

ENGLAND AND WALES / JUDGMENT

Causley, R v

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Neutral Citation Number: [2003] EWCA Crim 1840 IN THE COURT OF APPEAL CRIMINAL DIVISION No. 2001/05485/S3 Royal Courts of Justice The Strand London WC2A 2LL Thursday 5 June 2003 B e f o r e: LORD JUSTICE KAY MR JUSTICE FULFORD and MR JUSTICE TUGENDHAT

- ----- R E G I N A

- v - RUSSELL STUART CAUSLEY

- ----- Computer Aided Transcription by Smith Bernal, 190 Fleet Street, London EC4 Telephone 020-7421 4040 SMITH BERNAL (Official Shorthand Writers to the Court)

- ----- MR E FITZGERALD QC and MR A HALL QC appeared on behalf of THE APPELLANT MR M DENNIS and MISS R KARMY-JONES appeared on behalf of THE CROWN

- ----- J U D G M E N T SMITH BERNAL LORD JUSTICE KAY: 1. 2. 3. 4. 5. 6. 7. 8. 9. On 18 December 1996, following a trial before Mantell J and a jury, the appellant was convicted of murder and sentenced to life imprisonment. On 22 October 1998, the Court of Appeal dismissed an appeal against his conviction. Solicitors acting for the applicant subsequently made representations to the Criminal Cases Review Commission. The Commission themselves made inquiries into aspects of the case and as a result referred the case back to this court, exercising its powers under the Criminal Appeal Act 1995. The Crown's initial response was that it should resist the appeal. However, subsequently further material has come to light and this has persuaded the Crown to alter its stance. Recognising that the ultimate responsibility lies with the court, the view taken on behalf of the prosecution is that the court should conclude that the conviction is unsafe and therefore needs to be set aside. It is nonetheless the prosecution's view that, having regard particularly to the very serious nature of the charge, public interest demands that there should be a retrial. Mr Edward Fitzgerald QC on behalf of the appellant submits that if the court accepts the Crown's position in respect of the appeal, the court should in the interests of justice reject the application for a retrial. We invited Mr Fitzgerald to deal, first, with the grounds relating to the material that had brought about the change in the prosecution's stance since if we were to be persuaded that the Crown's view was correct in that respect it was unnecessary to explore Mr Fitzgerald's alternative contention that the material discovered earlier which had resulted in the referral in itself was sufficient to render the conviction unsafe. Having heard both Mr Fitzgerald and Mr Dennis on behalf of the prosecution, we indicated our acceptance of the view taken of the additional material by the prosecution so that inevitably the conviction had to be quashed. We did not therefore hear oral argument on the

proposition as to the appeal which divided the parties and we proceeded to hear the application for a retrial and Mr Fitzgerald's submissions in response. Because it has a bearing on the approach that we think proper to adopt in this judgment to the expression of our views on some aspects of the evidence, we record at once that we have concluded that this is a case in which there should be a retrial and we must now explain our reasons both for allowing the appeal and for ordering a retrial. In detailing the factual background to this case we immediately express our gratitude to counsel for the most helpful way in which the accumulated material has been summarised in their skeleton arguments and we shall draw liberally upon such summaries to recount the evidence. The appellant, then known as Russell Packman, married his wife Carole in 1965. They had one daughter, Samantha, who was born in October 1968. Both the appellant and Mrs Packman worked in the aircraft industry. Their work caused them to travel abroad frequently and also to spend periods between 1976 and 1982 residing abroad in Germany and Canada. In 1983 the appellant set up his own insurance business in Bournemouth. He employed a woman called Patricia Causley. At some stage after she started to work for him, the appellant and Patricia Causley started an affair. In 1984 the appellant and Mrs Packman bought a house in joint names. Later that year Patricia Causley moved into the house with both the appellant and Mrs Packman, where she and the appellant openly carried on the affair, notwithstanding the presence of Mrs Packman and their daughter in the house. In 1985 the appellant went to work for a company based in Italy. At trial a former work colleague, Mr Driscoll, gave evidence that in May 1985, after the appellant had returned home on leave for the weekend, he told him that he had had a huge row with Mrs Packman over his relationship with Patricia Causley and that there had been a physical fight. Another witness, Mr Turver, gave evidence that at the end of May 1985 Mrs Packman had told him, whilst returning home on a flight from Italy, that her marriage was on the rocks because the appellant had no intention of giving up his relationship with Patricia Causley. On 14 June 1985, Mrs Packman visited her doctor for a routine test. Her medical notes indicated that she had told her doctor that she was separating from her husband. On the same day, she consulted a solicitor, Mr John, for advice about divorce proceedings and financial matters. Mr John's note of the meeting stated that Mrs Packman agreed that she would come back for further advice once she had discussed matters further with her husband. She in fact made no further contact with her solicitor after that date. On 15 June, the following day, the appellant wrote to his solicitor, Mr Hackett-Jones, from Italy saying that he had decided to divorce but "Carole was being awkward". On 18 June the appellant wrote on the reverse of the letter that Mrs Packman "has contacted Ward Bowie (solicitors) and no doubt they will be in touch". That letter was later discovered by the police and recovered from the files held by Mr Hackett-Jones. Samantha Gillingham (the daughter) gave evidence that she believed her mother had gone missing some time between 11 and 15 June 1985. She was uncertain as to the exact date when she had last seen her. She described, however, the circumstances in which her mother had vanished from the home. She said that the appellant had taken her on a day trip to London, and that when they returned in the evening she discovered her mother's wedding ring on a kitchen worktop together with a note that appeared to be in her

mother's handwriting. The note was to the effect that Mrs Packman had had enough and could take no more. Samantha went upstairs and found the wardrobe doors in her mother's bedroom open and a torn-up dress lying on the floor. Her mother was missing, but none of her clothes so far as she could judge, nor her jewellery, including a Rolex watch, had gone; nor had any of the suitcases, nor had her passport. She checked and so far as she could tell few, if any, of her mother's personal belongings appeared to have been taken. Against that background the prosecution contended at trial that Mrs Packman had simply disappeared without trace from that time. It was their contention that the appellant, a man they described as a "ruthless and utterly determined man" had murdered her, his purpose being so that he could live with Patricia Causley as man and wife whilst maintaining his financial position. In due course he had taken her name of Causley as his own, and the pair of them had substituted her name for his wife's name on the title deeds to the matrimonial home. The prosecution alleged that the appellant was a clever, devious and cunning man, who, having murdered his wife, was able to dispose of her body in such a way that no trace of it was ever found again. It was further alleged that he had so managed to conduct himself that no police attention of any significant kind had then followed for some eight years. 17. From June 1985, so far as the prosecution could establish, there had been no trace whatsoever of Mrs Packman. The inquiries that were made covered not only this country but also countries with SMITH BERNAL which she had been known to have links in the past. In particular there were a number of aspects that were put forward and said to amount to the first limb of the Crown's case. In the eleven-and-a-half years that had elapsed between her disappearance and the date of the trial she had made no contact with the appellant, with her daughter Samantha, with her parents, with her brother, with her solicitor, or with any of her friends or acquaintances. Next the Crown pointed to the fact that Mrs Packman was somebody who had significant work connections and experience in the aviation industry, that she was highly thought of in that field of work, and would thus have found it a straightforward matter to obtain further employment in the industry. However, no one in that industry had heard of her from June 1985 onwards. The Crown called evidence to show the extent of the inquiries that had been made: inquiries with the National Health Service, both medical and dental; the passport office; National Insurance; Inland Revenue; Public Records Office; the Association of British Insurers; and the Register of Marriages, Divorce and Death. The way the Crown put it was that she had simply "disappeared off the face of the earth". Further, the Crown relied on the fact that her disappearance and the build-up to the trial and the trial itself had generated a good deal of national media attention, but still nobody had come forward to say that they had had any contact at all with the wife. Thus they invited the jury to conclude that she had not simply disappeared but that she had been killed and, since the appellant was the person with the clearest motive for wanting his wife dead, that he was responsible for her death and therefore guilty of the offence of murder. Those circumstances surrounding the disappearance amounted to the first limb of the prosecution's case. The second area upon which the Crown focused were the actions of the appellant himself between 1985 and 1994. It was submitted that the evidence demonstrated quite clearly that he had given numerous conflicting accounts about his wife's whereabouts,

that he had told lies as to whether or not she had been in contact with him and that, generally speaking, on an examination of the totality of his conduct he must have known full well that she had not simply disappeared but that she was not going to come back. In particular they put forward a number of separate matters which they suggested built up this picture. In late June 1985 the appellant had told Ian Driscoll that his wife had left him, taken money and gone to Canada. On 7 August 1985, the appellant told a bank manager, Geoffrey Warne, that he had separated from his wife and that she had gone to work abroad. On the same date the appellant went to Bournemouth Police Station and reported his wife as being missing as from 21 June 1985. This was the first and only time that the appellant approached the police about his wife's disappearance, save for events which were to occur at the turn of the year 1985/1986. On 11 August 1985, the appellant told Clive Phelan that his wife had gone to Germany with a German job shopper in the aircraft industry. In early September 1985, he told Georgina Whittamore that his wife had left him and gone to Switzerland or was about to go to Switzerland. In late 1985 he told Sarah Randall that his wife was with her boyfriend "up country", Saleem Rangoon that she had gone to France, and Lee Green that she was missing and had gone off with a man with a red Porsche. That leads to the events from the end of 1985 and through to January 1986. There was evidence to suggest that the appellant had claimed that he had had contact with his wife during the December and that she had been seen shopping. Indeed in December 1985 there was evidence to suggest that two people had gone to the police station at which inquiries into the missing person were being 18. 19. 20. 21. 22. 23. SMITH BERNAL conducted, claiming to be the wife and the daughter Samantha, to say that the wife was alive and well, but simply wanted nothing further to do with the family. Samantha was able to show that that was a charade because she had never been a party to going to the police station and she was able to give evidence that she had had no contact whatsoever with her mother. At the beginning of January the appellant took steps to ensure that the police wrote to his solicitor indicating that there had been this visit to the police station. It is unnecessary to go into all the detail of this matter. The Crown submit that there was a clear pretence going on at this stage. Clearly if there was any credible sighting of the wife at any time after June 1985, it would answer any allegations relating to her disappearance. The submission made in relation to these events was that what was happening at this time was a clear attempt to stop any inquiry into what had occurred being made because the wife would be thought to be demonstrably alive and that the person responsible for that was the appellant. Shortly after these events the appellant told another witness that his wife was in Malta. In 1986 he told Irene Steadman that his wife had gone to Germany with a rich German boyfriend and another witness, David Urquhard, that she had gone to Germany with a boyfriend, and that he had had no contact with her since she left. In about September 1986, the appellant's solicitor prepared a draft will on his behalf indicating, falsely, that the appellant had made no provision for his wife because she had already been provided for in that she had been given her half share in "my house" (a reference to the jointly-owned matrimonial home), and that she would become entitled to approximately £25,000 under certain policies of assurance in the event of his death, and "Furthermore, she is capable through her qualifications of earning a good income". So far as the house was

concerned, it is quite clear that, at the time when the wife was seeing a solicitor shortly before her disappearance, she was intent upon obtaining her share of the matrimonial property, but it is equally certain that she never did receive a penny from the equity that the couple had in the house. In 1986 the appellant and Patricia Causley travelled to Canada in search of work in the aircraft industry. With the appellant's knowledge and complicity, Patricia Causley used his wife's name to the authorities in order to obtain a work permit. While in Canada, the appellant told Anthony Stocks (who had known the appellant and his wife from an earlier period of work in Canada) that his wife was in Italy. He told John Stewart (who again had known the appellant and his wife from earlier work in Canada) that his wife had gone to work in France and Switzerland. He told a third person, John Gibbs (who again had known the couple before) that his wife had left him and "ripped him off" and "emptied their bank accounts". He told Frederick and Roslyn Rothwell (other acquaintances of them both) that his wife was now living abroad, telling Frederick Rothwell that she was living in Israel or South Africa. In 1989 the appellant and Patricia Causley returned to Dorset from Canada. The appellant told the Dorset Health Authority that his wife had been living abroad for five years. In 1990 the appellant told PC Forsyth that he believed his wife was in Canada with her boyfriend and that he had had little or no contact with her since she left. If the appellant believed that his wife had gone to Canada, then the use of her name by Patricia Causley in Canada was astonishing since it opened up the real possibility that her fraudulent use of that name would be discovered. 24. 25. 26. 27. 28. 29. 30. In June 1990, the appellant and Patricia Causley fraudulently transferred the title deeds of the matrimonial home from his and his wife's name to his and Patricia Causley's name. This was SMITH BERNAL achieved by Patricia Causley impersonating the appellant's wife and instructing solicitors to act on her behalf, claiming that she had been separated from the appellant for four to five years, that she was then living and working in Germany, and that she was about to emigrate to Canada. His pretence was supported by a forged letter sent from Germany. Patricia Causley thereafter attended a firm of solicitors and forged the signature of the appellant's wife in order to complete the transfer. In July 1990 the appellant forged his wife's signature in order to claim the sum of £2,823.54 by way of benefit under an endowment policy. The money was sent to the appellant at an address in Germany. In April 1991 the appellant again forged his wife's signature in order to claim the benefit under another endowment policy. On this occasion the proceeds came to a little over £400. In the autumn of 1993 the appellant, Patricia Causley and the appellant's solicitor attempted to carry out a life insurance fraud by faking the disappearance and death of the appellant. This led to their subsequent arrest. Whilst the appellant was on bail, on 1 June 1994 he and Patricia Causley were questioned at their home in Kent by police officers who were by now investigating the whereabouts of the appellant's wife as part of a missing person inquiry. The officers were not aware of the fact that the appellant had secretly tape-recorded this meeting. That tape-recording survived and was later seized by the police and therefore enables one to know for certain exactly what had been said. The appellant falsely told the officers that he had not heard from his wife since about 1989 or 1990 when he had received a telephone call from her whilst he had been working in Germany. He said that he had also received a letter from

her in February 1991, but he had not kept it. He said that he had earlier received a telephone call in Canada from her in 1987 when he believed that she, too, was then out in Canada. He falsely stated that there had been a financial settlement after the separation and that he had made payments in cash to her over a period of about 18 months, totalling between £17,000 and £26,000. Inquiries made in both Germany and Canada confirmed that there was no trace of the appellant's wife being in either country after June 1985. That in summary form represented the second limb of the prosecution case. The third limb upon which the prosecution relied, and which is particularly relevant to this appeal, came in the form of the evidence of three witnesses who claimed that they had had conversations with the appellant with regard to the murder of his wife. The three, independent of one another, detailed conversations which they said they had had with the appellant in different prisons at different periods of time. The first, Michael Lomond, claimed that whilst the two of them were together in Brixton Prison in 1994, whilst the appellant was on remand in relation to the life insurance fraud, he had spoken to him. The second, Andrew Murphy, had been in Ford Open Prison with the appellant in 1995. At that stage the appellant was serving a sentence of imprisonment in respect of the life insurance fraud. The third, Andrew Briggs, had been in Exeter Prison in 1996 at the time when the appellant was on remand in relation to the allegation of murder. Of these three witnesses the prosecution relied, principally, upon the evidence of Murphy who provided a detailed account of conversations held with the appellant over a period of time, during which he said that the appellant had freely admitted the murder of his wife. The evidence of 31. 32. 33. 34. 35. 36. 37. 38. 39. SMITH BERNAL Lomond provided less detailed information relating to the conversations with the appellant. The prosecution relied on the evidence of both witnesses, not only to establish that the appellant knew that his wife was dead, but also that he had been responsible for her murder. In both cases the prosecution contended that the evidence of the witness included details which could have only come from the appellant. The prosecution maintained that Briggs, the third of the witnesses, was to be treated in a wholly different way. They acknowledged that that which Briggs said that the appellant had said to him could not be the truth, even if Briggs was telling the truth when he said that the appellant had made such remarks to him. The prosecution opened the case on the basis that what had happened in relation to Briggs was that the appellant had made a deliberate attempt, whilst he was on remand and facing proceedings in respect of the murder of his wife, to create a smoke screen and thereby seek to undermine the impact of the confession evidence that had already been provided by Murphy and Lomond and which formed, as he knew, a part of the case against him. The prosecution expressly stated that they relied only on the fact that the appellant had made these remarks to Briggs, and not in any way on the truth of any of the details said to have been given by the appellant. It is necessary to deal with each of those witnesses and to deal with the background to their giving evidence, to deal with what was said in relation to them, and the way in which they were dealt with by police officers. In March 1994 Lomond was held on remand at Brixton Prison pending proceedings for offences of deception. He shared a cell with the appellant, who was likewise held on remand pending the proceedings in respect of the life insurance fraud. They shared a cell for about

four to six weeks, during which time the appellant was said to have made incriminating remarks about the disappearance of his wife. After their period of sharing a cell together, Lomond and the appellant had no further contact. On 3 June 1994, Lomond pleaded guilty to an offence of escape and eighteen offences relating to cheque fraud. He was sentenced to three years' imprisonment. His earliest release date was, therefore, June 1995. In April 1995 Lomond read a current newspaper article about the disappearance of the appellant's wife. The article was one featuring the daughter Samantha and it was headed "I fear for my mother". Lomond then made contact with the newspaper and thereafter with the police. In April 1995 he made a full witness statement to the police detailing what it was that he said the appellant had said to him about the disappearance of his wife. This was the only witness statement that was made by Lomond. He later gave evidence in accordance with that statement both at committal proceedings and at the trial. On 3 May 1995, Lomond absconded from the prison where he was serving his sentence. At that stage he had only two months left to serve of the sentence. At that stage the appellant had yet to be arrested or interviewed about the alleged murder of his wife. On 10 October 1995, whilst at large, Lomond dishonestly obtained £1,500 by deception from a branch of Lloyds Bank, Dorchester, Dorset. On 1 December 1995 he was circulated by the police as wanted in relation to the bank deception, having been identified on a bank video recording by DC Donnell, who was part of the police team investigating the disappearance or murder of the appellant's wife. 40. 41. 42. 43. 44. 45. 46. SMITH BERNAL 47. 48. 49. 50. 51. 52. 53. On 2 January 1996, Lomond was found and arrested in North London by officers from the murder team, including DC Donnell, under the supervision of DS Dymond, who was a senior investigating officer on the team. Lomond was taken to Dorset for interview in relation to the Lloyds Bank offence. On 3 January, the next day, Lomond was interviewed by DC Diment and DC Dodge (local officers concerned with the deception offence). Lomond did not ask for a solicitor for his first interview and he chose to make no comment in relation to the deception offence. He then asked for a solicitor and in due course a duty solicitor, Simon Lacey, attended Dorchester Police Station on his behalf. According to the statement of Mr Lacey, Lomond told him that he was "serving a lengthy prison sentence for similar matters prior to absconding". He went on to ask the solicitor to enquire of the police whether they would "write-off" the new offence if he were to admit it. Mr Lacey made an enquiry of the interviewing officers who went away to make inquiries. In due course Mr Lacey was informed by the officers that the offence could be written off should Lomond make admissions in interview. A second interview was then conducted and Lomond did admit the Lloyds Bank offence. Lomond was then returned to complete his prison sentence. No charge was ever laid against him in respect of the Lloyds Bank offence. DC Diment recorded on the crime report that the offence was written off under rule 12. That entry was later approved and endorsed by DI Brazier who had a responsibility for such matters. Mr Lacey has indicated that as far as he can recall he was unaware throughout his dealings with Lomond and the police that Lomond was a potential witness in a murder trial. On 18 January 1996, the Crown Prosecution Service in Dorset instructed Mr Anthony Donne QC to advise as to whether there was sufficient evidence upon which to charge the appellant with the offence

of murder. The available evidence included the witness statements of Lomond and Murphy. On 25 January Mr Donne advised that there was sufficient evidence. On 5 February the appellant was arrested and on 6 February he was interviewed and charged with the offence of murder. On 27 March 1996, Lomond was released from prison having completed his sentence. On 21 May 1996, Lomond attended the committal proceedings in this matter, where he gave evidence. On 5 December he attended the trial and again gave evidence. Lomond's evidence at trial accorded with the witness statement that he had earlier made. Under cross-examination Lomond maintained that as far as he was aware the writing-off of the Lloyds Bank offence was unconnected with the murder matter, that he had no motive to lie about the appellant, and that he had received no benefit for coming forward and giving such evidence. Those contentions were challenged in the course of cross-examination. As a result the prosecution sought evidence to rebut the assertion made in cross-examination. DC Diment, Nigel Bryant (a retired former police sergeant) and DCI Brazier attended court on 11 December 1996. Each made a witness statement dealing with the issue. DC Diment said that Lomond had denied the Lloyds Bank offence in interview, and that he had referred and discussed the matter with PS Bryant in the latter part of January. Having relayed the facts to him, PS Bryant decided that Lomond would not be prosecuted and that the offence should be submitted to a senior officer for it to be cleared up under the Home Office Rules. Nigel Bryant also stated that DC Diment had referred the matter to him in the latter part of January

1996. He went on to say that, having reviewed the facts, he decided that there should be no further action with regard to the offence. He gave the following reasons: (a) there were evidential problems with the clarity and continuity of the bank video; (b) an identification parade would be SMITH BERNAL essential; (c) Lomond would receive little, if any, punishment as he was still serving a prison sentence of three years and had only completed one year of the sentence; (d) Lomond had denied the offence; and (e) the loss incurred was small. He said that he had instructed DC Diment to submit the matter to a senior officer for clear up under the Home Office guidelines. At the time that he dealt with the matter he had been unaware of the fact that Lomond was a witness in another matter. 54. 55. DCI Brazier stated that he did not recall being involved in deciding whether or not Lomond should be prosecuted for the Lloyds Bank offence. He had recently reviewed the matter and he considered the decision not to prosecute Lomond but to clear up the matter was entirely appropriate. He then set out reasons similar to those given by Bryant in his witness statement. The statements of DC Diment and of Nigel Bryant were read to the jury with the agreement of the defence. It seems likely that defence counsel took the view that he had no material with which he could challenge the assertion being made by Diment or Bryant. The statement of Brazier was disclosed to the defence. It was not read in evidence and was simply treated as unused material. 56. When the trial judge came to sum up the evidence of Lomond he made a number of comments about it. In particular at page 52 of the transcript he said: "Lomond's evidence, if accepted, does not take you very far.... And it does seem, does it not, that Mr Donne has pinned the prosecution's colours to Murphy." He continued

on the same page: “There is evidence that Briggs may have had a motive for inventing a confession. There is no such evidence in the case of Murphy and Lomond, though suggestions have been made as to why they might. Lomond, it is suggested, in the hope of favours unspecified in the future...” The judge then dealt with the evidence that had been read to the jury from the officers. 57. The fresh evidence that emerged in relation to these matters, and which when taken with the matters relating to Briggs, led to the referral to this court revealed the following matters:

- (1) the custody record for Lomond's detention at Dorchester Police Station on 2 and 3 January 1996 revealed that Lomond was released from his arrest on 3 January 1996 because the offence was cleared up under Home Office Rules and that Lomond was then to be taken to Her Majesty's Prison Dorchester as an abscondee;
- (2) Lomond had admitted the Lloyds Bank offence in his second interview on 3 January (that is during the interview held after the police had agreed to clear up the offence should Lomond admit the matter);
- (3) the Lloyds Bank video was of sufficient clarity to enable an identification of Lomond to be made, notwithstanding that which was given as a reason for not pursuing the matter;
- (4) two witnesses from Lloyds Bank had indicated that they were confident that they would recognise the offender on an identification parade; and
- (5) Lomond was close to the due release date on his sentence, notwithstanding his absconding from SMITH BERNAL 58. 59. 60. prison, and Lomond was in fact released from prison on 27 March 1996, and the maximum loss of remission for his absconding from prison was 28 days. That fresh evidence contradicts the assertions made by DC Diment and Nigel Bryant that the discussions and decision with regard to the non-prosecution of Lomond occurred in the latter part of January. It also tended to contradict two of the reasons given by Nigel Bryant and supported by DCI Brazier by way of justification for dealing with the offence under the clear-up provisions in the Home Office Rules. We turn to the second of the witnesses, Briggs. The background to Briggs' involvement in this matter was that on 11 January 1996 he and his girlfriend Karen Riley were arrested for offences of theft and deception. The offences were investigated by WDC Clatworthy of the Devon and Cornwall Police who interviewed both Briggs and Karen Riley. In a detailed police report and summary of evidence forwarded to the Crown Prosecution Service at Truro, which does not bear a date but must have been prior to 23 February 1996, the officer made a particular point of encouraging the Crown Prosecution Service to prosecute Karen Riley in respect of her involvement in the offences committed by Briggs. On 13 January 1996, Briggs was remanded in custody to Exeter Prison in relation to the offences. On or about 7 February 1996, the appellant, having completed his sentence of two years' imprisonment in relation to the life insurance fraud, was also remanded in custody to Exeter Prison, having been charged with the offence of murder. Briggs and the appellant shared the same wing at the prison and came into regular contact with each other. On 13 March 1996, Briggs attended Liskeard

Police Station prior to a remand appearance at the local magistrates' court. Briggs offered to give to WDC Clatworthy information about the appellant with whom he regularly conversed. Briggs thereafter provided such information and that led to his making a witness statement on 15 April 1996. That statement detailed incriminating remarks said to have been made by the appellant with respect to the disappearance of his wife. During that period WDC Clatworthy liaised with DS Dymond, who was a senior investigating officer in the murder investigation that was based in Bournemouth. It is quite apparent that Briggs had two motives for assisting the police and for providing WDC Clatworthy with information about the conversations with the appellant. His first and principal motive was to help his girlfriend by persuading the police to accept that he was solely responsible for their alleged offending so that they would drop any charges against her. His second and subsidiary motive seems to have been to obtain credit for himself when he came to be sentenced for his offending. On 18 April 1996, John Revell, of the Crown Prosecution Service (Dorset), wrote a letter to his Honour Judge Overend, who was to preside over a plea and directions hearing in relation to the Briggs and Karen Riley charges on the following day. Mr Revell explained in confidence the reason why the prosecution would be seeking an adjournment of the hearing for a period of four weeks. He gave details of the assistance which Briggs was then providing to the police in respect of the murder inquiry. He indicated that more time was required in order to investigate the value of the evidence that had been provided by Briggs in his detailed witness statement. Mr Revell made reference to a "text" which the police proposed submitting to the court on behalf of Briggs, that is a letter indicating confidentially assistance rendered to the police which would be passed to the judge and taken into consideration in determining the appropriate sentence. Mr Revell took the course of writing to the judge in order that there would be no necessity for the information to be revealed at the hearing. The defence solicitor acting on behalf of Briggs and Karen Riley was fully aware of the course that was being taken and had consented to it. He had been provided with a copy of the letter. As a result, on 19 April the case was adjourned for a month to 17 May.

SMITH BERNAL 61. 62. 63. 64. 65. On 8 May 1996, John Revell attended a conference with Mr Donne, with Ian Graham of the Crown Prosecution Service (Dorset), Lyn Broddle of the Crown Prosecution Service (Dorset), DCI Knott (one of the officers involved in the inquiry), DS Dymond (to whom we have referred), and Detective Superintendent Donohoe. Following advice from Mr Donne, it was agreed that the police in the form of the murder team and the Crown Prosecution Service in Dorset would not be involved in any way in the decision making by the Devon and Cornwall Police and that the Crown Prosecution Service at Truro would be responsible for dealing with that matter on behalf of the prosecuting authority. It was also further agreed that no text would be provided to the court on behalf of Briggs. Letters confirming that it was "extremely important" that the decision making process in respect of Briggs and Karen Riley should be dealt with independently from any consideration of the murder trial were forwarded by Mr Revell to Mr Terence Eastwood of Crown Prosecution Service (Truro), and to the firm of solicitors representing both Briggs and Karen Riley. On 23 April 1996 Mr Martin Edmunds, counsel instructed on behalf of the Crown Prosecution Service in respect of the prosecution of Briggs and Karen Riley, advised

in writing that there was insufficient evidence to justify proceeding further against Karen Riley in respect of two of the three charges laid against her, but that there may be sufficient evidence in respect of the third charge, subject to the obtaining of further statements. On 17 May Mr Edmunds provided a further written advice in which he in effect confirmed his earlier advice in respect of the three charges against Karen Riley. He set out what had occurred at court that day at the adjourned plea and directions hearing. He indicated that he had advised WDC Clatworthy as to his view in respect of two of the three charges and he advised her further of the further evidence required in order to support the third charge. He further stated: "At court I took the opportunity to confirm with WDC Clatworthy of the Devon and Cornwall Constabulary and DS Dymond of the Hampshire Police Force who brought Mr Briggs to court from Winchester Prison that at no time has any police officer told Mr Briggs that we would drop charges against Mrs Riley in return for his co-operation with the Hampshire inquiry. It is clear that Mr Briggs wishes the charges against Mrs Riley to be discontinued and Mr Leadbetter who represents Mr Briggs and Mrs Riley informed me that although Mr Briggs intends to plead guilty to the charges against him, he wanted the charges against Mrs Riley to be discontinued and if this was not done said that he might not co-operate with the Hampshire inquiry. I confirmed to Mr Leadbetter my position, namely that a decision on the prosecution of Mrs Riley would be made by me and the Truro Crown Prosecution Service without any regard to the assistance which Mr Briggs might or might not provide to the Hampshire inquiry." On 10 June 1996, having been sent a further statement by WDC Clatworthy and the Crown Prosecution Service (Truro), Mr Edmunds provided a final written advice in which he confirmed that there was still insufficient evidence in relation to two of the three charges against Karen Riley, but that there was now sufficient evidence to proceed in relation to the third charge, adding that he could identify no cogent reason why they should not proceed. On 21 May 1996, Briggs gave evidence at the appellant's committal proceedings. On 14 June Briggs and Karen Riley appeared before His Honour Judge Taylor at the Truro Crown Court. Briggs pleaded guilty to his offences and was sentenced to two years' imprisonment. Karen Riley pleaded not guilty to her three offences. The prosecution elected not to proceed on any of the offences and the judge agreed to all three being left on the file. The prosecution had been represented on this occasion not by Mr Edmunds (who was unable to attend) but by Mr Ian Taylor of counsel. 66. On 14 June 1996, DS Dymond left a telephone message for John Revell of the Crown Prosecution SMITH BERNAL Service (Dorset), briefly indicating that Briggs had been sentenced to two years' imprisonment and the case against Karen Riley had been discontinued. DS Dymond subsequently provided a report dated 20 June 1996 in which he referred to the case against Karen Riley having been left on the file because "counsel for the prosecution concluded that in the light of the result of the additional inquiries he requested we did not have a realistic chance of conviction". On 30 July 1996, Briggs absconded from Her Majesty's Prison Leyhill. On 10 September 1996 he was re-captured in Somerset and sent to Her Majesty's Prison Dartmoor. On 13 November 1996, he was visited by WDC Clatworthy and DS Dymond. According to the account given by Briggs in a witness statement dated 12 June 2001, provided to officers from Wiltshire who conducted an inquiry on behalf of the Criminal

Cases Review Commission, the purpose of that visit was to check whether he was still prepared to give evidence at the appellant's forthcoming trial. He said that he was also asked about any outstanding offences and he admitted, on a clear-up basis, the theft of a milk van whilst he was on the run from prison and a number of theft and deception offences committed prior to his arrest in January 1996. On 28 November 1996, Ian Graham of the Crown Prosecution Service (Dorset) informed the appellant's solicitors by letter that on the advice of counsel no evidence was offered against Karen Riley. On the same date he informed Mr Donne by letter that, on the advice of counsel, Karen Riley was not proceeded with as there was insufficient evidence. At trial Briggs gave evidence in accordance with the witness statement he had earlier made. Under cross-examination he fully accepted that he had given information and assistance to the police in the hope that the case against Karen Riley would be dropped. However, he denied that there had been any deal with the police in that regard. He agreed that he had told the police that he was desperate to get Karen Riley off the joint charge. On 10 December 1996, during the course of cross-examination, an exchange took place between the trial judge and counsel as to what had been said in court on 14 June when Briggs and Karen Riley had been dealt with. Mr Donne indicated to the court that "there is correspondence which will be produced between the Crown Prosecution Service who instruct me and the Crown Prosecution Service who prosecuted this man and Karen Riley.... I will ask those instructing me to try and find out what was said to the court." WDC Clatworthy was asked by the prosecution to attend at court the following day, 11 December. She made a witness statement purporting to deal with what had occurred at court on 14 June. She indicated: (1) that she had been present at court together with DS Dymond when consultations took place with prosecution counsel Mr Taylor regarding the prosecution of Karen Riley; (2) she advised counsel that the original hire purchase agreement which was at the heart of the charge involving Karen Riley had still not been found and that the finance company concerned had indicated that the document had been lost; (3) as a result of the document having been lost, the case against Karen Riley was left on the file; and (4) she was present when the sentencing of Briggs had taken place, she had not presented any text to the court on behalf of Briggs and no relevant mitigation was given. The officer gave evidence at the trial. During examination in chief she indicated that she was aware of the three written advices provided by Mr Edmunds; that she was aware of the letters sent by the Crown Prosecution Service (Dorset) to the Crown Prosecution Service (Truro) and the firm of solicitors representing Briggs and Karen Riley; and that there was a difficulty in proceeding with the charge against Karen Riley owing to the absence of the hire purchase document. She asserted that 67. 68. 69. 70. 71. 72. SMITH BERNAL it had been the decision of prosecution counsel, Mr Taylor, on 14 June not to proceed with the third charge against Karen Riley in the light of the fact that that document was missing. The decision had been made after discussion with her at court about the evidential position. She said that the judge had been told in court by prosecuting counsel that the case against Karen Riley could not be proceeded with owing to the missing document. She asserted that no text had been prepared in the case on behalf of Briggs. The decision, she said, taken by prosecuting counsel on 14 June was not linked in any way to the fact that Briggs had been giving

information and was a potential witness in the case. She was cross-examined and again asserted matters consistent with those that we have already recorded. In respect of Briggs, the fresh evidence that emerged that was the cause of the referral to this court has revealed the following matters. The decision not to proceed further in relation to Karen Riley on 14 June was not made by prosecuting counsel, Mr Taylor, but was made by Mr Terence Eastwood from the Crown Prosecution Service (Truro). That decision had been made two days in advance of the hearing on 14 June. The decision taken by Mr Eastwood was purportedly made on public interest/evidential grounds, unrelated to Briggs' role as a witness in the proceedings being taken against the appellant. The reference to "evidential difficulties" would appear to conflict with the view taken by counsel and the Crown Prosecution Service (Truro) prior to that date. The decision by Mr Eastwood had been made as a result of an urgent review of the case papers in relation to Briggs and Karen Riley. That review had been prompted by a telephone call made on 12 June 1996 by WDC Clatworthy to the Crown Prosecution Service in which she had apparently expressed her concern and opposition to the fact that the Crown Prosecution Service were proceeding with the prosecution of Karen Riley. It would appear that without that intervention the matter would not have been reviewed by Mr Eastwood and the proceedings against Karen Riley in respect of the third charge would have continued on 14 June. On 10 December 1996, a number of documents were faxed from the Crown Prosecution Service (Truro) to Winchester Crown Court for the attention of a member of the staff of the Crown Prosecution Service (Dorset), who was the Crown Prosecution case worker in daily attendance at the appellant's trial. The documents recorded as faxed between 12.25 and 12.27 included a copy of notes made by Susan Woods on 12 June 1996, a copy of an internal Crown Prosecution Service note apparently relating to the Briggs/Riley hearing on 19 April 1996 and referring both to the letter sent to the judge on 18 April, to the police text, and to a copy of a note written on 18 June 1996 by Andrew Copeland sent to Terence Eastwood. It would appear that neither those documents nor their contents were disclosed to the appellant's counsel. Other documents which were faxed seem to have been disclosed. The inquiry revealed that Briggs had stated to the Wiltshire officers acting on behalf of the Commission that as far as he was concerned, there was in effect a deal between himself and the police (WDC Clatworthy and DS Dymond) in relation to his provision of information about the appellant and his assistance to the police in the case. He has stated that the primary aspect of the deal was that the police would ensure that the Crown Prosecution Service did not proceed with the prosecution of Karen Riley and a secondary and lesser aspect was assistance towards a reduced sentence for his own offences by way of a text or oral submission to the sentencing judge. Briggs has maintained, however, that his account of what the appellant said to him was nonetheless truthful. 73. 74. 75. 76. There were obtained transcripts of the proceedings of 14 June which reveal a number of matters. First, prosecution and defence counsel saw the judge in chambers before arraignment. Defence counsel drew specific attention to the letter of 18 April from Mr John Revell and in effect invited the SMITH BERNAL judge to treat the letter as if it was a text and to give Briggs full credit for his assistance to the police in respect of the proceedings against the appellant. The judge agreed to give Briggs full credit for such

assistance and made a significant reduction in the sentence imposed upon Briggs. No explanation was given by prosecuting counsel, Mr Taylor, either in chambers or in open court as to the reason for the prosecution not proceeding against Karen Riley. The Crown accept that the fresh evidence to which we have referred contradicts the evidence given by WDC Clatworthy as to the circumstances in which the remaining charge against Karen Riley was not proceeded with on 14 June; that it contradicts the impression given to the jury that there had not been any deal between Briggs and the police and the prosecution with regard to his assistance and the prosecution of Karen Riley; that it raises questions as to the nature and extent of any such deal; and that it contradicts the impression with which the jury may have been left that Briggs had received no benefit from the sentencing judge for his assistance when he appeared on 14 June 1996. So far as those two witnesses are concerned, as we have already indicated, we have not heard any oral argument as to whether those matters in themselves would render the convictions unsafe. The argument as advanced in writing in the skeleton arguments was that there was such a manifest withholding of information from the jury that the conviction, which may have been based in part upon those matters, has to be viewed as being unsafe. The Crown's response if those matter had been vital to the outcome of the case would have been that those matters played an insignificant part in the trial; that so far as the one witness was concerned, he had never been put forward as a significant part of the case and certainly the account as given by that witness of what the appellant said was not suggested to be the truth as to what had occurred. So far as the other witness was concerned, by the end of the case the Crown had disavowed the witness, invited the jury not to rely upon him, and the judge had reinforced that view in the course of the summing -up. Put another way, the Crown suggest that by the end of the case insofar as there was any reliance likely by the jury upon the evidence of any of these three witnesses, it was Murphy, the other witness to whom we have not yet turned, upon whom the Crown were relying and that it is unrealistic to think in any way that the evidence of the other two, without that of Murphy, could have resulted in any difference to the outcome of the case. As we have indicated, we have not gone into that matter. There are clearly features of what occurred in relation to these matters that are disturbing. Having regard to our view that there needs to be a retrial in relation to this matter, we think it unhelpful to investigate further or further to record our views in relation to those matters, lest in any way it prejudices the fairness of any retrial and in particular makes the more difficult the task of utilising such matters on behalf of the appellant should those who advise him wish to do so. We accordingly turn aside from those matters and turn to the third of the witnesses. The position in relation to Murphy was very different. By the time Murphy made a statement to the police, as we have already indicated, he himself was not a serving prisoner. At the time when he gave evidence, likewise he was not a serving prisoner. In those circumstances he neither had the need for, nor the opportunity to use, anything he was doing in relation to his evidence to provide him with immediate benefit by the giving of evidence. However, the defence suggested that Mr Murphy was a man with a bad record who had been committing crime all his life and, notwithstanding the fact that he was in his sixties, was likely to go on doing so, and that in effect by helping the police he was storing up

in the bank credit for himself against the likely situation that one day he might want to use it. Thus his position was very different. There is no evidence -- and was no evidence -- uncovered by the inquiry in any way to suggest that there was any police involvement by way of any sort of deal with the witness Murphy. Indeed, since he was not the subject of any charge at the time when he made a statement, or during the intervening period, there was no opportunity for any such suggestion to be made. Accordingly, at the stage when the 77. 78. SMITH BERNAL 79. 80. 81. 82. matter was referred to this court there was nothing in any way to discredit Murphy as a witness over and above matters which had been canvassed and canvassed properly during the course of the trial. However, since the matter has been referred to the court, fresh evidence has come to light in relation to Murphy of a quite different kind. It is that evidence which has caused the Crown to change its view. Put shortly, that evidence is that Murphy has given evidence in a murder case in the past in relation to a claim he made to having had a conversation in prison with the defendant in the other case, just as he claims in this case. That matter was a long time ago. On 12 September 1969, a woman called Mary Murray was killed at her home in Cork, Eire, by manual strangulation and blows from a heavy object. Her husband, Thomas Murray, called the police. Initially, he claimed that he had returned home and discovered that someone had murdered his wife. On 1 October 1969, he was interviewed. In the course of an interview he changed his account and confessed to having killed his wife whilst provoked by her. On 2 October he was charged with murder and remanded in custody. In December 1969, while on remand at Limerick Prison, Thomas Murray came to know Andrew Murphy, the witness, who was then on remand pending trial for theft and deception charges. On 29 December 1969 and 5 January 1970, Murphy made witness statements to the police detailing purported confessions to the killing made to him by Thomas Murray. Those confessions were corroborated by another serving police officer, Patrick McLaurence, who also made a witness statement about the matter on 10 January 1970. Andrew Murphy indicated that he had recorded some notes of the conversations with Murray on the back of an envelope and a letter. Murphy and McLaurence agreed to give evidence at the trial of Murray. The first trial started on 4 May 1970. But the jury were discharged after the trial judge had ruled inadmissible the confession alleged to have been made by Thomas Murray. A second trial started on 8 June. Both Andrew Murphy and Patrick McLaurence gave evidence, but the jury were unable to agree upon a verdict. There was therefore a third trial on 23 November 1970 and again the two witnesses both gave evidence. This trial resulted in the jury convicting Murray of manslaughter and he was sentenced to a term of two years' imprisonment. On 10 February 1970, three months before the start of the first trial, Murphy had pleaded guilty to the theft from a shop of jewellery worth £6,432, and other deception offences. He was sentenced to a term of three years. Prior to each trial both Murphy and McLaurence had made efforts to persuade the authorities to safeguard their personal positions in prison by ensuring that they were not kept in prisons in which their role as prosecution witnesses would not be known and that their identities would not be published in the press. It also appears that at some stage both Murphy and McLaurence sought to obtain benefit by way of remission of sentence by reason of their appearance as prosecution witnesses. It is apparent that

McLaurence, who only had a few months left to serve, did receive some remission. However, the position in relation to Murphy has not been capable of being established. It may well be that he was released earlier. Certainly when he gave evidence at the trial in this matter he made reference to the fact that his sentence had been cut short (as he put it) on a point of law. But there is no further indication to what he was referring there. It may be a reference to the fact that he received some remission of his sentence because of the assistance that he gave. 83. The Crown have accepted that if they knew of that earlier material they would have been under a duty to disclose it. They did not know about it. Mr Dennis says in relation to it that if the material had been known to the prosecution they would have been obliged not only to disclose it but also to SMITH BERNAL 84. 85. 86. 87. consider whether in the light of that evidence they ought to rely upon Murphy or not. Because they knew nothing of the background, that process never actually took place. So far as Murphy's evidence is concerned, he had made a statement, and he supported that statement in evidence, suggesting that the appellant had made detailed admissions to him during the course of the time when they had been in the same prison. He asserted that those admissions had been made at a time when both of them were on recreation and were walking round the prison in which they were detained. He again, as he had in relation to the Irish matter, said that he had made notes on the back of an envelope in respect of the matter. There was a third similarity because not only was there the writing on the back of the envelope, and also on each occasion the suggestion that the conversations had taken place when the two were walking around, but the further similarity that on each occasion he referred to the person making the confession to him having spoken of reading detective books and the like and drawing upon the knowledge that they had gained from that source. Murphy's evidence in relation to the matter was undoubtedly an important feature of the case at trial. There is no doubt at all that Mr Donne chose to present the case in a way that put the evidence particularly of Murphy, but of the three witnesses, at the forefront of his contention that the jury could be sure of guilt. When the judge came firstly to consider a submission of no case to answer, and later to sum up the case to the jury, he stressed that that was the main plank of the prosecution case. In those circumstances it is clearly a distinct possibility that the conviction was influenced very much by what Murphy had said about the matter. Thus if there is material that ought to have been available to the defence which might have caused doubt to be cast about Murphy's evidence, then the fact that that evidence was not available at the trial must lead to the conclusion that the resulting conviction was unsafe. That is the proposition that the Crown have accepted in relation to the matter. We have considered that with care. At first sight it might be said in relation to the matter that merely because Murphy has given evidence in similar circumstances before can have little bearing upon reliance placed upon his evidence unless it can be shown in some way that his earlier evidence is false. However, we are persuaded that that is far too simplistic an approach to these problems. There is no doubt at all that evidence of this kind does require a particular caution by the courts. Experience has dictated that when witnesses come forward to give evidence in this sort of way, there are real dangers that need to be catered for. In *Benedetto v The Queen* and *Labrador v The Queen* [2003] UKPC 27 (7.4.03), a recent decision of the

Privy Council, the matter was considered. The judgment delivered by Lord Hope of Craighead the Council referred to the problems that relate to such evidence and the experience not only of courts in this country but throughout the world in dealing with such matters. He likened the problems in relation to such evidence to those that are found in the case of identification evidence, not because they raised the same problems but because each needed special caution of which the courts might be more aware than a jury. At paragraph 32 of his judgment (which so far as we are aware is as yet unreported) Lord Hope said: "The problem which is presented by cell confessions is, of course, different. In the case of identification evidence it is that a wholly honest and convincing witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken, and that the value of such evidence is notoriously difficult to assess In the case of a cell confession it is that the evidence of a prison informer is inherently unreliable in view of the personal advantage which such witnesses SMITH BERNAL think they may obtain by providing information to the authorities. Witnesses who fall into this category tend to have no interest whatsoever in the proper course of justice. they are men who, as Simon Brown LJ put in *R v Bailey* [1993] 3 All ER 513, 523j, tend not to have shrunk from trickery and a good deal worse. And they will almost always have strong reasons of self-interest for seeking to ingratiate themselves with those who may be in a position to reward them for volunteering confession evidence. The prisoner against whom that evidence is given is always at a disadvantage. He is afforded none of the usual protections against the inaccurate recording or invention of words used by him when interviewed by the police. And it may be difficult for him to obtain all the information that is needed to expose fully the informer's bad character." 88. 89. Against that background and with the problems that occur we have to look at what is said to be the material that was not available to the defence at this trial. No one suggests that it was material that was known to the Crown which they withheld. It is readily understandable, bearing in mind that it came from an Irish case many years before, that it would not have been known to the Crown at that stage. But nonetheless there was this background. If in fact the defence had had knowledge of it, they would have been able to utilise it in more than one way. The first way in which they could have utilised it -- and a significant way -- is that they could have compared the evidence given by Murphy at the trial in Ireland with the evidence that he had given in relation to this matter. There were the areas of rather surprising similarity between the two. It would have been open to the defence to suggest to the jury that there was at least a possibility that Murphy, using the situation for his own benefit, had drawn upon the material arising from his experience in what may well have been a genuine situation in Ireland, to seek to give himself advantage in the future in relation to other matters in the future. What effect that would have had upon the jury is difficult to say with any certainty; but nonetheless it would have been a legitimate argument that could have been deployed and may have had some influence upon the jury's thinking. The other significant way in which the evidence could have been used would have been to discredit the witness in respect of various answers that he gave in the course of cross-examination. He was cross-examined about the number of times on which he had given evidence in the past. This was essentially in the context of the fact that he had a long

record and he was asserting that whenever he had been guilty, he had pleaded guilty. But nonetheless there was an exploring of the number of occasions on which he had given evidence before a jury, and he detailed occasions upon which he said that he had given evidence for the prosecution. He was asked whether there were any other occasions and he firmly asserted that there were not. He had made no reference at all to the matter in Ireland. Clearly at that stage, after that assertion had been made, it would have been open to defence counsel to point out that his answer was untrue, that he had given evidence, and evidence which had a similarity to that with which he was now dealing, on a previous occasion. That again may have had an impact upon the jury. Thus it is that we are persuaded that the material that was not available to the defence, not through any deliberate withholding by the prosecution, but nonetheless not available, was material that may have had an impact upon how the jury perceived the reliance that they could have placed upon the evidence of Murphy. 90. For the reason we have already indicated, if that was so, that may have had a bearing upon their ultimate conclusion as to whether or not the appellant was guilty. For those reasons it seems to us that the Crown's approach in accepting the cogent submissions made by Mr Fitzgerald in this regard is an entirely proper one and on that basis the conviction has to be viewed as unsafe. 91. There is only one other aspect of that matter with which we think we should deal and that is this. SMITH BERNAL Clearly it is undesirable that this situation should have been reached. One of the questions that has arisen in other jurisdictions is whether the prosecution ought to take steps themselves to try to find out whether or not a person has given evidence of a similar kind in the past. Mr Dennis has accepted on behalf of the prosecution that there ought to be a regular practice, when a person is giving evidence of this kind, for an inquiry to be made by the prosecution as to whether he has given evidence of a confession by a fellow prisoner before; and also insofar as it is possible, for inquiries to be made to see whether there is any other material that suggests that he has. That is a course that has been adopted in other jurisdictions. It seems to us that it is a sensible practice that ought to be utilised in cases of this kind. As we have indicated already, these cases do cause considerable concern. There is experience around the world which shows that some people do come forward on a number of occasions to say that they have had more than one conversation of exactly the kind that Mr Murphy was claiming and the Crown ought to take every step that they can to see whether there is information of the kind that has emerged in this case that should be made available to the defence and also to have it available for their own use in deciding whether or not the matter should proceed in reliance upon the potential witness. 92. In the course of his submissions to us in this regard, Mr Dennis helpfully pointed out to us that the code of practice pursuant to the Criminal Procedure and Investigations Act 1996, at paragraph 3.4 requires 93. 94. "In conducting an investigation the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend upon the particular circumstances." We would have thought that it was reasonable in a case of this kind, where reliance is to be placed upon a cell or similar confession, for inquiries to be made, including an inquiry of the person concerned. Whether that would in fact have made any difference in this case has to be doubted, having regard to the fact that

Murphy, when asked whether he had given evidence on other occasions, conveniently forgot to mention this matter in the course of his evidence. He may well have done the same if the inquiry had been made earlier. On the other hand, there is at least the possibility that, not faced with the matter suddenly in the witness box, he may have been more frank than he was when he gave evidence to the jury. For those reasons we are entirely satisfied that the Crown's position is right that this conviction cannot be sustained. Accordingly, we quash the conviction and allow the appeal. Having done that, we turn to the contested area between the parties which is whether or not there should be a retrial. Mr Dennis' contentions on behalf of the Crown can be put very shortly. This was a very serious matter. He submits that the public interest requires when an allegation as serious as this is made that the public have a right to know whether or not the offence was committed and if so whether the appellant was responsible for it; that all other things being equal, in such circumstances there ought to be retrial. He submits that in this case there is no good reason why that should not be the position. He contends that insofar as material has emerged since, that material does not in any way disprove any element of the case that was presented to the jury. This is not a case where a case has been put forward on a basis now demonstrated to be entirely false. None of the matters that have been raised in any way disproves the assertion of any of the three witnesses. But, he submits, notwithstanding that, there is a perfectly good part of the prosecution case that was presented to the jury which is capable of standing alone and which would in any event demonstrate the guilt of the appellant, namely the first two limbs to which we referred at the outset of this judgment. He submits that those ought to be put before a jury and the jury ought to SMITH BERNAL be permitted to decide whether or not they prove to the necessary degree of certainly the guilt of the appellant. 95. On behalf of the appellant Mr Fitzgerald contends that there are three essential reasons why the court ought not to accept that approach. In his skeleton argument he summarises them in this way:

- (1) It would amount to providing the prosecution with a second chance to obtain a conviction upon a wholly different basis to that pursued at trial and hitherto advanced in defence of this conviction. It would be particularly unfair because, given the way the case was put at trial, the Crown's present concession as to the unreliability of the alleged prison confessions would, if made at trial, undoubtedly have resulted in a successful no case submission. Moreover, it is not accepted that the circumstantial case amounts to a strong case.
- (2) A retrial would be oppressive given the substantial length of time that has elapsed since the commission of the alleged offence in 1985, the length of the sentence already served by the appellant, and his current age and deterioration.
- (3) A retrial would be unjust given the extent of the police misconduct at the trial on the handling of the prison informer witnesses. A retrial would also be unjust and prejudicial to his chances of receiving a fair trial in the light of the passage of time, the charges, the basis on which the case is now put, and the appellant's age and deteriorating mental state. Dealing with each of those in turn in the way that they were expanded upon by Mr Fitzgerald, we turn first to what may be described as his "second chance point". So far as that is concerned,

it is right to make clear that the prosecution have indicated to us that if there were to be a retrial it would be the intention of the prosecution not to call any of the three witnesses who claimed to have had a conversation with the appellant, but simply to rely upon the first two limbs of their case as presented on the earlier occasion. Mr Fitzgerald says that if the Crown were to do that, they would in effect be putting their case on a wholly different basis. At trial they had not suggested that those two limbs could in themselves have led to a conviction. They would therefore be abandoning the one area which they contended before would have justified a conviction and would in that sense be putting forward a quite different case to the one that had been advanced before. We do not accept that as a proposition. On last occasion the Crown put all these matters before the jury. It is perfectly right that they emphasised as the prominent limb of their argument in relation to the case the evidence of the three witnesses who talked of confessions, and in doing so to an extent they down-played the other limbs. However, it is equally clear that they were suggesting throughout that the various matters were interwoven. When the jury came to deal with the matter it was perfectly open to them to say, notwithstanding the approach adopted by the Crown and repeated by the judge in referring to the Crown's case, that they themselves did not think that the witnesses were witnesses upon whom they would wish to rely, but that the rest of the material that was placed before them convinced them of the guilt of the appellant. Thus the case that would now be presented would be a case that could have been the basis upon which the jury convicted on the earlier occasion. No one will ever know because juries are not required to give reasons. That is a very long way removed from the situation where the Crown subsequently try to run a case on a different factual or legal basis to the one that they had run on an earlier occasion. All that the Crown would be doing would be to abandon a part of their case -- that part of the case being the one that they themselves gave the greatest weight to on the earlier occasion, but not the only one that they put before the jury. It seems to us that that in 96. 97. 98. SMITH BERNAL 99. 100. 101. 102. 103. no way represents any unfairness in itself to the appellant. Mr Fitzgerald has highlighted the fact that the judge when he heard a submission of no case to answer seems to have indicated that had it not been for the evidence of the witnesses, and particularly the witness Murphy, he would not have allowed the matter to go before the jury. We do not think that the judge ever applied his mind to that question as such. He was faced with a case which was presented in a particular way by the prosecution. He came to the conclusion that there was material to go before the jury, largely basing it upon that which had been highlighted in the case. But we think it would have been a very different proposition if he had had the other material placed before him as the sole evidence upon which the prosecution relied. It is right to observe -- and the Crown have observed -- that both the Court of Appeal that gave leave to appeal on the last occasion and the court that heard the matter thought that the case was a strong one even without the confession. That in no way is binding upon us, but is perhaps an indication as to the likely way in which the judge might have reacted if in fact the only evidence had been that upon which the Crown would now rely and if a submission had been made as to their case. We think in the circumstances of this case that if the material which has led us to allow the appeal had been known to the defence and they had used it, the likelihood is that the

judge would still have decided that there was a case to go before the jury. So far as Murphy was concerned, that material in no way disproves the truth of what he was saying about these matters and we think if a submission had been made with that material having been exposed before the jury on the last occasion, the judge would still have decided that it was a matter that it was for the jury to decide. Thus we do not think that the appellant has been disadvantaged. On a retrial he will not have to face the problems that are related to those matters, save insofar as he wishes to utilise any of the material to his own advantage. Thus we cannot see that this can properly be said to be giving the Crown some unfair second chance. So far as oppression is concerned, the matters that are raised are matters properly to be taken into consideration in weighing the interests of the appellant against the public interest. It is right that he is now a man in his sixties. There is material that has been placed before us to suggest that there has been some deterioration in his mental health. That material, when read, at least raises a possibility of whether he might be unfit to be tried. Were that the case, then that is a matter that could be dealt with at the retrial and could be explored evidentially in the way that the law requires if that was appropriate. But nothing in the medical reports in our view goes so far as to preclude the possibility of a retrial. In any event the author of the reports makes clear that at least in large measure his reports are based upon what he has been told by the appellant himself and also reveals that his view is not one that is held by all other doctors who have seen the appellant. Nonetheless, we are prepared to accept for the purpose of considering whether there should be a retrial, that there may well have been some deterioration in the health of the appellant. If that is such as to preclude a fair trial, then that is a matter that can be utilised when the retrial is to take place. But we work on the assumption that it does not reach that sort of level. It seems to us that whilst it is a factor properly to be taken into account, it is not a determinative one. It is a long time since the time when this offence was committed. It is also a long time since the appellant was first to be tried in relation to these matters. Mr Fitzgerald has sought to argue that, having regard to his right to have a trial within a reasonable period of time, the court ought to conclude that it would be unfair now to order a retrial because of the passage of time. We do not think that a retrial would present any insurmountable problem for the defence. We think the factor of delay is another of the factors to be taken into account and weighed in the balancing exercise *SMITH BERNAL* which we see as the same balancing exercise whether the court considers its powers in the normal way or whether it considers the competing interests which would be relevant in determining, even if there was a breach of Article 6 in the sense that the trial had not taken place within a reasonable time, whether the appropriate remedy for that breach was simply to put an end to the proceedings at this stage. Both require that other factors involving the public importance of the matter and the legitimate public interest in the matter should be weighed against the very real interests of the appellant.

104. We have weighed all those matters up. At the end of the day we think it right to conclude that the public interest far outweighs any of those matters in a way that does requires that this very important matter should be the subject of a proper determination by a jury. Obviously

if we thought that it was impossible for there to be a fair trial, that would have prevented such a conclusion. We do not think that that is the situation. The passage of time of course makes it more difficult for witnesses to remember. There had been a lengthy passage of time between the alleged commission of the offence and the time when he stood trial. If the Crown are right, that is because of the actions of the appellant in covering up what he had done. In those circumstances that period was a necessary consequence of the allegations that are being made in this case. The appellant for his part at the time of the first trial had to face up to all the material with which he is now going to have to confront again at trial. We do not accept an argument advanced by Mr Fitzgerald that in some way further investigation now has to be made which would not properly have fallen to be made at the time. Most of the material that is now to be deployed against him at a retrial is material which comes exclusively from matters which must be within his own knowledge. Inferences are invited to be drawn from matters where he personally has been involved. They are the same matters that he had to face at the first trial. In preparation for that trial he must have been taken through them in detail by his then solicitors and gone through them and indicated what his answers were. Mr Fitzgerald suggested in some way that because the focus of the first trial was particularly on the third limb of the prosecution case the other two may have in some way been allowed to go by without the same degree of scrutiny as now would be necessary.

105. We reject that argument. On any view of it, they were critically important matters for the first trial. It seems to us inevitably they had to be addressed. The first way in which they would be addressed is by inviting the appellant himself to go through and indicate whether what was said by the various witnesses was true or not. We think that that inevitably was done. It resulted in large parts of the evidence to which we earlier referred as being the first and second limbs of the prosecution case being accepted. There were areas of contention. Those were explored at the trial. Transcripts are, we understand, available in relation to the trial and would be there to assist as to what was said and these can be utilised to assist the appellant's recollection of those events if necessary. 106. 107. Thus, although the time that has gone by is an important matter, we again do not think that it can be thought to be a conclusive matter at this stage preventing a fair trial. The other point made in this regard by Mr Fitzgerald relates to the period of time already served by the appellant. That is a significant matter. One should not lose sight of the fact that the sentence in this case was one of life imprisonment. It may be that the appellant has served a significant part of that part of the period before the time when consideration can be given to his release -- but not before the end of his sentence. His sentence is one of life imprisonment and remains in effect for the rest of his life. Even if released, he would be subject to licence and liable to recall. We do not think that it can properly be said that in effect he is so near the end of his sentence, or such a significant part has been served, that that ought to outweigh other considerations. SMITH BERNAL 108. Taking all these matters together, in our view it would not be oppressive for him to be retried. 109. The third aspect of the matter relates to the conduct of the police. It is said that, having regard to what is known about the conduct of the police as a result of the inquiries that have been made, that this is a case where the

confidence that there ought to be in the integrity of the prosecution can no longer exist. By way of example, Mr Fitzgerald says that whilst in the past it might have been possible to accept the evidence that extensive inquiries had been made in other countries to check that there was no trace of the appellant's wife, once one knows that there may have been impropriety on the part of officers involved in the investigation, one can no longer have such confidence. However, looking at the evidence that the Crown would seek to rely upon, that evidence comes not as a result of what police officers say, but as a result of the evidence essentially of civilian witnesses, all of whom talk about their recollection. We do not see that this is a case in which there is any realistic prospect that that evidence has been influenced adversely to the interests of the appellant by any conduct by the police. 110. Insofar as there is the further argument that the police may not properly have investigated the matter, it seems to us that the extent of the investigation that has been carried out will be apparent from the material that will be available to the appellant. If there has been any deliberate failure to pursue avenues, that will be apparent. If there has been any slackness in the following up of potential leads that can be established at trial.

111. Whilst any form of conduct short of proper conduct is always to be regretted in any case, particularly one as serious as this, and certainly there is evidence that some officers gave evidence that was misleading before the jury on the last occasion, nonetheless, having examined the matter with care and in detail, we do not see that there is any risk that that conduct is going to have any unfair impact upon a retrial. Accordingly, we do not think that that matter is one that should prevent there being a retrial. It will in any event be open to the defence to raise any of these matters they wish and insofar as there is any area where it can properly be said that question marks arise in relation to the police conduct, that is a matter that can be explored at trial. Thus at the end of the day we are quite satisfied that this is a matter that should be retried and accordingly we make an order to that effect.
112. MR DENNIS: May I mention three matters? 113. LORD JUSTICE KAY: Please.
114. MR DENNIS: Firstly, the appellant was tried on an indictment with one count of murder: that between 13 June 1985 and 6 August 1985 he murdered Veronica Mary Packman. We ask you to direct that an indictment in similar terms be preferred, and it would be referred back to Winchester Crown Court. In due course, once the matter is at the Crown Court, representations which no doubt can be considered and discussed between us can be made as to the appropriate venue thereafter. That is the first matter. 115. LORD JUSTICE KAY: Yes. We simply have to direct that a fresh indictment be preferred and direct that he be re-arraigned on that fresh indictment no later than two months from today. We hope and believe that it ought to be possible to do it much quicker than that. The process can at least be started. It is desirable, unless Mr Fitzgerald says anything to the contrary, that the arraignment ought to be at Winchester so that at least everyone knows where the arraignment is going to take place. We make no further order as to where it should be, but leave it to be determined in the normal way. It is for the parties to make such representations as they wish at the arraignment. It SMITH BERNAL will then be for the

administration under the guidance of the presiding judges to decide where the trial should take place. Mr Fitzgerald, is there anything on which you want you to put down a marker in relation to venue?

116. MR FITZGERALD: Well, I do want to put down a marker, my Lord, that there is almost certainly going to be an application that it would be an inappropriate venue and I accept my learned friend's point that that is appropriate for that to be made to the judge presiding at Winchester. 117. LORD JUSTICE KAY: Yes, if it is known that there is going to be an application it is sometimes helpful because people start thinking what the alternatives are.
118. MR FITZGERALD: My Lord, I think that there is a real risk that the publicity surrounding the original trial at a relatively small venue will make it difficult to have a fair trial. 119. LORD JUSTICE KAY: So just not Winchester will be the application, will it, or what?
120. MR FITZGERALD: My Lord, not Hampshire. 121. LORD JUSTICE KAY: I guess it might be Bristol?
122. MR FITZGERALD: My Lord, it might be. Of course, of lot of the witnesses are international. 123. LORD JUSTICE KAY: We will say no more in relation to it, but people can be told that there is likely to be an application so that at least it is know, so that people are not starting to set aside days at Winchester at this stage.
124. MR FITZGERALD: My Lord, yes. 125. LORD JUSTICE KAY: Thank you. Anything further?
126. MR DENNIS: The second matter is that the appellant of course is in custody. 127. LORD JUSTICE KAY: Yes, we will deal with that in a moment.
128. MR DENNIS: The third is reporting restrictions. 129. LORD JUSTICE KAY: I was going to ask about that.
130. MR DENNIS: I would invite the court to consider making an order that there should be no publicity of these proceedings and the judgment of this court until the conclusion of the proceedings before the Crown Court, the reason being that any publicity of this matter would obviously highlight the position in relation to the three witnesses and the confessions made. 131. LORD JUSTICE KAY: Yes, it would also highlight the fact that he had a conviction in relation to the fraud. That was another matter that concerned us. There was a third one and I have forgotten it, I am afraid. We will see what Mr Fitzgerald says. What do you say, Mr Fitzgerald?
132. MR FITZGERALD: My Lord, certainly there should be no reference to the previous conviction for the moment, but the only question then is whether there should be reference to the evidence of the witnesses that may not be relied on. That may have a prejudicial effect. 133. LORD JUSTICE KAY: Subject to the agreement of those with whom I sit, I would be prepared to make SMITH BERNAL an order that the press may publish the fact that an appeal has been allowed, the conviction has been set aside and a retrial has been ordered, but to go no further than that until such stage as the proceedings before the Crown Court

have been concluded.

134. MR FITZGERALD: My Lord, I do not object to that. 135. LORD JUSTICE KAY: If at any stage any member of the media wishes to make application in relation to that, we will of course entertain it. They can put in a written representation and if need be we will deal with it then. But I would not have thought so. It seems to me that this is one of those cases where you cannot really do it. I am always very reluctant to handicap them from reporting matters. It will not eventually stop them reporting it in as much detail as they want. But it will delay it, and even that I do not like to do unless it is necessary. We think, subject to anything you want to say, Mr Fitzgerald, that that is the order to make. The outcome of this, that is that the appeal has been allowed, the conviction has been set aside and a retrial has been ordered may be reported now, but no other part of these proceedings may be reported until such time as the proceedings before the Crown Court have been concluded. Are you content with that?
136. MR FITZGERALD: My Lord, yes. 137. LORD JUSTICE KAY: We are not precluding anybody from --
138. MEMBER OF THE PRESS: My Lord, might I point out that the report of yesterday's proceedings has already appeared in local newspapers. That was on the basis of contemporaneous reporting -- 139. LORD JUSTICE KAY: Yes, we made no order. They were entitled to.
140. MEMBER OF THE PRESS: That is fair enough, but from your order today, anything from this time onwards -- 141. LORD JUSTICE KAY: From this time onwards the only report that should appear is that.
142. MEMBER OF THE PRESS: I am much obliged. Thank you. 143. LORD JUSTICE KAY: You will have to explore whether there has been any publicity which causes you concern and that can be taken into account in any application you have to make.
144. MR FITZGERALD: My Lord, yes. I had understood the press were here appreciating that the issue was a retrial. 145. LORD JUSTICE KAY: Well, in fairness to them, it is up to us to say so. They cannot be expected to guess what we are going to say tomorrow.
146. MR FITZGERALD: My Lord, no. My Lord, the issue therefore of the indictment and the venue having been resolved, I think your Lordships have to direct there be two counsel at the retrial. 147. LORD JUSTICE KAY: Well, we have to grant you a representation order or there will be none -- and do not just say "two counsel" or your solicitor will say, "What about me?"
148. MR FITZGERALD: I am sorry. A representation order -- 149. LORD JUSTICE KAY: You want a representation order for leading counsel, junior counsel and a solicitor? SMITH BERNAL
150. MR FITZGERALD: Yes, my Lord. 151. LORD JUSTICE KAY: Yes.

152. MR FITZGERALD: My Lord, there is also an application in relation to the defendant's costs orders in relation to the solicitor who did all the work before my instructing solicitor came on board. Perhaps I can just put that aside for one moment? 153. LORD JUSTICE KAY: Yes.
154. MR FITZGERALD: My Lord, the only other matter is in relation to bail. My Lord, clearly the key factors in relation to that are all the matters that I have urged before your Lordships: the length of time that he has served in custody, the psychiatric evidence -- I am not going to go into detail -- 155. LORD JUSTICE KAY: No, we have read it again today.
156. MR FITZGERALD: -- and the very serious concerns expressed by the psychiatrists. Your Lordships will see the serious concerns expressed. This obviously will be a time of great stress. If he is successful in the retrial then it would be oppressive, in my submission, given this whole history, for him to spend another day in custody unnecessarily. On that basis, and on the basis that the reason why he is facing a retrial so long after the event, as your Lordships know, is because there has been a defect. It is no fault of his own. I would submit that this is a case where it is appropriate that, if there has to be a retrial, that retrial would be for him not to be in custody. That is both fair to him, given the whole history of this matter and the likelihood that the proceedings will at least take some time to get properly prepared for and it is fair to avoid the risk of further psychological deterioration and that it will also enable him to prepare for the retrial in proper conditions. My Lord, those are the grounds on which I ask that the defendant be granted bail. Obviously there are not all the materials before your Lordships for a bail application, but I do submit that it is appropriate that bail be granted in principle and that that such conditions that need to be attached are attached. 157. LORD JUSTICE KAY: Thank you. (The court conferred) 158. LORD JUSTICE KAY: Mr Fitzgerald, I am afraid he will remain in custody to await retrial. We particularly having regard to some of the matters in his history.
159. MR FITZGERALD: My Lord, the other matter is as to the defendant's costs order. I am not obviously briefed on behalf of them, but I understand that the position is that costs were incurred by my instructing solicitors' predecessor. 160. LORD JUSTICE KAY: Your instructing solicitors have been covered by a representation order?
161. MR FITZGERALD: Yes, they are covered. 162. LORD JUSTICE KAY: When did they come in.
163. MR FITZGERALD: About six months before the referral. 164. LORD JUSTICE KAY: It was before the referral? SMITH BERNAL
165. MR FITZGERALD: Yes. 166. LORD JUSTICE KAY: Can we make an order relating to events before the referral?
167. MR FITZGERALD: My Lord, I think the only test, from what I can see under section 16, the only test is whether they are costs incurred by the defendant. 168. LORD JUSTICE KAY: In these proceedings, is it not?
169. MR FITZGERALD: In the criminal proceedings. 170. LORD JUSTICE KAY: I do not know.

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171. MR FITZGERALD: It is 6.7 of Archbold. 172. LORD JUSTICE KAY: 6.7?
173. MR FITZGERALD: Yes, 6.7 of Archbold, page 803. My Lord, proceedings do include the court below. It is at 6.12. 174. LORD JUSTICE KAY: But, you see, there are no proceedings afoot in that limbo state, are there?
175. MR FITZGERALD: My Lord, may I do this -- 176. LORD JUSTICE KAY: I think we are not prepared to make an order at this stage, but if they wish to renew the application themselves, they may do so.
177. MR FITZGERALD: I am obliged, my Lord. Those are the only matters. 178. LORD JUSTICE KAY: Thank you. SMITH BERNAL
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