflecting whether the numerous reviews and investigations into this case and what went wrong with it may amount to overkill. Whether they do or not, the kind of inquiry which we were invited to undertake by Mr Ryder simply cannot be justified. It would be wasteful of this court's limited resources. Other cases, awaiting hearing, would be delayed. The ongoing inquiries would be disrupted by the demands this court would have to make to procure the further disclosure which would be a necessary concomitant of its own inquiry. The end result would add nothing of importance to what will undoubtedly become known when the remaining inquiries are completed. Although this court cannot dictate the processes to be adopted by each review, we anticipate that those conducting them would consider any relevant contributions for the appellants. In any event, we have no doubt that the interests of justice in this case will be well served, without any further inquiry by this court.

32. In summary these convictions were quashed because of the failure of the Crown to make proper disclosure of material relating to the role and activities of the undercover police officer, Mark Kennedy as well as of materials which had the potential to provide support for the defence case or to undermine the case for the prosecution. These materials were pertinent to a potential submission of abuse of process by way of entrapment and in any event they

had the capacity to support the defence of necessity and justification. The trial was rendered unfair and the convictions are unsafe. Accordingly they were quashed. We decline to order further inquiries by this Court. Ancillary costs orders in favour of the defence were made at the conclusion of the hearing.