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SCSL-04-15-T
(11891 - 11961)

11891

IN THE SPECIAL COURT FOR SIERRA LEONE.

THE TRIAL CHAMBER.

Before: The Trial Chamber.
Judge Benjamin Itoe, presiding.
Judge Bankole Thompson.
Judge Pierre Boutet.

Registrar: Mr Robin Vincent.
Date filed: 17th May 2005.

Case No.SCSL 2004-15-T.

In the matter of:

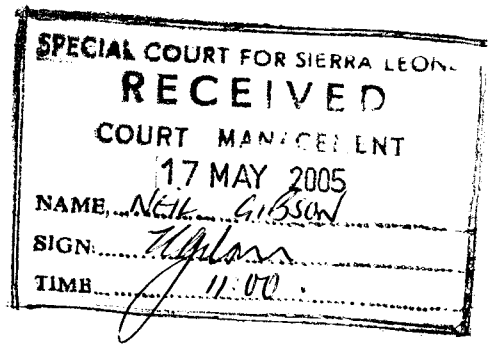
THE PROSECUTOR

Against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

GBAO AND SESAY JOINT DEFENCE APPLICATION FOR THE EXCLUSION OF THE TESTIMONY OF WITNESS TF1-141

Office of the Prosecutions.
Luc Cote, Chief of Prosecutions.
Lesley Taylor
Pete Harrison
Sharan Palmer



Counsel for Augustine Gbao
Andreas O'Shea
Girish Thanki
John Cammegh

Counsel for Issa Sesay
Wayne Jordash and Sareta Ashraph

Counsel for Morris Kallon
Shekou Touray,Charles Taku and Melron Nicol-Wilson.

A. Background to the application

1. This is an application for the exclusion of the testimony of witness TF1-141 on the basis of a violation of Rule 66 of the Rules of Procedure and Evidence and or abuse of process of the Court. During the cross-examination of witness 141 on 19th April 2005,[1] counsel for Augustine Gbao, John Cammegh asked the witness whether when he was interviewed by the lady referred to as Sharon, she was writing directly into a computer or taking down hand written note with a pen. The witness responded that she was writing with a pen. Counsel then followed up with the question whether she was also writing with a pen when dealing with the evidence on Gbao and the answer was again in the affirmative.

2. Lead counsel for Augustine Gbao, Andreas O'Shea, then requested the prosecution through the court to clarify whether there were handwritten notes as the witness had suggested. The prosecution, after inquiry, then informed the court that there were probably handwritten notes, but that those notes had been destroyed. Counsel for Gbao then indicated to the court that he understood from the information provided that the prosecution had no record of the content, nature or date of such notes and could not remember the position.

3. It is submitted that the information provided by the prosecution in conjunction with the information provided by the witness, which the prosecution did not impeach but corroborated, meant that it had been shown on the balance of probabilities that handwritten notes did exist in relation to the witness's account of matters going to the proof of the commission of crimes by Augustine Gbao and the other three accused. It further followed, in our respectful submission, from the information provided to the court that these notes had not been disclosed to the defence and could not be disclosed to the defence by virtue of their destruction. It is submitted that it could further be implied from the prosecution's response and failure to refute defence counsel's interpretation that the prosecution had no further current knowledge

[1] See Transcript of 19 April 2005, page 76 *et sec*

about the details in relation to these notes, that the prosecution in fact is unable to shed any further light on the notes because of their destruction.

4. It is respectfully submitted that the above facts disclose a violation of Rule 66 and an abuse of the process of the court in depriving the defence of the ability to demand these notes which they are entitled to do in terms of the Rules of Court. It is further submitted that prejudice has been caused to the defence by the inability to examine material subject to disclosure and capable of being the subject of cross-examination. Further, in our submission, the Court only needs to be satisfied that there might have been prejudice in order to deem it necessary to provide a remedy for the breach. Given that the handwritten notes cannot in fact be produced, it is respectfully submitted that there is no other appropriate remedy other than the exclusion of the evidence in witness 141 in its entirety.

B. Violation of Rule 66 of the Rules of Procedure and Evidence

5. Rule 66 of the Rules of Procedure and Evidence requires the Prosecution to disclose to the defence all statements of witnesses which the prosecution intends to call. In its Decision of 14th July 2004 in the case of *Norman et al,*[2] this Chamber held that interview notes taken by the prosecution in the course of an investigation constituted witness statements for the purpose of Rule 66. In its Decision of 1 October 2004,[3] this Chamber further held that handwritten notes taken by the prosecution in the course of an interview with a witness were subject to disclosure under Rule 66 and the fact that the prosecution had claimed to have destroyed the notes did not exclude them from the liability to disclose that material.

6. Since the prosecution witness has given evidence of the existence of handwritten notes, which the prosecution does not contest but in fact corroborates with the assertion that they have been destroyed, it is submitted

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[2] *Prosecutor v Norman et* al, Decision on Disclosure of Witness Statements and Cross-examination of 16 July 2004

[3] *Prosecutor v Norman et* al, Ruling on Disclosure of Witness Statements of 1 October 2004

that there has been a prima facie showing of a breach of Rule 66. It is further submitted that by destroying the notes the prosecution has removed all ability for the Defence or the prosecution to ascertain the content of these notes which may have contained previous inconsistent statements or exculpatory evidence. Depriving the Defence of the opportunity of reviewing these notes and the Chamber of being in a position to make any finding at all in relation to these notes has therefore, it is submitted, caused obvious prejudice to the accused.

7. It is submitted that the Chamber has the power under Rule 54 or alternatively under Rule 89(C) to exercise its discretion not to admit or exclude evidence to preserve the fairness of the proceedings. Under Rule 54, the Court may make such orders as are necessary for the conduct of the trial, including we would say as are necessary to preserve the right of the accused to a fair trial, the right to adequate facilities and the right to examine witnesses and have witnesses examined against him under the same conditions. Under Rule 89(C) the direction that the Chamber 'may' admit relevant evidence clearly accords a judicial discretion in this regard. In the alternative, this power derives from the inherent jurisdiction of the Court sourced from powers implied within the provisions of the Treaty, Statute and Rules to take the necessary measures to give effect to the right to a fair trial. As Lord Scarman observed in the context of the approach to exclusion of evidence, it is 'the "overriding duty" of the judge to ensure a fair trial.[4] Lord Griffiths has noted that judges have the power 'to exclude evidence if it is necessary in order to secure a fair trial'.[5] These observations are germane to and consistent with the discretion to admit evidence under Rule 89(C), the power to make such order as are necessary for the conduct of the trial under Rule 54, as well as the Court's inherent powers.

8. On the national level in at least some jurisdictions it is an accepted basis for the exclusion of evidence that rules regulating the conduct of the investigating authorities have been breached.[6] In such cases in England, for example, the

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[4] See *R v Sang* [1980] AC 402 (HL)
[5] See *Scott v R* [1989] AC 1242, at 1216
[6] See *Absolam* 88 Cr App R 332; *Delaney* 88 Cr App R 338

showing of bad faith is not necessary for the exclusion of evidence, although this factor will make its exclusion more likely.[7] In the Canadian case of *Carosella*,[8] the notes of a social worker from the complainant in a sexual assault case were destroyed and the social worker had no recollection of the content of the notes. It was held by the Supreme Court of Canada that there had been a breach of the accused constitutional rights in the non-disclosure of these notes by the prosecuting authorities which properly led to a stay of the proceedings. It was held that once the breach was established it was not necessary for the accused to show additional prejudice. Any possibility of contradiction with her evidence by reference to a previous account was destroyed. In this case the possibility of challenging the testimony of the witness had not been completely removed by the destruction of the notes but since the Defence is deprived of the opportunity of examining them, their potential significance cannot be assessed. Here we do not ask for a stay of the proceedings but a lesser remedy, the exclusion of the evidence of the one witness who was the source of the notes. In the light of the fact that it is now impossible for anyone to remedy this situation and place these materials in the hands of the defence it is respectfully submitted that the only appropriate remedy is the exclusion of the entire testimony of witness TF1-141.

C. Abuse of process of the court

9. It is submitted that it is not necessary for there to have been an abuse of the process of the court for the Court to exercise its discretion to exclude the evidence of witness 141. However, it is submitted further and in the alternative that in this instance there has been an abuse of the process of the court in that the integrity of the proceedings have been scarred by the destruction of Rule 66 material and that this constitutes an additional ground for the exclusion of the evidence of witness 141.[9] While the doctrine of abuse of process is usually argued as grounds for a stay of proceedings, it is submitted that this is but one

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[7] *Delaney*, idem
[8] *R v Carosella*, 1997 Can Sup Ct, Lexis 11
[9] See *Prosecutor v Barayagwisa*, Decision of 3 November 1999

remedy and where appropriate a lesser remedy can be applied, in this case the exclusion of the evidence.

10. It is submitted that to destroy material which is or is capable of forming the basis of an obligation of disclosure under rule 66 or rule 68 is a misuse of the process of the Court. For this proposition to be sustained it is submitted that it is sufficient that the material in question was subject or capable of being subject to a disclosure obligation. It does not require evidence of knowledge of this fact by the prosecution or bad faith on their part. However, in this case it is submitted that at the time of the destruction of the notes in question the prosecution should have known that hand written notes taken in the course of an interview were capable of falling under its disclosure obligations under rule 66 and possibly also under rule 68.

11. The Court had previously on 1 October 2004 rendered a ruling that handwritten notes taken during the course of an interview were the subject of disclosure under rule 66 and must be disclosed despite an indication from the prosecution that the notes have been destroyed. This Ruling confirmed the effect of an earlier ruling where it was held that any notes taken during the course of an interview where a witness was telling his story in relation to the alleged commission of a crime was capable of falling within the definition of a witness statement. It is submitted that the prosecution can be deemed to have been aware of this ruling at the time of the destruction of the notes in question in this case. No mention of Augustine Gbao is made by the witness until 9 October 2004. So, either the prosecution destroyed the notes after the CDF rulings of 14 July and 1 October 2004 had been delivered or alternatively failed to disclose an earlier reference to Augustine Gbao by the same witness. In either case it is respectfully submitted that the prosecution have acted wrongly. It can be inferred that such actions were done knowingly or negligently and it is submitted the process of the court has been misused.

PRAYER - IT IS THEREFORE REQUESTED:

That the testimony of witness TF1-141 be excluded

Or in the alternative:

That such portions of the testimony for which there had been no disclosure to the Defence of the contents thereof prior to the 14th July 2004, the date of the first ruling clarifying the law on witness statements, be excluded.

Andreas O'Shea, for Augustine Gbao
Wayne Jordash, for Issa Sesay

16 May 2005

LIST OF AUTHORITIES.

1. **R v SANG [1980] AC 402 (HL).**
2. **SCOTT v R [1989] AC 1242,at 1216**
3. **R v ABOSALAM 88 Cr App R332.**
4. **R v DELANEY 88 Cr App R 338**

88 Cr App Rep 338, 153 JP 103, [1989] Crim LR 139

R v **Delaney**

Court of Appeal (Criminal Division)

88 **Cr** App Rep **338,** 153 JP 103, [1989] Crim LR 139

HEARING-DATES: 8 August 1988

8 August 1988

CATCHWORDS:
Evidence -- breach of Code of Practice under Police and Criminal Evidence Act 1984 -- whether evidence obtained must be excluded.

HEADNOTE:
In connexion with a serious indecent assault on a three year old girl the appellant, who was 17 years of age and educationally subnormal, was interviewed by the police. His personality, according to a psychologist, was such that when being interviewed as a suspect his quick emotional arousal might lead him to wish to rid himself of the interview by bringing it to an end as quickly as possible. During the first interview at the police station which lasted 1 1/2 hours the two interviewing officers were at pains to minimize the gravity of the offence and to suggest that the real requirement of the offender was psychiatric help. It was only at the very end of that interview that the appellant, after a series of denials, admitted that it was he who had assaulted the little girl and followed that with further admissions in subsequent interviews. However, a record of that first interview was not made until the following day in breach of the Code of Practice (C) 11.3 and 11.4 made under s 66 of the Police and Criminal Evidence Act 1984. Those admissions were, in effect, the whole basis of the prosecution case.

At the trial it was submitted by the defence that the Judge was under a duty to reject the confession by virtue of s 76 of the 1984 Act and that in his discretion under s 78 of that Act he should reject it. Whilst accepting that there had been a flagrant breach of Code, the Judge ruled that the confessions should be admitted. The appellant was convicted.

Held: The mere fact that there had been a breach of the Codes of Practice did not of itself mean that the evidence obtained had to be rejected. It was not part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice.

In the present case, however, by failing to make a contemporaneous note or indeed any note as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what happened during the interviews and what did induce the appellant to confess. Having regard also to the long term expectations of the appellant based on the assertion by the police officers that treatment rather than punishment was required, the Judge should have excluded the confessions, particularly so against the background of the appellant's age, his sub-normal mentality and the behaviour of the police.

The conviction was unsafe and unsatisfactory and the appeal would be allowed.

INTRODUCTION:
Appeal: by Joseph Patrick **Delaney** against his conviction at Lewes Crown Court for indecent assault.

COUNSEL:
R Hunt, for the appellant; S Stevens, for the Crown.

PANEL: Lord Lane, CJ, French, J, Farquharson, J

JUDGMENTBY-1: LORD LANE CJ

JUDGMENT-1:
LORD LANE CJ (reading the Judgment of the court): On April 14, 1987 in the Crown Court at Lewes, Joseph Patrick **Delaney** was, upon conviction, sentenced to five years' youth custody for an offence of indecent assault upon a little girl of three years of age. He now appeals against conviction by leave of the full Court. He appeals against sentence by leave of the single Judge.

There is no need to spend very much time on describing the offence itself. There is no doubt but that someone indecently assaulted the little girl. It was indeed a horrifying case. The assailant, whoever he was, took the little girl from where she had been playing with some friends to some woods nearby. He there stripped her completely of her clothes, and with his fingers penetrated both her vagina and her anus. He then made off, leaving the child to make her way home as best she could. She was found in the road crying and naked, by a kindly woman who took steps to restore her to her family.

It is not difficult to imagine the sort of feeling which this type of offence would be likely to engender in the minds of any jury trying the case.

The assault took place on October 17, 1986, in Hastings. It was some 12 days later, on October 29, that this appellant was interviewed by the police, first of all, at the place where he was living and then later at thepolice station. He was questioned about his movements on October 17. He was then 17 years of age. The evidence before the court from an educational psychologist was that he, the appellant, was educationally subnormal, with an intelligence quotient of about 80. His personality, according to the psychologist, was that when being interviewed as a suspect he would be subject to quick emotional arousal which might lead him to wish to rid himself of the interview by bringing it to an end as rapidly as possible.

These were circumstances in which, par excellence, any interrogation should have been conducted with meticulous care and with meticulous observance of the rules of fairness, whether those rules were by virtue of common law or by statute or otherwise. Unhappily, that is not what happened. After a lengthy interview at the police station lasting for about an hour and a half, the appellant eventually said that it was he who had assaulted the little girl. He followed up that admission with further admissions at further interviews which took place. That initial admission and what followed was in effect the whole basis of the prosecution case. Without it and without the further admissions, the case against the appellant was non-existent. There is no dispute about that.

The Judge was called upon to rule whether the confession should be admitted in evidence. It was submitted that by virtue of s 76 of the Police and Criminal Evidence Act 1984 it was his duty to reject it and that by virtue of s 78 of the Police and Criminal Evidence Act 1984 in his discretion he ought to have rejected it.

In a ruling which is as clear and succinct as one comes to expect from Judge Gower, he ruled that the confessions should be admitted. It is the appellant's contention, advanced before this court by Mr Hunt, that that ruling should have been otherwise.

In order to decide those questions one must examine the facts of the interview with some care. The first interview, of about an hour and a half at the police station, consisted until the very end of a series of denials by the appellant that he had anything to do with the assault upon this little girl. Detective Constable Kitchen and Detective Constable Miller were the two officers. It is clear from what they said at the trial that they had come to the conclusion that the appellant was indeed the person who had committed this offence. Even on their own account, it is plain that they were at pains to minimize the gravity of the offence when questioning this youth. They were at pains to suggest that the real requirement of the offender in these circumstances was psychiatric help. One of the expressions they used was: "People would be looking for ways of helping you with any problem that you might have." In short, they were making it clear that this was a case, in their view, more for the attention of doctors than the attention of Judges. So much was apparent from the evidence of the officers themselves.

However, and this was a matter which exercised the Judge particularly, that note of evidence was not made up until the following morning, the interview having taken place in the early afternoon of the previous day. The note was then made up the following morning by Detective Constable Kitchen dictating it to a typist. That note emerged as a statement some 12 days later. It occupied three and a half pages, during the course of which the appellant was stoutly denying his guilt. At the end of the 90 minutes, Detective Constable Kitchen said: "We don't think that there is any doubt that you are the person responsible", to which the appellant is reported to have replied: "You know it is me, don't you, but I am finding it very hard to talk about it." Thereupon, Detective Constable Miller said: "Come on, let's get it off your chest. Let's get it sorted out once and for all", to which the appellant replied: "You know it was me don't you?" Detective Constable Kitchen said: "Does that mean you are actually admitting it?" The appellant said: "Yes." Then, for the first time, the officer began to record the interview.

The matter which exercised the Judge particularly was the way in which the officers had disregarded the terms of the Codes of Practice which were made under s 66 of the Police and Criminal Evidence Act 1984. The material parts of that Code in the present circumstances are to be found at C.11.3. It reads, so far as is material, as follows:

"(a) An accurate record must be made of each interview with a person suspected of an offence, whether or not the interview takes place at a police station. (b) if the interview takes place in the police station or other premises . . . (ii) the record must be made during the course of the interview, unless in the investigating officer's view this would not be practicable or would interfere with the conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarizes it. 11.4 If an interview record is not made during the course of the interview it must be made as soon as practicable after its completion."

The officer's assertion that it was not practicable to make a verbatim record was described by the Judge as being the sheerest nonsense, a comment with which this Court entirely agrees. That flagrant breach of the Code, as the Judge correctly described it, was the starting point of the submission made to the Judge by counsel for the appellant that the confessions should be rejected. But the mere fact that there has been a breach of the Codes of Practice does not of itself mean that evidence has to be rejected. It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice.

It is s 67(11) of the Act which describes the status of the Code in the following words:

"In all criminal and civil proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court or tribunal conducting the proceedings to

be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

Thus, in so far as it may be relevant, observance of the Code may benefit the prosecution in a criminal case and breaches of the Code may benefit the defence.

The particular breach in the present case, which we have already described, did not directly affect the confessions which the appellant made. They did undoubtedly, however, have an indirect effect.

Under s 76 of the Act:

"When it is represented to the court that the confession was or may have been obtained . . . (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

By failing to make a contemporaneous note, or indeed any note, as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what did indeed happen during these interviews and what did induce the appellant to confess. To use the words of Mr Hunt to the court this morning, the Judge and the prosecution were pro tanto disabled by the omission of the officers to act in accordance with the Codes of Practice, disabled from having the full knowledge upon which the Judge could base his decision. The Judge of course is entitled to ask himself why the officers broke the rules. Was it mere laziness or was it something more devious? Was it perhaps a desire to conceal from the court the full truth of the suggestions they had held out to the defendant? These are matters which may well tip the scales in favour of the defendant in these circumstances and make it impossible for the Judge to say that he is satisfied beyond reasonable doubt, and so require him to reject the evidence.

In this case, even on their own account, the officers, as the Judge found, said things which could well be regarded as improper persuasion to the defendant to admit guilt; for example, the references to the need for psychiatric help and the assertion that if such an offender admitted what he had done people would go out of their way to help him. Detective Constable Kitchen agreed that he had deliberately sought to play down the seriousness of the assault because he had the feeling that the defendant was the man responsible and he, Detective Constable Kitchen, did not want to frighten the appellant away from confessing his guilt. He seems to have overlooked the possibility that he might, by the same token, be encouraging a false confession.

Mr Hunt seeks to derive assistance from what was said in R v Fulling (1987) 151 JP 485; [1987] 85 **Cr** App R at pp 140 and 141 of the judgment. There are set out a number of examples of what, prior to the 1984 Act, were properly described as oppression, but since the 1984 Act may well fall within the terms not of oppression but of s 76(2)(b) of the Act, the part of the Act which we are now considering.

The Judge considered these matters, but he came to the conclusion that the defendant, when he made his admissions, did not think that the effect of the admissions would be to enable him to go home. He thought, rightly, that the probability was that it would lead him to being kept in custody and not granted bail. It was for those reasons that the Judge came to the conclusion, despite the flagrant and serious breaches of the code, that the confession was not obtained in the consequence of anything said or done likely to render unreliable any confession made by the defendant.

We hesitate to criticize that conclusion, coming as it does from this particular Judge, a judge who had, moreover, seen and heard both the appellant and the police officers, which of course we have not. However, it seems to us that Mr Hunt's submission is correct, namely, that it was not so much the question of immediate release which was exercising the mind of the appellant at interview. The evidence from the psychologist was that this man was poorly equipped to cope with sustained interrogation and the longer the pressure was imposed upon him the more confused he was likely to be in his own mind. He would experience what we have already described, the heightened sense of arousal from which he would want to escape. As the Judge said, the appellant was under no illusions about the possibility of immediate release were he to confess, but what the officers, even on their own account of the interview, had been stressing, was that it was in the long run that treatment was required rather than punishment. We think that it was this long term prospect, as Mr Hunt has rightly described it, to which the Judge paid insufficient attention. The appellant may have felt it was easier to get away from the unpleasant state of arousal by making these confessions, particularly in the light of the suggestion that what was required was treatment rather than prison.

Much the same considerations apply to the discretionary power under s 78(1) of the Act, which it is not necessary for this court to read.

Likewise, the further power under s 82(3) which reads as follows:

"Nothing in this Part of the Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

Had the Judge paid the attention which we think he should have paid to the long term expectations of the appellant rather than to the prospects of immediate release, and had he paid attention to the fact that the breaches of the Code deprived the court of the knowledge which should have been available to it, namely of precisely what was said by these officers in the vital interview, the Judge would, and we think should, have ruled against the admission of these confessions, particularly so against the background of the appellant's age, his subnormal mentality and the behaviour of the police and what they had admittedly said to him.

Finally, we add this. The Judge was troubled by this case. We are likewise troubled. It is a case, in our judgment, where the conviction can properly be described as unsafe or unsatisfactory. Consequently, this appeal is allowed and the conviction will be quashed.

DISPOSITION:
Appeal allowed.

SOLICITORS:
Crown Prosecution Service, Lewes, for the Crown.

88 Cr App Rep 332, [1988] Crim LR 748

R v **Absolam**

Court of Appeal (Criminal Division)

88 **Cr** App Rep **332,** [1988] Crim LR 748

HEARING-DATES: 1 July 1988

1 July 1988

CATCHWORDS:
Evidence -- Admissibility -- Questioning of Defendant by Police -- Confession Obtained in Breach of Code of Practice -- Whether Such Evidence So Obtained to be Excluded as Having Adverse Effect on Fairness of Trial of Defendant -- Police and Criminal Evidence Act 1984 (c 60), s 78(1).

HEADNOTE:
By section 78(1) of the Police and Criminal Evidence Act 1984: "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it."

[The relevant parts of the Code of Conduct made under section 66 of the Act appear in the judgment]

The appellant was arrested for threatening behaviour whilst on bail for possession of cannabis, a controlled drug. He was taken to the police station where he was required to report. The custody officer there, knowing the offence for which the appellant was on bail, asked him to produce any drugs in his possession in the hope that he would do so. The appellant produced a quantity of cannabis and was questioned about it before being informed of his right to legal advice, contrary to section 58 of the Police and Criminal Evidence Act 1984, and the Code of Practice made pursuant to sections 66 and 67 of the Act. He was cautioned during the questioning; but no formal record of the questions and answers were shown to or signed by the appellant. He was charged, inter alia, with possession of cannabis resin with intent to supply and with supplying cannabis to persons unknown, solely on the evidence obtained during questioning by the custody officer. Those admissions he later denied. At his trial a submission that that evidence had been obtained in breach of section 58 and the Code of Practice aforesaid was overruled by the trial judge who ruled that save for one question and answer the rest were admissible evidence as they did not constitute an interview for the purposes of the 1984 Act and the Code, and that the administering of the caution after the first question remedied any previous failure. The appellant was convicted and appealed on the ground that the evidence in question ought not to have been admitted.

Held, that the appellant was entitled to be advised of his right to consult a solicitor before he was questioned since there was nothing to suggest that it was impracticable to do so. A series of questions by the police to the appellant, as a suspect, to obtain admissions on which proceedings could be based was an interview within the meaning of the Code of Practice. The giving of a caution after a questioning had begun could not cure the failure to advise a

suspect of his right to consult a solicitor before pertinent questioning revealed his guilt of possession of cannabis. In view of the significant and substantial breaches of the Code, the evidence should have been excluded under section 78 of the Police and Criminal Evidence Act 1984. Accordingly, the appeal would be allowed and the convictions quashed, a conviction for simple possession of cannabis would be substituted.

NOTES:
For ss 58, 66, 67, 78 of the Police and Criminal Evidence Act 1984 and the Code of Practice, see Archbold (43rd ed) paras 15-38, 3, 85, 46.

INTRODUCTION:
Appeal against conviction.

On January 7, 1988, in the Crown Court at Acton (Judge Compston) the appellant was convicted of possession of cannabis with intent and supplying cannabis. On January 28 he sentenced to concurrent terms of nine months; imprisonment suspended for two years with a supervision order. He was also ordered to pay £200 towards the costs of the prosecution.

The facts are stated in the judgment.

The main ground of appeal was that the trial judge had wrongly exercised his discretion in allowing evidence obtained during the questioning of the appellant by the custody officer after his arrest in breach of section 58 of the Police and Criminal Evidence Act 1984 and the Code of Practice made thereunder.

COUNSEL:
R Bloomfield (assigned by the Registrar of Criminal Appeals) for the appellant; DC Medhurst for the Crown.

PANEL: Bingham LJ, McCullough, Waite JJ

JUDGMENTBY-1: BINGHAM J

JUDGMENT-1:
BINGHAM J, (Reading the Judgment of the Court): This is an appeal brought with the leave of the single judge against a conviction recorded on two counts in the Crown Court at Acton on January 7 this year. The appellant was then convicted of possession of cannabis with intent to supply and of a second count of supply cannabis. On January 28 he was sentenced to nine months' imprisonment on each count concurrently suspended for two years with a supervision order. He was also ordered to pay £200 towards the costs of the prosecution.

The facts giving rise to the appeal are unusual and perhaps unlikely to be repeated. The story occurred on August 9, 1987, when, at about 11.20 pm, the appellant was arrested for threatening behaviour. He told the police that he was on bail to Knightsbridge Crown Court at the time, and it was a condition of his bail that he should report to Harlesden police station at regular intervals. It so happens that the offence for which he was on bail was an offence of possessing cannabis.

He was taken to Harlesden police station and at a time which is not entirely clear, but which was probably about 11.27 pm, his detention was authorised. Very shortly after that time, at 11.28 or 11.29, he was told that his detention was authorised and the process of documenting his detention began. He was required to empty his pockets and did so. He was the asked "Is that all?" and answered "Yes."

One then comes to a somewhat extraordinary incident. The custody officer in Harlesden police station, who knew the purpose for which the appellant was already on bail, having

seen the appellant empty his pockets, said to the appellant with a flash of inspiration, "And now put the drugs on the table. The appellant then put his hand inside his trousers and pulled out a plastic bag which contained eight smaller bags containing cannabis resin. The custody officer said: "You haven't been selling drugs again, have you?" to which the appellant answered "Yes." The appellant was then reminded of the caution which he had earlier been given and the custody officer asked, "How many of these packets have you sold today?" The appellant answered, "I do not know." The custody officer then asked, "Were these bags ones that you have left over from selling today?" The appellant answered "Yes."

It appears, if we can pause at that point in the narrative, that in evidence the custody officer agreed with a number of things that were put to him. First, he agreed that he knew that the offence for which the appellant was on bail was one of supplying cannabis. He agreed, secondly, that he asked the appellant to put the drugs on the table in the hope that he had some drugs on him but without any grounds for believing that he had drugs on him. He agreed, thirdly, that once he saw the drugs produced by the appellant he believed that an offence had been committed and had in mind an offence of possession with intent to supply.

It was common ground that no written record was made of the questions and answers that were given by the appellant at the time, and the officer agreed that the questions which he asked were with a view to securing evidence for use in court at a later date by way of admission.

We resume the narraitve. At about 11.33 pm the appellant was advised of his right to consult a solicitor. He said that he wished to have legal advice and arrangements were made to put him in touch with a legal adviser, who advised him over the telephone to answer no questions. Subsequently it appears that questions, if asked, were certainly not answered and it may be that they were not asked. Later still a written record was made of the questions and answers while the appellant was still in the police station, but this record was never shown to him nor did he sign it.

It was against that background that the indictment was preferred against the appellant. On the count of possessiong cannabis with intent to supply the prosecution case rested on the appellant's admissions, which he denied. It is right to emphasise that the questions and answers which we have summarised are the questions which the police say they asked and the answers which the police say they received. The essential parts of the conversation are denied by the appellant. The case on this count also, to some extent, rested on the quality found on the appellant and the number of bags, although later in the trial he was to say that he had bought a quantity of cannabis at a discount for his own use.

On the second count of supply cannabis to persons unknown, the evidence against him was the evidence of his admissions which, as I have said, he denied.

So It was that the case came before the Crown Court in Acton in January 1988. The appellant pleaded not guilty and the matter was therefore tried before the judge and jury. There was, however, a trial within a trial concerning the admissions said to have been made by the appellant and submissions were made on behalf of the appellant that the evidence of his alleged admissions should be excluded under section 78 of the Police and Criminal Evidence Act 1984.

At the end of those submissions the learned judge rules one question and answer inadmissible, namely the first question and answer following the production of the bags of cannabis. That was the question: "You haven't been selling drugs again, have you?" asked by the custody officer, and the appellant's alleged answer was "Yes." The judge ruled that the other questions and answers were admissible.

The appellant gave evidence. He denied the conversations. He said that the cannabis was for

his own use, but he was convicted and sentenced as we have summarised.

On the appellant's behalf Mr Bloomfield in this Court has relied essentially on the submissions which he made to the learned judge below. In that context he has referred us to various provisions of the 1984 Act and the Code. In particular we should draw attention to section 58 governing the rights to access to legal advice and sections 66 and 67 dealing with the Codes. We shall not however lengthen this judgment by citing those passages.

It is however submitted on the appellant's behalf that under the Codes he was entitled to be told at a very early stage of his detention at the police station, and before questioning, of his rights to legal advice. Our attention has been specifically drawn to the paragraphs as follows.

"C:3.1 When a person is brought to a police station under arrest or is arested at the police station having attended there voluntarily, the custody officer must inform him of the following rights and of the fact that they need not be exercised immediately . . . (ii) the right to consult a solicitor in accordance with section 6 below; and (iii) the right to consult this and other codes of practice.

C:3.2 The custody officer must also give the person a written notice setting out the above three rights, the right to a copy of the custody record in accordance with paragraph 2.4 above and the caution in ther terms prescribed in section 10 below. The custody officer shall ask the person to sign the custody record to acknowledge receipt of this notice.

C:3.3 If the custody officer authorises a person's detention he must inform him of the grounds as soon as practicable and in any case before that person is then questioned about any offence.

C:3.4 The person shall be asked to sign on the custody record to signify whether or not he wants legal advice at this point."

It is further submitted that under the code a suspect is not to be interviewed until legal advice, if sought, has been obtained. Paragraph C:6.1 provides:

"Subject to paragraph 6.2 any person may at any time consult and communicate privately, whether in person, in writing or on the telephone with a solicitor.

C:6.3 A person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it unless"

and then there are a series of exceptions which are said not to apply here.

Our attention has also been drawn to paragraph C:11.2 which provides: "As soon as a police officer who is making enquiries of any person about an offence believes that a prosecution should be brought against him and that there is sufficient evidence for it to succeed, he shall without delay cease to question him."

Clause C:10.1 provides:

"A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous quesions that provide grounds for suspicion) are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution. He therefore need not be cautioned if questions are put for other purposes, for example, to establish his identity, his ownership of, or responsibility for, any vehicle or the need to search him in the exercise of powers of stop and search."

It is then provided in C:11.3

:"(a) An accurate record must be made of each interview with a person suspected of an offence, whether or not the interview takes places at a police station.

(b) If the interview takes place in the police station or other premises: . . . (ii) the record must be made during the course of the interview, unless in the investigating officer's view this would not be practicable or would interfere with the conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it.

C:11.4 If an interview record is not made during the course of the interview it must be made as soon as practicable after its completion."

We then go forward to paragraph C:12.12:

"Where the person interviewed is in the police station at the time that a written record of the interview is made, he shall be given the opportunity to read it and to sign it as correct or to indicate the respects in which he considers it inaccurate, but no person shall be kept in custody for this sole purpose. If the interview is tape recorded the arrangements set out in the relevant code of practice apply."

In reliance principally on those paragraphs of the Code the argument on behalf of the appellant is put, in a nutshell, thus. Everything proceeded unobjectionably until the moment when, in answer to the custody officer's inspired question, the drugs were produced and put on the table. It then became apparent to the officer, as he acknowledged, that an offence had been committed. At that stge the appellant had not been advised of his right to legal advice, but the situation had arisen in which it was plainly necessary that he should be advised of his right to legal advice and, in particular, it was necessary that he should not in the light of his apparent guilt be further questioned until he had been offered that opportunity and, if he sought legal advice, had had the opportunity of receiving it. It is true that after the first question and answer which the learned judge excluded the appellant was reminded of the caution, but he was not advised of his right to legal advice until the questions and the incriminating answer had been given. Still less had he the opportunity of obtaining legal advice before the questioning was initiated at all. It is plain that what happened in the unexpected situation which arose was that the officer, perhaps taken by surprise on the production of the drugs, embarked on a series of questions which the appellant answered and by the time he was advised of his rights at 11.33 it was in truth too late.

The matter did not end there because although the custody officer did make a written record of his interview with the appellant, that was never shown to or signed by the appellant, even though it was made while he was in the police station and he could have been given the opportunity of verifying it.

Those submissions were put to the judge but save for the exclusion of the one question and answer which we have identified, the learned judge rejected the argument. He said that the appellant was only entitled to his right to consult a solicitor "as soon as practicable." That is, we think, a reference to the language used in section 58(4) of the Act, but in our judgment it has no application here since the appellant's right plainly was under the Code to be advised of his right to legal advice, and there was nothing to suggest that there was any impracticability about giving him that advice before the questioning began.

The learned judge further held that the series of questions and answers, to which we have referred, were not an interview. It is of course plain that this was not in any formal sense a conventional interview, but equally in our judgment it is plain that it was an interview within the purview of the Code, in that it was a series of questions directed by the police to a

suspect with a view to obtaining admissions on which proceedings could be founded. There was nothing in the nature of the questions and answers in this case which, in our judgment, makes the provisions relating to interviews in any way inapplicable. Indeed, this is just the sort of situation in which those provisions are most significant.

The learned judge thirdly held that the caution given after the first question remedied any previous failure. There again, with respect, we find ourselves unable to follow the learned judge. It was of course quite proper to repeat the caution but it did not overcome the real gravamen of the appellant's complaint which is the failure to tell him of his right to consult a solicitor and the initiation of a course of very pertinent questioning at a time when he had not had the opportunity of obtaining that advice, and at a time when his guilt, certainly of possessing, was apparent to the custody officer.

These submissions were made to the learned judge and he was referred to section 78 of the Act, which provides:

"(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence as obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Counsel submitted that these breaches having occurred, the learned judge should exclude the evidence as having an adverse effect on the fairness of the proceedings. The learned judge rejected, as I have said, all the points (except one) which were advanced to him, but he did say:

"Finally, even if I were more favourable to the defendant on his initial, if I may say so very thoroughly argued point, my view is that looking at section 78 I have to be just to both sides. That being so, in my view the finding of the drugs and the conversation after the caution should in fairness to both sides, the prosecution and no less the defence, he admitted. That is what I so rule."

It is not entirely clear what the judge meant by saying "even if I were more favourable to the defendant," but it seems to us that if the learned judge had been persuaded that there were here significant and substantial breaches of the Code he would, in all probability, have excluded the answers given by the appellant. We say that partly because he did in fact exclude the one question and answer which he judged to be irregular, but also because he would, we think, had he taken the same view of the Code as we have, have formed the opinion that this was a case in which, as a result of a line of questioning initiated in remarkable circumstances but with no warning to the appellant of his right, the appellant would not have given the answers that he did, and that the prosecution would not have been in receipt of these admissions if the appropriate procedures had been followed.

We conclude therefore that if the learned judge had regarded the provisions of the Code as being applicable, as we do, he would have formed the opinion that this evidence should be excluded. We accordingly judge that the conviction on the second count should be quashed. It also follows that the conviction of intending to supply on the first count should be quashed, but it is accepted that there would none the less have been a proper conviction on the more limited basis of simple possession of this cannabis.

We therefore allow the appeal and quash the conviction on the second count, and also quash the conviction on the first count, replacing that conviction with a conviction for simple possession.

We have had to consider what is the appropriate penalty in that altered state of affairs. This

appellant had previously been convicted of various offences relating to drugs. On the first occasion he was fined £10. On the second occasion he had been put on probation and on the third occasion he had been fined £50. It is plain that he is fast approaching the point at which a sentence of imprisonment even for possession is likely to be imposed if he does not mend his ways, but on this particular occasion we think that the appropriate peanlty in place of that imposed by the learned judge on count 1 should be a fine of £75. It would be inappropriate in the circumstances that the full order for costs should stand and therefore we shall replace the order for payment of £200 costs by an order that the appellant pay £50. To that extent this appeal is allowed.

DISPOSITION:
Appeal allowed in part. Convictions on counts 1 and 2 quashed. Substitution of conviction of simple possession on count 2.

SOLICITORS:
Crown Prosecution Service, Acton.

Scott and another v R
Barnes and others v R

CRIMINAL; Criminal Procedure, Criminal Evidence

PRIVY COUNCIL
LORD BRIDGE OF HARWICH, LORD GRIFFITHS, LORD ACKNER, LORD GOFF OF CHIEVELEY AND LORD LOWRY
30 JANUARY, 13 MARCH 1989

Criminal law – Trial – Depositions as evidence – Exclusion of deposition – Deposition of deceased witness – Deposition containing uncorroborated identification evidence – Whether trial judge having discretion to exclude admission of deposition in evidence.

In two separate appeals from Jamaica the questions arose whether a trial judge in a criminal case had a discretion to refuse to admit the sworn deposition of a witness who had died before trial and, if so, in what circumstances that discretion should be exercised and what direction the judge should give on the issue of identification.

In the first case the two appellants were charged with murdering a special constable in a bar. The only evidence of identification was that contained in the deposition of a witness who deposed that he had seen the appellants' faces as they ran from the bar and had subsequently pointed out the appellants to the police when they were at a bingo game before they were arrested. The witness died before the trial. The appellants both gave evidence at their trial that they had been elsewhere on the day of the shooting and that at the time of their arrest they had not been singled out by the witness. In the second case the three appellants were charged with shooting dead the driver of a van and stealing a factory payroll which he was carrying. A witness gave evidence at the preliminary but was murdered before the trial. In his deposition he had stated that he saw the shooting and that it had been done by the three appellants, all of whom he knew. The only other eye witness was unable to recognise anyone. All three appellants raised an alibi defence. In each case, without the evidence in the deposition, there would have been insufficient evidence to put any of the appellants on trial. In each case the trial judge admitted the depositions in evidence. In the first case the judge in his summing up implied to the jury that the fact that the witness had picked out the appellants to the police when they were amongst others at a bingo game authenticated the identification itself. In the second case the judge gave no direction on the issue of identification and did not warn the jury of the danger of a mistaken identification or draw their attention to the circumstances in which the identification was made or to the fact that it differed from the evidence of the other eye witness. In each case the appellants were convicted. The Court of Appeal of Jamaica refused the appellants leave to appeal against their convictions and they appealed to the Privy Council.

Held – (1) A judge in a criminal trial had a discretion to exclude the admission of a sworn deposition of a deceased witness so as to ensure a fair trial, notwithstanding that the deposition was relevant and admissible evidence, but that discretion should be exercised with great restraint. Provided that (a) the jury were warned that they had not had the benefit of hearing the deponent's evidence tested in cross-examination, (b) particular features of the evidence in the deposition which conflicted with other evidence and which could have been explored in cross-examination were pointed out where appropriate, (c) the appropriate warning of the danger of identification evidence was given in an identification case and (d) inadmissible matters such as hearsay or matters which were prejudicial rather than probative were excluded from the deposition before was read to the jury, the deposition should be admitted in evidence. Neither the inability to cross-examine nor the fact that the deposition contained the only evidence against the accused nor the fact that it was identification evidence was of itself sufficient **305** to justify the exclusion of a deposition. The crucial factor was the quality of the evidence in the deposition and if the deposition contained evidence of reasonable quality, even if it was the only evidence against the accused, the deposition should be admitted and the interests of the accused protected in the summing up. On the facts, the evidence of identification contained in the depositions was not of such poor quality that it would have been unsafe to convict on it if the jury had received the appropriate guidance in the summing up. There were, accordingly, no grounds on which the trial judges could have exercised their discretion to exclude the admission of the depositions (see p 311 *f*, p 312 *c j* and p 313 *a* to *g* post); *R v Sang* [1979] 2 All ER 1222, *R v Blithing* (1983) 77 Cr App R 86 and R v O'Loughlin [1988] 3 All ER 431 considered.

(2) Where the sole evidence of identification connecting the defendant to the crime was uncorroborated, the trial judge should give the jury a clear warning of the danger of a mistaken identification and only in the most exceptional circumstances should a conviction based on uncorroborated identification evidence be upheld in the absence of such a warning. The fact that the defendant had been picked out at an identification parade did not obviate the need for such a warning. In the circumstances the failure of the trial judge in each case to give the jury the appropriate warning vitiated the convictions. It followed therefore that the appeals would be allowed and the convictions quashed (see p 314 *g j* to p 315 *a c d* and p 316 *f*, post); *R v Turnbull* [1976] 3 All ER 549 applied.

Notes
For a witness's deposition as evidence, see 11 *Halsbury's Laws* (4th edn) para 427.

Cases referred to in judgment
R v Blithing (1983) 77 Cr App R 86, CA.
R v Collins [1938] 3 All ER 130, CCA.
R v Linley [1959] Crim LR 123, Leeds Assizes.
R v O'Loughlin [1988] 3 All ER 431, CCC.
R v Sang [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL.
R v Turnbull [1976] 3 All ER 549, [1977] QB 224, [1976] 3 WLR 445, CA.
R v White (Donald) (1975) 24 WIR 305, Jamaica CA.
R v Whylie (1978) 25 WIR 430, Jamaica CA.
Selvey v DPP [1968] 2 All ER 497, [1970] AC 304, [1968] 2 WLR 1494, HL.
Sutherland v The State (1970) 16 WIR 342, Guyana CA.

Scott and anor v R

Richard Scott and Dennis Walters appealed with special leave of the Judicial Committee of the Privy Council granted on 29 April 1986 against the decision of the Court of Appeal of Jamaica (Carberry, Carey and White JJA) on 20 December 1982 dismissing the appellants' applications for leave to appeal against their convictions and sentences on 25 September 1980 in the Home Circuit Court at Kingston before Campbell J and a jury for murder. The facts are set out in the judgment of the Board.

Barnes and ors v R

Winston Barnes, Washington Desquottes and Clovis Johnson appealed with special leave of the Judicial Committee of the Privy Council granted on 5 November 1986 against the decision of the Court of Appeal of Jamaica (Carey, Ross JJA and Wright AJA) on 10 February 1986 dismissing their applications for leave to appeal against their convictions and sentences on 24 November 1983 in the Home Circuit Court at Kingston before Parnell J and a jury for murder. The facts are set out in the judgment of the Board.

Peter Thornton and *Dennis Daley* (of the Jamaican Bar) for the appellants Scott and Walters.
Justin Shale for the appellants Barnes, Desquottes and Johnson.

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The Director of Public Prosecutions of Jamaica (Glen Roy Andrade QC) and *Kent S Pantry* (of the Jamaican Bar) for the Crown.

13 March 1989. The following judgment was delivered.

LORD GRIFFITHS. On 25 September 1980 the appellants Richard Scott and Dennis Walters were found guilty of murder and sentenced to death. Their appeals were dismissed by the Court of Appeal of Jamaica on 20 December 1982. On 24 November 1983 the appellants Winston Barnes, Washington Desquottes and Clovis Johnson were found guilty of murder and sentenced to death. They were refused leave to appeal by the Court of Appeal of Jamaica on 10 February 1986.

These appeals have been heard together because they raise a common issue of importance, namely whether a trial judge in a criminal case in Jamaica has a discretion to refuse to admit a sworn deposition of a witness who has died before the trial, and if so in what circumstances the discretion should be exercised. The appeals also require their Lordships to consider further grounds of appeal in each case with which they will deal after considering the common issue.

The prosecution case against Scott and Walters was that on 11 May 1978 the appellants shot Abraham Roberts, a special constable, with his own revolver in a bar at 9 Harris Street, Kingston. He died from his injuries on 15 May 1978. The only eye witnesses to the shooting were a woman who was in the company of the deceased and who was subsequently seen at the police station but who did not give evidence at the trial and David Ridley, the ten-year-old son of the owner of the bar, who had a good opportunity to see those who carried out the shooting but who failed to identify either of the appellants on a subsequent identification parade.

The only evidence of identification of the appellants was that contained in the deposition of Cecil Gordon who died before the trial. The deposition reads:

> 'This deponent Cecil Gordon, on his oath says as follows: "I am a sideman on a truck and live in the parish of Kingston. On 11th May, 1978, about 2.45 p.m. I was walking on Harris Street, Kingston 13, in the parish of Kingston, and after passing a bar saw two men standing at a gate about half chain from the bar. I walked past these men who were about an arm's length from me and went into the yard. I then went to my gate about two chains away at 2 Harris Street. As I opened the gate I heard an explosion like a gunshot coming from the direction of the bar. I turned around and looked in that direction and saw the two men I had passed on the road running from the bar. One of the men who I had known about five months before that day was running in front with a gun in his hand, the other man was running close behind him. They ran across Harris Street, turned down a cross street and disappeared from my sight. I then saw a woman holding up a man and taking him out of the bar. They passed me at my gate. I followed them down a Spanish Town Road and saw the man leaning against a wall. I went up to him and he raised up his shirt. I then saw a wound at his side. The lady had left him at the time. She returned shortly after in a taxi, the man was placed in the taxi which drove away with him and the lady. I went to the Denham Town Police Station and made a report. On the 19th of May, 1978, about 9.00 p.m., I was walking on Spanish Town Road and saw the two men sitting around a table on the sidewalk playing a game with other men. I went to the Denham Town Police Station and made a report. I went back with the police to Spanish Town Road and saw the two men still playing the game. In the presence and hearing of the two men I told a policeman that they were the two men who had shot the policeman at the bar. The men made no statement. The policeman took them to the Denham Police Station. I went with them. The two accused in the dock are the men I saw running from the bar and who were pointed out by me to the police. The accused Richard Scott is the man I knew before that day. He was the man running in front with the gun in his hand. The accused Walters was running behind the accused Richard Scott. I knew Scott as Owen. Immediately after hearing **307** the explosion I saw the two accused running from the bar and the lady holding the man and coming out after them."
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> Cross-examined by Miss Benbow: "I used to live at 11 Harris Street before going to 2 Harris Street. I do not know the number of the bar premises. I passed the bar before reaching the gate at 11 Harris Street. There are other buildings between the bar and 11 Harris Street. The buildings are houses. There is just one gate between the bar premises and 11 Harris Street. The two men were standing in front of a gate at 11 Harris Street. Other people are now living at 11 Harris Street. The two accused men were standing against the gate column of 11 Harris Street and looking in the direction of the bar. They were looking sideways down the road. I did not call to them."
>
> Cross-examined by Miss Lyer: "I have been living on Harris Street for a long time. The gate of premises 11 Harris Street was open and the accused men were standing behind the column of the gate. The column was taller than the men. I had turned into the premises 11 Harris Street and saw the men by the column at the gate. Premises No. 2 Harris Street is on the other side of the road from 11 Harris Street. I was going to

somebody at 11 Harris Street. I went into 11 Harris Street with the intention of picking some ackees but they were not yet open. I just looked on the ackee tree and turned back through the gate. I did not stop to speak to anyone. The two accused men were still at the gate when I left the premises. I cannot say how long it took me to walk from 11 Harris Street to 2 High Street. I saw the faces of the two men when they were running."

To Court: "I did not know the lady who was holding up the man. I had never seen her before. I saw her at the Denham Town Police Station later that day. I didn't know the man with the wound before that day."

This is signed by the Resident Magistrate of the Gun Court.

REGISTRAR: Mr B. L. Myrie, on the 25th of July, 1978 and it is also signed by the witness Cecil Gordon.'

The appellants both gave evidence and their defence was that neither of them had been in Harris Street on the day of the shooting and that at the time of their arrest they were not singled out by Gordon but arrested with a number of other persons.

The prosecution case against Barnes, Desquottes and Johnson was that on the morning of 3 December 1982 Horace Fowler was shot after stopping his Datsun van in Olympic Way whilst on his way to his factory in Spanish Town Road and the $1,000 that he had with him to pay his employees was stolen. The prosecution alleged that Barnes had hidden in the back of the van and at a prearranged spot had shouted for the van to stop and that when it stopped Clovis Johnson and Washington Desquottes approached the cab of the van and Johnson shot and killed Fowler. It was then alleged that all three accused ran off with Johnson carrying a bag containing the money.

There were two eye witnesses of the shooting, Percival Brown heard the gunshot and looked in the direction of the van to see Fowler slumped over the wheel of the van. He saw one man walking away from the van down Fourth Street but was unable to recognise anyone.

Larkland Green was the other eye witness. He gave evidence at the preliminary inquiry but was shot and killed before the trial. His deposition including cross-examination reads as follows:

'This deponent Larkland Green on his oath saith as follows: I am a truck sideman residing in the parish of St. Andrew. I knew the deceased Horace Fowler. He was the manager for the Gypsum Factory on the Spanish Town Road. I used to see him driving a motor van. I do not remember the colour. On 3rd December, 1982, I was standing at the corner of Olympic Way and Sixth Street in Olympic Gardens and saw the van driven by the deceased coming from the direction of the bank on Olympic Way, and reaching near the corner of Sixth Street, near Mr. Austin shop, I ↳ **308** heard the accused Winston Barnes who lying on the floor of the van called out "Hold on driver" and the driver Mr. Fowler stopped the van. I then saw two men who had come along Sixth Street stopped at the corner. They were Clovis Johnson and Washington Desquottes, otherwise called Budda. They are now in the dock. (witness points to accused man). I saw Clovis Johnson went to the front of the van where the driver Mr. Fowler was sitting and pushed a gun through the window. I heard an explosion like a gun shot and saw the accused Clovis Johnson with the gun in his hand running down Sixth Street, followed by the other two men. Clovis Johnson had a bag in hand which he did not have when he went up to the van. After the explosion I observed that Mr. Fowler was lying stretched out on the seat of the van. A crowd gathered and a man went in the van and drove it away with Mr. Fowler. I have known Clovis Johnson for more than twenty years. He used to live near to me at Magesty Gardens. I have known Washington Desquottes, otherwise called Budda for over one year. I knew him when living at Woodpecker Avenue. I have known Winston Barnes, o/c Redman for about two years. I used to see him at the Gypsum Factory. I heard something later that day. I never saw Mr. Fowler again. The incident took place after lunch time. Lunch time was 12.00 midday.

Cross-examination by Mr. Green who also holds for Mr. Soutar. Clovis Johnson was a boy when I first knew him. He was about ten years of age at the time. I have been seeing him all along. He stopped talking to me from he turned away. I was once a Home Guard. I knew that Johnson was once involved in politics. I do not know what side he supported. I am a J.L.P. supporter. I was not a P.N.P. at the last election. There was no bad blood between the accused Johnson and myself. I have known the accused Barnes for about three years. I have never spoken to him. I was standing about eight feet from the van when it stopped. (Witness points out distance). I was standing at a gate. I was standing outside Mr. Austin's gate waiting on a man that I worked with. People were walking on the road. More buses than pedestrians passed that corner. Mr Austin's premises is a bar. The other two men were standing at the corner when the van stopped. As the van stopped the men went up to it. After the explosion some people ran away, others ran towards the van. I didn't run away.

Cross-examined by Mr. Williams. The van stopped on Olympic Way. I was standing on Olympic Way. I was at Mr. Austin's gate. The gate is about ten feet from the corner. (Witness points out distance). I was not then working at the Gypsum Factory. I saw the van drove up before seeing the two men. I have no idea of the time. The men went up to the van as it stopped. The incident with the accused putting his hand in the front of the van took place in a short time. After the incident the three men ran down Sixth Street. I saw their backs while they were running. I was standing on the left hand side of the van. I don't know if the van was a left or right hand drive vehicle.

Larkland Green, His Mark.

B. L. Myrie,

Resident Magistrate

Gun Court

3.3.83.'

The defence of each defendant was an alibi. Barnes made an unsworn statement from the dock supported by the sworn evidence of one witness. Desquottes made an unsworn statement from the dock supported by the sworn evidence of his sister. Johnson gave sworn evidence in support of his own alibi.

It will be seen from this brief recital of the facts that in each case the vital evidence of identification was that contained in the sworn depositions of the deceased witnesses. Without the evidence in the depositions there would have been insufficient evidence to put any of the appellants on trial. The trial judges in each case admitted the depositions ↳ **309** in evidence pursuant to the provisions of s 34 of the Justices of the Peace Jurisdiction Act, the relevant part of which provides:

'... and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that

any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same: Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place.'

In its original form the section only provided for a deposition to be read in evidence if the deponent was dead or too ill to attend the trial. The power to read the deposition if the deponent was absent from the island or insane was added by amendment and it was at the same time provided that this power should be subject to the consent of the court. That this additional power should be made subject to the consent of the court is readily understandable. If absence from the island is temporary an adjournment may be more just than continuing without the presence of the witness and if the witness becomes insane it may cast grave doubt on the value of his evidence. But no similar statutory discretion is bestowed on the court if the witness is dead or gravely ill. The judgment of Carberry JA in the appeal of Scott and Walters contains a masterly analysis of the historical background of s 34 and the corresponding provisions contained in English statute and common law. Their Lordships accept his conclusion that no statutory discretion is bestowed on a judge by s 34 to exclude a deposition if a witness is dead or too ill to attend court. If such a statutory discretion had existed it would have been unnecessary to provide specifically for such a discretion when the two additional grounds of admissibility, namely absence from the island and insanity, were subsequently added to the statute.

There remains however the further question whether, even if a deposition is admissible under s 34, there exists at common law a power in a judge to refuse to allow the prosecution to adduce it in evidence.

Two recent cases in the House of Lords *Selvey v DPP* [1968] 2 All ER 497, [1970] AC 304 and *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 contain numerous judicial dicta that refer to the discretion of a judge in a criminal trial to exclude admissible evidence if it is necessary in order to secure a fair trial for the accused. In *Selvey's* case the power was held to extend to exclude the admission of the character of the accused under s 1(f)(ii) of the Criminal Evidence Act 1898. In *R v Sang* the Court of Appeal certified the following question of law for the consideration of the House:

'Does a trial judge have a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?'

The answer to that question contained in the speech of Lord Diplock, with which the rest of their Lordships agreed, was in the following terms ([1979] 2 All ER 1222 at 1231, [1980] AC 402 at 437):

'(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence **310** obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of the discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur.'

The phrase 'prejudicial effect' is a reference to the fact that although evidence has been admitted to prove certain collateral matters there is a danger that a jury may attach undue weight to such evidence and regard it as probative of the crime with which the accused is charged. An example is the admission of the bad character of the accused if he has attacked the character of a prosecution witness. This evidence of the accused's bad character is admitted to assist the jury to decide how far they can rely on the allegations he makes against the prosecution witness and therefore what weight they should attach to the evidence of that prosecution witness. It is not admitted to prove that because the accused is a man of bad character he is more likely to have committed the crime because English law does not regard a propensity to commit crime as probative of the particular crime with which the accused is charged. Nevertheless, there may be a danger that knowledge of the accused's bad character may unduly prejudice the jury against him.

In the case of Barnes, Desquottes and Johnson it was submitted to the Court of Appeal that the prejudicial effect of the deposition outweighed its probative value. This was a misuse of the phrase. The evidence in the deposition was highly probative of the offence, it was the evidence of an eye witness well placed to see the events he described. It was only 'prejudicial' in the sense that it was on the face of it strong prosecution evidence that might well result in the conviction of the accused. The Court of Appeal, after citing *R v Sang* rejected the submission, saying:

'In the instant case, as already pointed out, there was no question of the prejudicial effect of the evidence outweighing its probative value, the evidence had not been obtained from any of the applicants, and since the evidence was relevant and admissible the learned trial judge had no discretion to exclude it from the trial.'

Whilst agreeing with the Court of Appeal that the admission in evidence of the deposition did not fall within the rule that evidence may be excluded on the ground that its prejudicial weight excludes its probative value, their Lordships do not accept that because the deposition is relevant and admissible evidence a judge has no discretion to exclude it.

In *R v Sang* the House was not concerned to consider the problem of the admissibility of depositions and a number of their Lordships were careful to state that the discretion was not limited to cases where the prejudicial effect of evidence outweighed its probative value. In particular Lord Salmon said ([1979] 2 All ER 1222 at 1237, [1980] AC 402 at 445):

'I recognise that there may have been no categories of cases, other than those to which I have referred, in which technically admissible evidence proffered by the Crown has been rejected by the court on the ground that it would make the trial unfair. I cannot, however, accept that a judge's undoubted duty to ensure that the accused has a fair trial is confined to such cases. In my opinion the category of such cases is not and

never can be closed except by statute. I understand that the answer given by my noble and learned friend, Lord Diplock, to the certified question accepts the proposition which I have just stated. On that basis, I respectfully agree with that answer.'

See also the speeches of Lord Fraser and Lord Scarman ([1979] 2 All ER 1222 at 1239, 1243, [1980] AC 402 at 447, 452).

There have been a number of decisions in which a deposition has been excluded. In *R v Linley* [1959] Crim LR 123 Ashworth J refused to allow the evidence of the victim of a ↳ **311** robbery to be read. In *R v O'Loughlin* [1988] 3 All ER 431 Kenneth Jones J refused to permit the depositions of two witnesses and the statement of a police officer to be read in an IRA trial where this evidence constituted the sole evidence against the accused. It should however be noted that in that case the judge was exercising the statutory discretion recently bestowed by s 78(1) of the Police and Criminal Evidence Act 1984. In *R v Blithing* (1983) 77 Cr App R 86 the Court of Appeal allowed an appeal on the ground that the trial judge should have exercised his discretion to exclude a statement tendered in committal proceedings which is treated as equivalent to a deposition under the English statute. Again in parenthesis it is to be noted that the court assumed that the discretion existed under s 13(3) of the Criminal Justice Act 1925. The Court of Appeal held that the discretion should be exercised to ensure that the defendant received a fair trial and allowed the appeal because the judge had held that the discretion should only be exercised if it would be 'grossly unfair' to the accused to admit the statement. Their Lordships are very doubtful whether they would have exercised the discretion in the same way as the Court of Appeal on the facts of that case but do not dissent from the proposition that the discretion should be exercised to ensure a fair trial for the accused.

In *R v White (Donald)* (1975) 24 WIR 305 the Court of Appeal in Jamaica held that the trial judge had a common law discretion which he ought to have exercised on the particular facts of that case to exclude a deposition which contained the only evidence against the accused in an identification case. The Court of Appeal in Scott and Walters were critical of some of the reasoning of that decision, but did not go so far as to say it was wrongly decided in so far as it recognised the existence of the discretion at common law. In *Sutherland v The State* (1970) 16 WIR 342 the Court of Appeal in Guyana recognised a discretion at common law to exclude a deposition if its admission would be likely to produce injustice of a kind inconsistent with a fair trial although on the facts of that case the Court of Appeal held the deposition had been properly admitted.

There is one further case to which reference is made in some of the authorities but which has little bearing on the problem raised in the present appeal. In *R v Collins* [1938] 3 All ER 130 the accused had indicated to the examining magistrates that he intended to plead guilty at his trial. The magistrates therefore bound over the witnesses for the prosecution conditionally under s 13 of the Criminal Justice Act 1925 as it appeared that no witnesses would be required at the trial. When the accused appeared at quarter sessions he changed his mind and pleaded not guilty. He asked for an adjournment to call witnesses to prove an alibi. His application for an adjournment was refused and the deputy chairman allowed the prosecution to prove their case by reading the depositions of the witnesses who had been conditionally bound. Humphreys J, in giving the judgment of the Court of Criminal Appeal, stated that the course adopted by the deputy chairman 'was not intended by the statute and ... could never have been contemplated by Parliament' (at 132). This observation was manifestly correct: the power to bind over a witness conditionally was introduced to provide for the situation when the evidence of a witness is uncontroversial and unchallenged so that it can be read without putting the witness to the unnecessary inconvenience of attending the trial. In making this point Humphreys J naturally stressed the normal form of jury trial and the value of cross-examination but his remarks in this context are no reliable guide to the considerations that should weigh with a judge when considering whether or not to exercise his discretion to admit a deposition.

In the light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding the deposition, for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence. If the courts are too ready to exclude the deposition of a deceased witness, it may well place the lives of witnesses at ↳ **312** risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case. In an identification case it will, in addition, be necessary to give the appropriate warning of the danger of identification evidence. The deposition must of course be scrutinised by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.

Provided these precautions are taken it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it will be unsafe for the jury to rely on the evidence in the deposition. It will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances. This much however can be said, that neither the ability to cross-examine, nor the fact that the deposition contains the only evidence against the accused, nor the fact that it is identification evidence will of itself be sufficient to justify the exercise of the discretion.

It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. By way of example, if the deposition contains evidence of identification that is so weak that a judge in the absence of corroborative evidence would withdraw the case from the jury, then, if there is no corroborative evidence, the judge should exercise his discretion to refuse to admit the deposition for it would be unsafe to allow the jury to convict on it. But this is an extreme case and it is to be hoped that prosecutions will not generally be pursued on such weak evidence. In a case in which the deposition contains identification evidence of reasonable quality then even if it is the only evidence it should be possible to protect the interests of the accused by clear directions in the summing up and the deposition should be admitted. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition.

In neither of the present appeals was the evidence of identification contained in the depositions of such poor quality that it would be unsafe to convict on it if the jury had received the appropriate guidance in the summing up. There were, accordingly, no grounds on which it would have been right to exercise the discretion to exclude the admission of these depositions in evidence.

Their Lordships turn now to consider the additional grounds of appeal. In the case of Scott and Walters it is submitted that the judge failed to give an adequate direction on the issue of identification. Experience has taught judges that no matter how honest a witness and no matter how convinced he

may be of the rightness of his opinion his evidence of identity may be wrong and that it is at least highly desirable that such evidence should be corroborated. It has however also been recognised that to require identification evidence in all cases to be corroborated as a matter of law will tilt the balance too far against the prosecution. The compromise of this dilemma arrived at in *R v Turnbull* [1976] 3 All ER 549, [1977] QB 224 is the requirement that a judge must warn the jury in the clearest terms of the risk of a mistaken identification. Lord Widgery CJ giving the judgment of the five-judge court said ([1976] 3 All ER 549 at 551–552, [1977] QB 224 at 228):

> 'First, whenever the case against an accused depends wholly or substantially on ⊕ **313** the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.'

In *R v Whylie* (1978) 25 WIR 430 at 432 the Court of Appeal in Jamaica, following *R v Turnbull* said:

> 'Where, therefore, in a criminal case the evidence for the prosecution connecting the accused to the crime rests wholly or substantially on the visual identification of one or more witnesses and the defence challenges the correctness of that identification, the trial judge should alert the jury to approach the evidence of identification with the utmost caution as there is always the possibility that a single witness or several witnesses might be mistaken.'

Never can the importance of such a warning be greater than in a case such as the present where the sole evidence of identity is contained in the deposition of a deceased witness and where the quality of the identification may have been of the fleeting glance type, for in cross-examination the witness said he saw the men's faces as they ran from the bar. It is possible that he may have recognised the men as he passed them earlier in the street but he does not say so in the deposition and there will of course be no opportunity for investigating the matter at trial.

In dealing with the evidence of Gordon the judge never warned the jury that although Gordon may have been an honest witness his identification of the two accused might nevertheless be mistaken. On the contrary, the emphasis throughout is on the question of the adequacy of the opportunity that Gordon had for observing the two accused. These passages in the summing up, so far from conveying any warning of the danger of mistake, carry the clear implication that provided that the identifying witness had a sufficient opportunity to observe the accused the identification evidence may be safely relied on. The concluding paragraph in the passage dealing with the identification evidence again, so far from hinting at any danger in reliance on the identification evidence, suggests by implication that the confidence with which Gordon picked out the two accused when they were found amongst others at the bingo game in some way authenticates the identification itself. This of course is erroneous. The fact that an identifying witness has picked out the accused at an identification parade in no way obviates the need for a warning of the danger that his evidence may be mistaken.

The Court of Appeal considered that the judge's direction on identification was adequate and referred to the fact that he had pointed out the circumstances in which the identification was made and the handicap the jury suffered in not seeing the witness cross-examined. The Court of Appeal also said: 'The judge discussed with the jury ... the danger of identification evidence.' With all respect to the Court of Appeal, the judge did not discuss with the jury the fundamental danger of identification evidence which is that the honest witness convinced of the correctness of his identity may yet be mistaken. Their Lordships have given anxious consideration to the question of whether this submission is fatal to the convictions. They take into account that the jury had the opportunity to see the accused give evidence and clearly rejected their alibis and that they took only 11 minutes to arrive at their verdict. Their Lordships have nevertheless concluded that if convictions are to be allowed on uncorroborated identification evidence there must be a strict insistence on a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict, and that it would only be in the most exceptional circumstances that a conviction based ⊕ **314** on uncorroborated identification evidence should be sustained in the absence of such a warning. In this capital offence their Lordships cannot be satisfied that the jury would inevitably have convicted if they had received the appropriate warning in the summing up and they will accordingly advise Her Majesty to allow the appeal of Scott and Walters.

The same point on lack of a proper direction on identification evidence is taken on behalf of the appellants, Barnes, Desquottes and Johnson. The judge in this case gave no direction of any kind on the issue of identification. He did not warn the jury of the danger of a mistaken identification nor did he draw attention to the circumstances in which it was made or to the fact that it differed from the evidence of the other eye witness, Brown.

The Court of Appeal in rejecting the appeal on this ground said:

> 'A failure to warn the jury of dangers inherent in visual identification cases, it must be borne in mind, is but one of the factors to be taken into consideration in determining the fairness and adequacy of a summing up.'

This passage gives too little weight to the recognised dangers of convicting on uncorroborated evidence of identity. For the reasons already given a failure to give a warning of the danger of identification evidence is generally to be regarded as a fatal flaw in a summing up and almost inevitably so in a case such as the present where the sole evidence of identity is the uncorroborated deposition of a deceased witness. Their Lordships are satisfied that the failure to give any direction on the issue of identity is a sufficient reason to compel them to advise Her Majesty to allow the appeal in this case.

Barnes and Desquottes also appeal on the ground that no adequate direction was given on whether or not they might be guilty of manslaughter rather than murder on the ground that they were not party to a common enterprise to use a firearm in the robbery. In their Lordships' view the circumstances of this case did call for a direction on common enterprise which would have left the issue of manslaughter to the jury, albeit there was evidence on which the jury would be entitled to conclude that all three men were party to a common enterprise to use the gun. However, as their Lordships are satisfied that the appeal must be allowed on the issue of identification, they do not propose to go further into this issue which depends solely on the particular circumstances of this case.

Complaint was also made that the judge gave the impression to the jury that the witness of identification had been deliberately liquidated to prevent him giving evidence. Their Lordships are sure that the judge had no intention to convey any such impression, nevertheless they have misgivings that the

judge's choice of language may have unwittingly sown the seed of such a suspicion in the minds of the jury. The judge in the presence of the jury delivered a long ruling giving his reasons for admitting the deposition of the deceased witness, in the course of which he said:

> 'That application was based on the evidence that Larkland Green was a witness called at the preliminary inquiry into this charge, and that after giving evidence at the inquiry, and before the start of this trial, he was shot and killed.'

And at a later stage in the ruling he said, discussing s 34:

> 'The other instance is where the witness, having given evidence at the preliminary inquiry and before the Circuit Court trial begins, has died. And it doesn't matter whether the witness was deliberately liquidated for the purpose of putting him out of the way so that he cannot give evidence, or he dies of natural causes, of a heart attack, for instance, it doesn't matter, once it is proved he has died.'

And, finally, he finished his ruling by saying:

> 'It would be a serious thing. That was what I was trying to avoid from away back in 1974, for it to be authorised in Jamaica for it to be believed in Jamaica or that it should be the law in Jamaica, that a man can commit a serious offence and those **315** acting on his behalf, or even with his assistance, only have to eliminate the chief witness to secure his own acquittal. That if that were laid down to be the law in Jamaica, I shudder at what should happen. The evidence that we have is that of the chief witness—I make no further comment, it is the subject of police inquiry, and it would have to be, because the officer who gave the evidence saw the man dead on the street with a bullet in the head, to at least enforce the preliminary inquiry into the cause of death the police would have to inquire into it.'

In the course of the summing up the judge said:

> 'Now, witnesses were called on both sides but principal witness, Mr Larkland Green, who would have been called if he had been alive, is gone beyond, way beyond, and miracles are not being worked these days where you can raise a man from the dead, so you remember listening to that lengthy legal argument as to whether or not I should have allowed the deposition of this witness to be read ... the only eye witness to the incident, Larkland Green, who, at the preliminary examination, implicated the three accused, was shot to death on 11 May 1983. That was about two months after he had given evidence at the preliminary examination. That is not under any dispute.'

Larkland Green was found by the police shot dead in the street with a man named Bennett who had also been shot to death. Bennett had no connection with this case and there is no suggestion that Green's death was in any way connected with the accused or anyone acting in their interest. Their Lordships nevertheless feel considerable unease that the judge's remarks may have at least implanted in the jury's mind the suspicion that Green was killed to prevent him giving evidence that identified the accused. The judge should have heard the arguments of counsel and have given his ruling on the admissibility of the evidence in the absence of the jury and should have avoided language in the summing up that could be interpreted as carrying any implication that the witness had been killed to prevent him giving evidence. This then is another feature of the trial that contributes to the final decision of their Lordships humbly to advise Her Majesty the interests of justice demand that the convictions of these appellants should be quashed and their appeal allowed.

Appeals allowed. Convictions quashed.

Solicitors: *Simons Muirhead & Burton* (for the appellants); *Charles Russell Williams & James* (for the Crown).

[1980] AC 402

REGINA

RESPONDENT

AND

SANG

APPELLANT

[HOUSE OF LORDS]

[1980] AC 402

HEARING-DATES: 30, November 13 December 1978, 21, 22, 23, May 25 July 1979

25 July 1979

CATCHWORDS:
Crime - Evidence - Discretion to exclude - Agent provocateur - Evidence of activities incited by agent provocateur - Whether discretion to exclude evidence

HEADNOTE:
Two defendants were indicted on counts of conspiracy to utter forged banknotes and unlawful possession of forged banknotes. They pleaded not guilty and counsel invited the trial judge to allow a trial within a trial to determine whether the activities referred to in the indictment came about as a result of incitement by an agent provocateur. Counsel hoped that having established the facts, he would persuade the judge to exercise his discretion to exclude any prosecution evidence of the commission of offences so incited. The judge, doubting the existence of any such discretion, invited counsel to argue the point on the assumption that the necessary facts had been established. After argument, the judge ruled that he had no such discretion. Thereupon the defendants changed their pleas, and each pleaded guilty to one count and was sentenced. The Court of Appeal upheld the judge's ruling.

On appeal by one defendant: -

Held, dismissing the appeal, (1) that a judge in a criminal trial always had a discretion to refuse to admit evidence if, in his opinion, its prejudicial effect outweighed its probative value (post, pp. 434C-D, 436A-B, 437D, 438F, 441F, H, 445E,450A-B, 451G-H, 452D-E, 454D, 456H - 457A).

(2) That, save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, the judge had no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means, the court not being concerned with how it was obtained, and it was no ground for the exercise of the discretion to exclude evidence that it was obtained as the result of the activities of an agent provocateur (post, pp. 433A-B, 437E, 443C-D, 445F, 450B-C,452F, 457A).

Noor Mohamed v. The King [1949] A.C. 182, P.C.; Harris v. Director of Public Prosecutions [1952] A.C. 694, **H.L.**(E.); Kuruma v. The Queen [1955] A.C. 197, P.C. and Reg. v. Payne [1963] 1 W.L.R. 637, C.C.A. considered.

Reg. v. Ameer and Lucas [1977] Crim.L.R. 104 overruled.

Per curiam. It is well settled that the defence of entrapment does not exist in English law (post, pp. 432A-B, 441E,443B-C, 445G, 451C).

Reg. v. McEvilly (1973) 60 Cr.App.R. 150, C.A. and Reg. v. Mealey (1974) 60 Cr.App.R. 59, C.A. approved.

Decision of the Court of Appeal (Criminal Division), post, p. 405; [1979] 2 W.L.R. 439; [1979] 2 All E.R. 46 affirmed.

INTRODUCTION:
APPEALS against conviction.

On October 13, 1977, the defendants, Leonard Anthony Kimyou **Sang** and Matthew Mangan, were jointly indicted at the Central Criminal Court and pleaded not guilty. Following a preliminary ruling by the trial judge, Judge Buzzard, that he had no discretion to refuse to admit evidence that the activities referred to in the indictment had allegedly been incited by the police through an informer, the defendants sought to change their pleas, and pleas of guilty to different counts in the indictment, one relating to conspiracy to utter and the other to the unlawful possession of forged banknotes, were accepted. The defendants were then sentenced.

The trial judge certified the following point of law:

"(1) Has a trial judge a discretion to reject admissible evidence unfairly obtained otherwise than in cases where its prejudicial effect outweighs its probative value? (2) If he has a discretion, is he bound in his exercise of it to reject evidence of the commission of crime where the crime would not have been committed but for the activities of the agent provocateur?"

The facts are stated in the judgment of the court.

The defendant appealed to the House of Lords.

COUNSEL:
Laurence Giovene for the defendants.

W. N. Denison for the Crown.

Cur. adv. vult.

December 13.

Lord Rawlinson Q.C. and Laurence Giovene for the appellant. It is submitted: (1) A judge in a criminal trial has a discretion to reject relevant evidence of more than minimal value, being evidence other than evidence of admissions, by applying the general principle of fairness when he is satisfied that an accused has been deliberately procured, incited or tricked into the commission of a crime which he would not otherwise have committed. (2) It is contrary to public policy to deny to this court a discretion to exclude relevant evidence when an accused has been deliberately procured, incited or tricked into the commission of a crime which he would not otherwise have committed by the conduct of the police or other officials

or their agents.

The defence of entrapment was considered in part 5 at p. 32 of the Law Commission Report in 1977 on Defences of General Application (Law Com. No. 83). It is accepted that it has no place in English law, but paragraph 5.8 at p. 35 states the law correctly.

One must distinguish cases where a police agent has infiltrated a group suspected of a criminal enterprise and has of necessity participated in their activities.

When a person has no intention of being a burglar an agent provocateur may suggest that he should burgle X's house. In such a case it would be unfair to prosecute a man who has been induced by the authorities to commit a crime.

A judge who disagrees with the policy of a prosecution cannot stop it in limine. But the point may arise in the way the case is presented to the court. The judge can control the presentation of the evidence. Since 1948 the judges have been asserting an inherent power to exclude admissible evidence on grounds of unfairness.

Difficulties have arisen from some of the authorities: Rex v. Christie[1914] A.C. 545, 560 and the intervention of Lord Halsbury in the argument reported at 10 Cr.App.R. 141, 149; Brannan v. Peek [1948] 1 K.B. 68; Noor Mohamed v. The King [1949] A.C. 182; Harris v. Director of Public Prosecutions [1952] A.C. 694, 707-708; Browning v. J. W. H. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172, 1177 (Lord Goddard C.J.) and Kuruma v. The Queen [1955] A.C. 197, 203-205.

So far one finds disapproval of the police acting as agents provocateurs and a power in the court to exclude admissible evidence in certain circumstances. From Kuruma's case [1955] A.C. 197, it appears that the judge has a general discretion to exclude evidence when it operates unfairly against the accused, e.g. in the case of a trick or of an agent provocateur.

In Reg. v. Payne [1963] 1 W.L.R. 637 evidence was excluded on this ground that it had been unfairly obtained. In Callis v. Gunn [1964] 1 Q.B. 495 the court followed that case, holding that it had an overriding discretion. There is in the court a power to exclude evidence if the overriding principle of fairness has been breached. Legally admissible evidence

may be excluded "if justice so requires": Myers v. Director of Public Prosecutions [1965] A.C. 1001, 1024. Reg. v. Murphy [1965] N.I. 138 was not a case of inducing a person to do an act which he never had any mind to do.

The law has developed in a succession of cases: Sneddon v. Stevenson[1967] 1 W.L.R. 1051; King v. The Queen [1969] 1 A.C. 304, 313-315, 319; Reg. v. Birtles [1969] 1 W.L.R. 1047, 1048-1049; Reg. v. McCann (1971) 56 Cr.App.R. 359; Reg. v. Foulder [1973] Crim.L.R. 45; Reg. v. Burnett [1973] Crim.L.R. 748; Reg v. McEvilly (1973) 60 Cr.App.R. 150; Reg. v. Mealey (1974) 60 Cr.App.R. 59; Reg. v. Willis [1976] Crim.L.R. 127; Reg. v. Ameer and Lucas [1977] Crim.L.R. 104; Reg. v. Humphreys [1977] A.C. 1, 24, 25-26, 46, 47, 52-53, 55 and Jeffrey v. Black [1978] Q.B. 490. See also Cross, Evidence, 4th ed. (1974), pp. 27-28, 281-285; Phipson on Evidence,12th ed. (1976), para. 829, p. 363; Archbold Criminal Pleading Evidence & Practice, 40th ed. (1979), para. 1404, p. 912. As to Scottish law, in which departure by the prosecution from strict procedure requires to be excused, see Lawrie v. Muir, 1950 J.C. 19, 27. Reliance is placed on Reg. v. Stewart (1972) 56 Cr.App.R. 272.

The accused in this case had never previously been concerned with such an offence. He was procured and tempted to commit this offence. Kuruma's case [1955] A.C. 197; Reg. v. Payne [1963] 1 W.L.R. 637 and Callis v. Gunn [1964] 1 Q.B. 495 indicate that the court has power in the exercise of its discretion to rule out such evidence as this on the overriding principle of fairness. If the judge is satisfied at a "trial within a trial" that the commission of the offence

was instigated by an agent provocateur instructed by the police and but for that the accused would not have committed it, he can in his discretion decline to allow the Crown to prove its case by that evidence. The court has an inherent power to do what the justice of the case demands. Here it demands that evidence of the commission of an offence which has been procured by a trick is unacceptable and should not be received as being contrary to the principles of fairness. The court must exercise its discretion on the particular facts of the case.

It would be contrary to public policy to deny the court this discretion to exclude evidence when the accused has been procured, incited or tricked to commit an offence. The courts have expressed abhorrence of this course of conduct. It is unacceptable for the courts to be used to secure a conviction when a police officer or an agent provocateur has procured a person to commit a crime. It would be an obstacle to the courts exercising their function not to let them disallow such evidence. It is not enough for the courts to deal with the matter by the making of critical comments.

K. A. Richardson and W. N. Denison for the Crown. It is submitted: (1) There is no doctrine of "entrapment" in English law. (2) If "entrapment" in the full sense of persuading someone to commit an offence which he would not otherwise commit is not a defence, the court cannot get round that by saying that it has a discretion to exclude evidence of the commission of the offence because it was unfairly induced by an agent provocateur. (3) There is a plain distinction between evidence unfairly obtained and criminal activity unfairly induced and the court is not here

dealing with the former. (4) There is no overriding principle or general rule of fairness which can operate to allow a judge to exclude admissible evidence provided its prejudicial effect to the defence does not outweigh its probative content; if its prejudicial effect does not outweigh its probative content the question of discretion does not arise.

Paragraph 5.8 of the report of the Law Commission on Defences of General Application goes beyond the powers of the courts to exclude evidence to ensure a fair trial. The courts have other means to that end, e.g. the rules relating to autrefois convict, autrefois acquit and double jeopardy.

The essence of the respondent's argument is stated by Martland J. in Reg. v. Wray (1970) 11 D.L.R. (3d) 673, 685 et seq. See also what Roskill L.J. said in the Court of Appeal (ante, p. 421C-G). Archbold Criminal Pleading Evidence & Practice, 40th ed., paras. 1406-1407, p. 913 correctly expresses the law of England.

One must distinguish between evidence of an admission pure and simple and evidence of the fact that a defendant had a particular piece of knowledge. There are strict rules governing the admissibility of confessions but the fact that a defendant knew, for instance, where a murder weapon was would be in a different category. One must not invoke a wide discretion to get round the fact that the defence of entrapment does not exist in English law. Thus if a man suspected of being a professional assassin were approached by a police officer with a contract to kill X, the intention being that he should be arrested while trying to kill him but by mismanagement the killing actually occurred, the killer would be liable to be prosecuted for murder. Although the police officer might be prosecuted for incitement, it should not be impossible to proceed against the killer. There should not be two standards, one applying to trivial offences and the other to grave offences.

The cases on agents provocateurs start with Brannan v. Peek [1948] 1 Q.B. 68. In that case there was no suggestion that the evidence in question should be excluded, though the behaviour of the police was criticised. In the Browning case [1953] 1 W.L.R. 1173, 1177, Lord Goddard C.J. criticised the action of agents provocateurs but said that though an offence had been committed the situation could be dealt with by an absolute discharge. In Reg. v.

Birtles [1969] 1 W.L.R. 1047 the use of an informer to encourage the commission of an offence was disapproved of, but it was not suggested that this would provide a defence. In Reg. v. McCann, 56 Cr.App.R. 359, a trap was set because the defendant already intended to commit an offence. In Reg. v. McEvilly, 60 Cr.App.R. 150, 153, Roskill L.J. said that the defence of "entrapment" did not exist in English law. He disapproved of Reg. v. Foulder [1973] Crim.L.R. 45 and Reg. v. Burnett [1973] Crim.L.R. 748 and refused to follow them, both cases decided before Reg. v. Mealey, 60 Cr.App.R. 59, in which it was decided that there was no defence of "entrapment."

The duty of the court is to see that the accused has a fair trial according to law. The rules of admissibility of evidence are framed to ensure that. Under those rules confessions improperly obtained and criminal activity improperly induced are in different categories: see Reg. v. Willis [1976]

Crim.L.R. 127. On the question of agents provocateurs Reg. v. Ameer and Lucas [1977] Crim.L.R. 104 was wrongly decided.

Many offences are committed as a result of persuasion from many different sources. "Entrapment" does not affect the actus reus or the defendant's mens rea. It does not matter whether the "entrapment" comes from a fellow criminal or an agent provocateur; it makes no difference as to culpability, though it can be taken into account in passing sentence. Exclusion of evidence on the ground of "entrapment" should not prevail over the rules in the search for a fair and proper trial according to law.

There is no overriding discretion to exclude evidence alleged to have been unfairly obtained. The Law Commission Report of 1977 on Defences of General Application, paragraphs 5.18-5.20, pp. 40-41 states the view of the law which the respondent submits is correct.

In all the cases cited there was an issue of guilty or not guilty, a live issue, and also an element of what some people would call unfairness, yet of all the cases appealed in England only in Reg. v. Payne [1963] 1 W.L.R. 637 was the discretion exercised in favour of the accused save in the "similar facts" cases. After Kuruma v. The Queen [1955] A.C. 197 the existence of the discretion was assumed, yet in that case it was not exercised in favour of the defendant. The discretion to exclude evidence of "similar facts," even when technically admissible, was laid down in Noor Mohamed v. The King [1949] A.C. 182, 192. In Harris v. Director of Public Prosecutions [1952] A.C. 694, 707 it was said that the discretion to exclude evidence of "similar facts" should be exercised where the probable effect prejudicial to the defendant would be out of proportion to its evidential value. That is not disputed but it does not apply in practice outside the categories mentioned in the judgment.

Kuruma v. The Queen [1955] A.C. 197, 203 is authority first and foremost for the proposition that the test to be applied is whether or not the evidence is relevant to the issues. What was said at p. 204 should be read in the context of what was said previously. Lord Goddard C.J. was there laying down an important principle and dealing with the argument submitted for the appellant at pp. 199 and 200. But his obiter may be wrong if read without qualification.

Reg. v. Payne [1963] 1 W.L.R. 637 is not a general authority on discretion but on the point of an accused person incriminating himself.

Callis v. Gunn [1964] 1 Q.B. 495 seems to extend the discretion but the Crown succeeded on the question of its exercise and it was held that nothing justified the exclusion of the fingerprint evidence.

In Reg. v. Buchan [1964] 1 W.L.R. 365, 368 a pure question of unfairness arose. The accused refused to say anything if what he said was taken down, but a police officer in the next room did take it down. The court saw nothing wrong in the course taken and did not

exercise its discretion to exclude the evidence though the court upheld the general rule of fairness. It would have been otherwise if the statement had not been voluntarily made.

Reg. v. Murphy [1965] N.I. 138, 149, was a clear case of a trick by agents provocateurs, but, while recognising the existence of the discretion, the court refused to exclude the evidence. Lord MacDermott C.J. recognised

the difficulty of laying down a firm summary of the circumstances in which the discretion should be exercised.

Reliance was also placed on Rumping v. Director of Public Prosecutions[1964] A.C. 814, 845-846, Sneddon v. Stevenson [1967] 1 W.L.R. 1051; King v. The Queen [1969] 1 A.C. 304; Reg. v. Keeton (1970) 54 Cr.App.R. 267; Reg. v. Stewart [1970] 1 W.L.R. 907, 911; People (Attorney-General) v. McGrath (1960) 99 L.T. 59, 73-74 and Jeffrey v. Black [1978] Q.B. 490, 495 (Lord Widgery C.J.).

In case after case the courts have asserted the existence of a special discretion to exclude evidence unfairly obtained but of the cases which went to appeal only in Reg. v. Payne [1963] 1 W.L.R. 637 was it exercised. It would be unsatisfactory if the exercise of the discretion depended on a subjective judicial assessment. In the cases from which the discretion stems the court was concerned with the highly prejudicial effect of minimally probative evidence and that is how the discretion should be limited. Thus it falls within narrow and well defined categories.

This was a case of "entrapment" and the discretion should not be used to get round the principle that "entrapment" is no defence in English law.

Lord Rawlinson Q.C. in reply. Apart from the "similar facts" cases and the cases of self-incrimination, the judges have been applying the principle of fairness in the exercise of their discretion. Since 1948 the categories governing the exercise of the discretion have been extended beyond the test of whether the evidence in question was of minimal probative value and the judges have been moving towards the Scottish position that in the exercise of the discretion every irregularity in obtaining the evidence calls for an excuse. If the judges believe that there has been a trick or some other unfairness then they have an overriding discretion. If there has been a breach of the Judges' Rules it is left to the discretion of the judges whether or not to admit the evidence. The principle of exclusion does not depend on inadmissibility. The cases of self-incrimination turn on the principle of fairness, even if the evidence be reliable. The protection given to a person incriminating himself should be extended to enable the court to give protection in other cases of unfairness. Reg. v. Ameer and Lucas [1977] Crim.L.R. 104 shows how a trial judge can deal with the circumstances in a case of unfairness. The law laid down in Reg. v. Wray,11 D.L.R. (3d) 673, 679, 681, 682 approximates to the Scottish position.

Their Lordships took time for consideration.

July 25.

PANEL: Roskill and Ormrod L.JJ.and Park J Lord Diplock, Viscount Dilhorne, Lord Salmon,Lord Fraser of Tullybelton and Lord Scarman

JUDGMENTBY-1: ROSKILL L.J

JUDGMENT-1:
ROSKILL L.J: read the following judgment of the court. The defendant **Sang** and the defendant Mangan were jointly indicted at the Central Criminal Court before Judge Buzzard on October 13, 1977, on two counts. The first alleged conspiracy between them and others to

utter forged United States banknotes. The second alleged unlawful possession of the forged United States banknotes. To both those counts each defendant initially pleaded not guilty. At the beginning of the trial (that is to say, after arraignment but before counsel for the Crown began to open the case for the prosecution) Mr. Giovene, for **Sang,** invited the trial judge to allow a trial within a trial to take place. His purpose, as he put it, was that the court might consider "whether or not the involvement of my client, Mr. **Sang,** and consequently of that of his associate Mr. Mangan" came about as a result

of the activities of an agent provocateur. Mr. Giovene made no secret of the fact that he hoped to establish from evidence given at such a trial within a trial by cross-examination of a police officer named Sergeant Glass and by evidence-in-chief from an alleged police informer who went by the name of Scippo, that **Sang** had only become involved in the offences alleged against him because of the activities in Brixton Prison of Scippo who, allegedly acting under police instruction, had approached **Sang** who was also at the time in Brixton Prison. It was said that this approach was made with a view to procuring that **Sang** on his release would, albeit unknown to him, become involved with Sergeant Glass and other police officers posing as ready and willing purchasers of **Sang's** "merchandise," that is to say the forged United States banknotes, thus ensuring **Sang** first committing and then being arrested for and ultimately convicted of the offences charged. It was said that those offences would not have been committed but for these police-inspired activities of Scippo and subsequently of Sergeant Glass.

Mr. Giovene hoped that once the factual foundation for his argument had been thus laid, he could persuade the judge in the exercise of what was claimed to be the judge's discretion, to rule that the Crown should not be allowed to lead any evidence of the commission of an offence or offences incited in this way with the consequence that a verdict of not guilty was inevitable and indeed would have to be directed by the judge.

When the reason for this request for a trial within a trial was first indicated to the judge, he himself at once raised the question whether in point of law and even assuming the facts outlined above were established, he possessed the discretion which the defence sought to invoke. The transcript of the argument which ensued shows clearly that the judge had grave doubts as to the existence in law of the suggested discretion, any exercise of which would, as he pointed out, prevent the prosecution from proceeding at all with the charges. He therefore invited Mr. Giovene to argue the question whether this discretion existed at all in point of law upon the assumption that the required facts had been established, namely that **Sang's** offences would not have been committed but for police incitement through an informer to commit them. Mr. Giovene agreed to this course and the argument proceeded accordingly.

After long and careful argument, which is recorded in the transcript which we have read, the judge on October 17, 1977, ruled that as a matter of law he did not possess the discretion in question. Therefore, as Mr. Giovene had already hinted would be the case if the judge rejected his submissions, **Sang** pleaded guilty to count 1, the conspiracy count, and Mangan pleaded guilty to count 2, the possession count. These pleas were duly accepted. The judge sentenced **Sang** to 18 months' immediate imprisonment and Mangan to 12 months' imprisonment suspended for two years.

The judge proffered a certificate to Mr. Giovene on **Sang's** behalf that **Sang's** case was fit for appeal. Strictly, this was unnecessary inasmuch as an important point of law is involved, but no doubt the

judge was moved to grant the certificate in the hope that this court might the more readily be able to decide whether or not his ruling was correct. A certificate was not proffered to Mangan's counsel and since the trial Mangan has lost touch with his solicitors. He was not represented on the hearing of **Sang's** appeal. We shall not therefore in this judgment deal separately with his appeal.

The action taken by the judge to rule upon an assumed factual basis presents this court with a certain initial difficulty, though we have great sympathy with him in the situation in which he was placed. This court has often said that trial judges should not in general rule upon questions of the admissibility of evidence without hearing that evidence. But in the present case, if the judge were to hear that evidence, there would have been a lengthy trial within a trial at which matters might have been sought to be investigated which would not have been directly relevant to proof of **Sang's** guilt. For example, what instructions were given to Scippo; what were the sources of information that were available to Scippo or to the police officers; and police policy in permitting infiltration of this kind into suspected gangs of criminals. Some or all of these are matters which are not, at any rate normally, matters for a trial court to investigate. And if the judge's view of the law were right, such an inquiry would have been to no purpose even if he had felt able to permit it, for he did not possess the discretion upon the very existence of which Mr. Giovene's argument depended for its success. We therefore think that in the exceptional circumstances of this case the course which the judge took was well justified, but the fact that we have accepted that this is so must not be taken as in any way encouraging departure from the basic principle that trial judges should not rule upon questions of admissibility of evidence without first hearing the evidence to which exception is sought to be taken.

The judge's ruling raises a question of great importance upon which, so far as we can discover, no binding decision has ever been given by an appellate court in this country, and in relation to which it is plain from what we have been told that trial judges in Crown Courts have in recent years taken differing views.

There is no doubt that over the years many dicta have been uttered by judges of great eminence upon this topic, some of which if read literally can be interpreted as supporting Mr. Giovene's argument. But as will appear in this judgment, it is a striking fact that with the single exception of Reg. v. Payne [1963] 1 W.L.R. 637 (a case to which we shall later refer) in no single one of these cases where these dicta have been uttered has the court excluded the evidence objected to, even when it has been obtained in circumstances which it is difficult not to regard as "unfair" or "unjust," whatever standard one applies, and in at least one case of flagrant illegality, and therefore we would have thought either "unfairly" or "unjustly," whichever of those adverbs be preferred.

We think the right approach to the present problem in view of the state of the authorities is first to state certain propositions which seem

to us to be established beyond peradventure, at least so far as this court is concerned.

First, a trial judge has not and must not appear to have any responsibility for prosecution.

Second, a trial judge has no power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy that prosecution ought not to have been brought.

Authority binding upon this court for these two propositions will be found in Connelly v. Director of Public Prosecutions [1964] A.C. 1254, and in Reg. v. Humphrys [1977] A.C. 1. We do not think it necessary to give specific references to the many passages in the various speeches in these two cases where these propositions are stated.

Third, a trial judge may have power to stop a prosecution if it amounts to an abuse of the process of the court and is oppressive and vexatious. We say "may have" because this was the view of Lord Salmon and of Lord Edmund-Davies in Reg. v. Humphrys [1977] A.C. 1. Viscount Dilhorne thought otherwise and there is no binding decision of a majority of their Lordships upon this point. It has not been argued before us in the present appeals that if the

present prosecution were allowed to proceed, it would amount to an abuse of the process of the court.

Fourth, evidence which is relevant to the issue before the court is admissible however that evidence has been obtained. In delivering the opinion of the Judicial Committee in Kuruma v. The Queen [1955] A.C. 197, Lord Goddard C.J. stated the law thus, at p. 203:

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

Lord Goddard C.J. said, at p. 204:

"In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried."

Fifth, the so-called doctrine of entrapment has no place in English law: Reg. v. McEvilly (1973) 60 Cr.App.R. 150, 156; Reg. v. Mealey(1974) 60 Cr.App.R. 59 and Reg. v. Willis [1976] Crim.L.R. 127.

The decision that the doctrine of entrapment has no place in English law is thus comparatively new - as was the contention that it had such a place - and long after the uttering of the various dicta to which we have yet to refer. This court in Reg. v. Willis certified as questions of general public importance these three questions:

"1. Does the defence of entrapment exist in English law? 2 If the answer to 1 be yes, what are the limits of such defence?

3. Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?"

This court, however, refused leave to appeal. Subsequently the House of Lords also refused leave to appeal. It was not argued before us that Reg. v. Willis or indeed the earlier cases had been wrongly decided, and indeed it is difficult to see how this could properly have been done in view of the authority of these recent decisions and of the refusal of their Lordships in Reg. v. Willis to allow the matter to be taken further.

We think it important to observe that in Reg. v. Willis, this court devoted some consideration to the problem with which we are concerned. Lawton L.J. in giving the judgment of the court pointed out that the supposed existence of this discretion, which he called "this so-called rule of fairness" was something novel and appeared to have arisen from some comments made by Lord du Parcq in Noor Mohamed v. The King [1949] A.C. 182, 192, followed by Viscount Simon in Harris v. Director of Public Prosecutions [1952] A.C. 694. We feel we should here point out that the actual dictum which Lawton L.J. attributes to Viscount Simon does not, so far as we have been able to trace, appear in any authorised report of his speech. But we do not think this apparent misquotation affects the essential issue. We later quote in full the passage in Viscount Simon's speech to which we think Lawton L.J. must have been intending to refer.

Lawton L.J stated that this rule (if as wide as suggested) could "stop the Crown putting forward a case which they wished to put forward because he" (the judge) "considers that they have obtained the evidence unfairly." Earlier in his judgment Lawton L.J. said:

"The application of that principle to the facts of this case would have meant that the judge would have been entitled to rule after arraignment that the Crown were not to put that evidence before the court. We consider this to be a startling proposition. It is clear on the authorities that judges have a discretion to exclude certain types of evidence. They can exclude evidence which has been obtained in breach of the Judges' Rules: and they can exclude evidence which has minimal probative value and much prejudicial value, but under this so-called rule of fairness, if it is as wide as counsel at the trial seem to have assumed it was, a judge can stop the Crown from presenting their case altogether."

Lawton L.J. continued later:

"Nevertheless, since Lord Simon made his statement of what he considered judges could do, many courts, including this court, have assumed that he was right and have acted on what he has said. But whether they have done so in a manner which he contemplated i another question altogether. We do not feel it necessary for the purposes of this case to inquire further into the basis of the power

of the judge, if he has any, to stop the Crown putting forward a case which they wish to put forward because he considers they have obtained the evidence unfairly. We will assume that there is a discretion for the judge to do something of that kind."

In a number of these cases where this issue has arisen, counsel for the Crown has conceded that a discretion existed which was wide enough to stop the Crown from presenting its case: see, for example, the ruling of Judge Gillis on July 30, 1976, briefly reported in Reg. v. Ameer and Lucas [1977] Crim.L.R. 104. The making of this concession does not appear from that report, but we have a transcript of the judge's ruling and the making of the concession is clearly recorded in the transcript; indeed, counsel apparently described the discretion as "wholly unfettered." In the present case Mr. Denison for the Crown not only made no such concession, but firmly denied that the relevant discretion existed at all.

Thus, in this appeal we have to decide what this court in Reg. v. Willis (unreported) did not have to decide, namely whether this discretion exists or whether the assertion, and indeed the occasional acceptance of its existence, has not been based upon a misunderstanding of the various dicta, and a failure to relate those dicta to the facts of the particular case against the background of which the dicta were uttered.

We have been unable to find in any of the authorities before World War II any suggestion of the existence of such a discretion. On the contrary, such dicta as there are are the other way. In Director of Public Prosecutions v. Christie (1914) 10 Cr.App.R. 141, an interlocutory observation of the Earl of Halsbury is recorded, at p. 149:

"I must protest against the suggestion that any judge has the right to exclude evidence which is in law admissible, on the ground of prudence or discretion, and so on."

But while we can find no express qualification in the speeches in that case of that interjection as a correct statement of legal principle, we draw attention to a passage in the speech of Lord Moulton who said, at pp. 159-160:

"Now, in a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter given in evidence must be relevant. I am of opinion, that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial effect on

the minds of the jury, which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection; and such an intimation from the tribunal trying the case is

usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure."

Lord Reading C.J. stated the same principle in somewhat different words, at pp. 164-165:

"The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of judges to juries strongly warning them not to act upon the evidence of an accomplice unless it is corroborated... Such practice has found its place in the administration of the criminal law because judges are aware from their experience that in order to ensure a fair trial for the accused, and to prevent the operation of indirect, but not the less serious, prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence. Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, though admissible in law, has little value in its direct bearing upon the case, and indirectly might operate seriously to the prejudice of the accused, should not be given against him; and, speaking generally, counsel accepts the suggestion, and does not press for the admission of the evidence unless he has good reason for it."

Thus there are to be found in Director of Public Prosecutions v. Christie clear statements, first, that what is relevant is admissible, whether in civil or in criminal cases, but second, in criminal cases the overriding requirement of securing a fair trial for an accused person entitles and indeed requires the trial judge to see that evidence which, though strictly admissible, is in its nature much more prejudicial than probative should not be laid by the prosecution before the jury, so as to minimise the risk of miscarriage of justice upon the basis of evidence of minimal probative value. Lord Reading C.J.'s comparison, at p. 164, with the warning required to be given against conviction on the uncorroborated evidence of an accomplice is illuminating in this respect. The acknowledgment of the existence of the judicial discretion then under discussion was directed not to stopping the Crown from presenting its case altogether, but to ensuring that that case when presented did not include evidence which, though strictly admissible, was of minimal probative value.

Director of Public Prosecutions v. Christie, 10 Cr.App.R. 141 was not a "similar fact" case, but in point of legal history it was decided after Makin v. Attorney-General for New South Wales [1894] A.C. 57 and after the decision of the House of Lords in Reg. v. Ball[1911] A.C. 47 had unanimously approved Makin's case. One has only to read the "similar fact" cases decided around this period, both before and after Christie's case to see that the courts were not slow to appreciate that the dangers against which the reasoning in Christie's case was designed to guard were inherent in the leading of "similar fact" evidence. Such evidence by its very nature might lead juries to convict when that evidence, properly analysed, was in truth of little probative value and yet of grave prejudicial effect. Hence the practice of judges withholding "similar fact" evidence unless it were in the trial judge's view "truly probative of" or "had a material bearing on" (many different phrases are to be found in the authorities) the

issue which the jury had to decide.

One does not have to search far for other examples of judicial caution in this respect. The exclusion of the doubtfully obtained confession (see Reg. v. Thompson [1893] 2 Q.B. 12) and the refusal after 1898 to allow an accused person to be cross-examined as to character, even though strictly the line drawn by the Criminal Evidence Act 1898 had been crossed, are both examples of this practice. In each and every such case the objective was to minimise the risk, so far as humanly possible, of a miscarriage of justice caused by the conviction of an innocent person, by refusing to allow evidence of little probative value but highly prejudicial in character to be adduced; an objective sometimes, perhaps, achieved only at the cost of the acquittal of an obviously guilty person.

It is against this background that we turn to consider the statements in Noor Mohamed v. The King [1949] A.C. 182 and of Viscount Simon in Harris v. Director of Public Prosecutions [1952] A.C. 694. In giving the opinion of the Judicial Committee in the former case, Lord du Parcq said, at p. 192:

"It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and sense of fairness of the judge."

In Harris v. Director of Public Prosecutions [1952] A.C. 694, Viscount Simon, after setting out this passage we have just quoted from Noor Mohamed's case said, at p. 707:

"This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect 'would be out of proportion to its true evidential value' (per Lord Moulton in Director of Public Prosecutions v. Christie). Such an intimation rests entirely within the discretion of the judge."

It must be noted that both these cases were "similar fact" cases. In each case the passage relied upon on behalf of the defendants must be read against that background fact. In the former case the Judicial Committee was concerned that evidence of a suspicious antecedent death had been used as evidence against the accused in relation to the murder with which he was charged; wrongly, as the Judicial Committee held. In the latter case, the trial judge was said to have failed to have warned the jury against using evidence admissible on other charges (upon which in fact the jury had acquitted) when considering the evidence on the only charge upon which they ultimately convicted.

The next relevant case is Kuruma v. The Queen [1955] A.C. 197, which, as already stated, is clear authority for the proposition that if evidence is relevant it is admissible. In a passage following that which we have already quoted, Lord Goddard C.J. repeated that for this purpose there is no difference in principle between civil and criminal cases. Lord Goddard C.J. added, however, at p. 204:

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasised in the case before this court of Noor Mohamed v. The King [1949] A.C. 182, 191-2, and in

the recent case in the House of Lords, Harris v. Director of Public Prosecutions [1952] A.C. 694, 707. If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

Lord Goddard C.J. then went on to consider certain Scottish decisions and added:

"In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried."

Two comments may be made upon Kuruma v. The Queen [1955] A.C. 197. First, Lord Goddard C.J. was, we think, intending to say no more in the passage which we have quoted than had already been said first in Noor Mohamed v. The King [1949] A.C. 182 and then in Harris v. Director of Public Prosecutions [1952] A.C. 694. If, therefore, our analysis of those two decisions is right, Kuruma's case goes no further than its two predecessors.

Those two cases seem to us merely to repeat what had previously been stated by both Lord Moulton and Lord Reading C.J. in Director of Public Prosecutions v. Christie, 10 Cr.App.R. 141, indeed as will have been seen, Viscount Simon in terms refers to Christie's case in the report in Harris's case, at p. 707. Secondly, as to the dictum of obtaining evidence by a trick, it is relevant to look at the facts in Kuruma v. The Queen [1955] A.C. 197. The appellant was charged with murder. The principal evidence against him had been obtained by a flagrantly illegal search; something which, it might be thought, was far more than just "unfair," if that be the test, or obtaining evidence by a trick. When the report of the argument for the appellant is studied, it will be seen that it was contended that that evidence, having been illegally obtained, was inadmissible or, if not inadmissible, was of such a character that the trial judge and the Court of Appeal ought to have excluded it in their discretion. It is clear that that argument failed in toto. Yet if the discretion now asserted to exist did and does exist it is difficult to envisage a stronger case for its exercise. Implicitly the Judicial Committee held that this evidence was admissible without qualification. The question of discretion is only discussed in the context of the two earlier cases to which we have referred and neither of those cases is authority for what Lord Goddard C.J. said about obtaining evidence by a trick; a statement which, with every respect to Lord Goddard C.J., cannot be regarded as more than a dictum, particularly in the light of certain later authorities to which we have yet to refer. It is, however, of interest to note that their Lordships appear to have regarded the manner in which the evidence had been obtained as well as certain other factors in the case to justify mitigation of the death penalty.

We venture to think that both Lord du Parcq and Viscount Simon would be surprised if they could learn that the two passages we have quoted, the one from Noor Mohamed v. The King [1949] A.C. 182 and the other from Harris v. Director of Public Prosecutions [1952] A.C. 694 were being relied upon as authority for the proposition that a trial judge had a discretion to exclude evidence so as wholly to prevent the prosecution case being presented in a case where that evidence was immediately probative of the offence charged - especially where the commission of the offence was admitted - solely because the commission of the offence was incited by a police officer or a police informer. We venture to think that Lord Goddard C.J. would have expressed the same surprise that his dictum in Kuruma v. The Queen [1955] A.C. 197 was being similarly used.

There is no risk in the class of case with which we are presently concerned of an accused being convicted on evidence of little probative weight. The question in such a case is different, namely whether a trial judge has power and, if he has power whether he ought to use that power, to prevent an accused person being convicted of an offence which he claims he would not have committed but for such incitement.

It is argued that even if Lord Goddard C.J.'s dictum in Kuruma'scase does not justify the

conclusion that a judge has such power, an earlier decision of the Divisional Court, consisting of Lord Goddard

C.J. himself and Humphreys and Singleton JJ. in Brannan v. Peek[1948] 1 K.B. 68, does so decide. This decision has been said to be the high water mark of the incitement cases in the defendant's favour. It is in fact the earliest of the incitement cases to which counsel refers us. It was a street bookmaking case and a street bookmaker had beyond question been incited to commit the alleged offences by police officers who placed bets with him in a public house. The justices had convicted the appellant. He appealed and the appeal was allowed on the ground that the public house in question was not a "public place" within the meaning of the relevant statute. Lord Goddard C.J. and Humphreys J. expressed both concern and strong disapproval of the fact of incitement which was proved beyond possibility of argument. But judicial disapproval, however strongly expressed, is one thing. It is quite another thing to elevate such judicial disapproval into a rule of law. It is a striking fact that no member of the court which heard Brannan v. Peek [1948] 1 K.B. 68 suggested that the police evidence was inadmissible or that the magistrates had power to refuse to allow it to be adduced and should have exercised that power. On the contrary, had that court, especially that court as then constituted, thought that a possible view, it is in our opinion unthinkable that the court would not have so said and allowed the appeal on that ground. But the decision proceeds upon an assumption that the evidence was admissible and that the conviction would have been proper had the offence been in a "public place." Mr. Giovene sought to explain the decision on the ground that counsel for the appellant had not raised the question of admissibility. It certainly appears that he did not do so. But we have little doubt that even so the court would have raised the question of its own motion had it thought the contention tenable.

Brannan v. Peek [1948] 1 K.B. 68 precedes Kuruma v. The Queen[1955] A.C. 197 by some seven years. In this case the "unfairness" of police behaviour was manifest, as was, as already pointed out, the illegality of the police action in Kuruma's case. Yet in neither case was the offending evidence ruled out.

We turn next to Reg. v. Murphy [1965] N.I. 138, a decision of the Northern Ireland Courts-Martial Appeal Court presided over by Lord MacDermott C.J. The substance of the case against the appellant, who was a soldier, was based on answers given by him to police officers posing as members of a subversive organisation. Those questions concerned the security of the appellant's barracks. The appellant was convicted solely on this evidence. He appealed on the ground that the court-martial ought in its discretion to have rejected this evidence because of the way it had been obtained. On the facts Reg. v. Murphy [1965] N.I. 138 was a clear incitement case. Indeed, Lord MacDermott C.J., at p. 140, describes the evidence as having been "undoubtedly induced by a trick."

The court accepted the law as stated in Kuruma v. The Queen[1955] A.C. 197, namely that evidence that is relevant is admissible however it has been obtained. But having so stated and referred to what had been said previously before Kuruma's case in Noor Mohamed v. The

King [1949] A.C. 182 and Harris v. Director of Public Prosecutions [1952] A.C. 694, and since Kuruma's case by the Divisional Court in Callis v. Gunn [1964] 1 Q.B. 495, Lord MacDermott C.J. said, at pp. 147-148:

"We do not read this passage" (he was referring to the judgment of Lord Parker C.J. in Callis v. Gunn) "as doing more than listing a variety of classes of oppressive conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without

occasional resort to it. We find that conclusion hard to avoid on any survey of the preventive and enforcement functions of the police, but it is enough to point to the salient facts of the present appeal. The appellant was beyond all doubt a serious security risk; this was revealed by the trick or misrepresentation practised by the police as already described; and no other way of obtaining this revelation has been demonstrated or suggested. We cannot hold that this was necessarily oppressive or that Lord Parker of Waddington intended to lay down any rule of law which meant that it was the duty of the court-martial, once the trick used by the police had been established, to reject the evidence that followed from it."

This decision is of the highest persuasive authority. In our judgment it clearly shows that whatever the precise words used by Lord Goddard C.J. in Kuruma v. The Queen [1955] A.C. 197 or by Lord Parker C.J. in Callis v. Gunn [1964] 1 Q.B. 495 the court has no power or, if it has the power, it should not exercise that power to exclude evidence merely because a trick or misrepresentation has been used to secure that evidence if the device adopted were thought necessary for the detection of crime and the apprehension of criminals.

This reasoning was later accepted by Lord Parker C.J. himself in the Divisional Court in Sneddon v. Stevenson [1967] 1 W.L.R. 1051, another clear case of incitement, as had been both Brannan v. Peek[1948] 1 K.B. 68 and Reg. v. Murphy [1965] N.I. 138. The appellant was a prostitute. She had been convicted of soliciting. She appealed on the ground that her offence had been committed as a result of the incitement by police officers and that that evidence ought not to have been admitted. The Divisional Court dismissed the appeal. After referring to what Lord MacDermott C.J. had said in Reg. v. Murphy [1965] N.I. 138, Lord Parker C.J. said, at pp. 1057-58:

"No doubt action of this sort should not be employed unless it is genuinely thought by those in authority that it is necessary, having regard to the nature of the suspected offence or the circumstances in the locality. But if it is done for one or other of those reasons, then I myself can see no ground for setting aside a conviction

obtained on such evidence or, as in Murphy's case, excluding the evidence itself."

Thus far, therefore, there is clear authority that the mere fact that evidence is produced by police participation in an offence is of itself no ground for its exclusion. Such evidence is admissible because it is both relevant and probative. The fact that in none of these cases cited thus far has any such evidence been excluded either as a matter of law or as a matter of judicial discretion, even when it has been obtained by illegal means, strongly suggests to us either that there is in law no discretion to exclude it, or if there be such a discretion, it would be a wrong exercise of that discretion to exclude that evidence merely because it had been obtained through the medium of informers or police officers inciting the commission of the offence charged in the course of an authorised course of investigating suspected crime.

We turn next to the trilogy of cases in which this court has had recently to consider the position of informers, Reg. v. Birtles [1969] 1 W.L.R. 1047, Reg. v. McCann (1971) 56 Cr.App.R. 359, and Reg. v. McEvilly, 60 Cr.App.R. 150. It is important to observe that in each of these three cases the court was concerned with and only with an appeal against sentence. The judgments in each case touch upon the question of evidence obtained from or through informers. In Birtles's case Lord Parker C.J., at pp. 1049-1050, emphasised the importance of seeing:

"so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed. It is one thing for the police to make use of information concerning an offence that is already laid on. In such a case the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the

offence or indeed for a police officer himself to do so. But it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out."

Both in Reg. v. Birtles [1969] 1 W.L.R. 1047 and in Reg. v. McCann, 56 Cr.App.R. 359 the court reduced the sentences, treating the possibility of the appellant having been incited to commit the crime charged as operating in mitigation of sentence, but no more.

Some reliance was placed upon a passage in the judgment in Reg. v. McEvilly, 60 Cr.App.R. 150, 153:

"There is no doubt, in the view of this court, but that that evidence was admissible. The fact that the evidence was admissible does not, of course, of necessity involve that it should be placed before the jury. It is well established that in certain classes of case evidence may be admissible: yet its probative value may be minimal and its prejudicial effect enormous. In such cases a judge, in the interests

of securing a fair trial and of avoiding prejudice against a defendant, should exercise the discretion which he has to exclude such evidence."

But this passage was, we think, intended as no more than a general reference to the Noor Mohamed v. The King [1949] A.C. 182 and Harris v. Director of Public Prosecutions [1952] A.C. 694 line of case. Had more been intended, this court could hardly have expressed the disapproval which it did in the following paragraph of the two Crown Court decisions there referred to where the trial judges respectively concerned "acting upon some suggested principle of alleged unfairness which it is not easy to follow" had excluded evidence obtained through informers and thus brought about the acquittal of the persons charged.

The next case in this series is Reg. v. Mealey, 60 Cr.App.R.59, to which reference has already been made. This was an appeal against conviction as well as against sentence. This court there followed and approved the decision in Reg. v. McEvilly, 60 Cr.App.R. 150 and, after holding that there was no doctrine of entrapment in English law, Lord Widgery C.J. went on to say, at pp. 63-64:

"I must, in deference to Mr. Solley's argument, say a word or two about why, in our judgment, it is not helpful in the result to his client. Mr. Solley insisted... that this was really a question of evidence which was unfairly obtained. He cited a number of authorities to us, some of which are known to the court anyway, which do establish a general proposition that a judge in an English criminal trial has a wide discretion to exclude evidence unfairly obtained. But the point of the present application has nothing to do with evidence unfairly obtained. The only way in which the matters were put before us by Mr. Solley, or could have been put before us, was on the footing that the activity itself was provoked by a police informer acting as agent provocateur. That is the only point, and the authorities to which Mr. Solley has drawn our attention are in the main unhelpful on what we see as the only real point in this case."

Lord Widgery C.J., after referring both to Reg. v. Murphy [1965] N.I. 138 and to Brannan v. Peek [1948] 1 K.B. 68, went on, at p. 64:

"Nothing which the court has said today is to be taken as in any way approving the action of agents provocateurs when their conduct crosses the line to which I have already referred. One must recognise that up to a point infiltrators must show sympathy with an encouragement of the group into which they have infiltrated themselves; but no-one who read Lord Goddard C.J.'s words about the dislike for such agents in this country should think

that the attitude of the courts towards agents provocateurs is different in principle from what it was then."

Thus Lord Widgery C.J. was seemingly saying that the Noor Mohamed v. The King [1949] A.C. 182 and Harris v. Director of Public Prosecutions[1952] A.C. 694 line of cases was unhelpful when considering the evidence, plainly admissible, which was obtained from or through

informers. He repeated what had been said before regarding distaste for activities of this kind, but plainly recognising them as a disagreeable necessity at the present time.

This decision strongly suggests that not only is such evidence admissible but that the cases where the courts have exercised a discretion to exclude evidence are of little, if any, assistance when considering whether evidence obtained by or through informers is to be admitted.

We turn to the most recent of these cases, Jeffrey v. Black [1978] Q.B. 490, a decision of the Divisional Court. In this case the police had acted illegally in searching the respondent's room without his consent and there found drugs. He was charged with drug offences on the basis of evidence thus illegally obtained. The justices had excluded the evidence. The Divisional Court allowed an appeal by the prosecutor on the ground that the evidence, however obtained, was relevant and therefore admissible, and ordered the case to be remitted for trial before another bench of justices. The court applied what had been said in Kuruma v. The Queen [1955] A.C. 197. It accepted the existence of a discretion but held that the justices had wrongly exercised it. Lord Widgery C.J., after referring to Kuruma's case, said, at pp. 497-498:

"But that is not in fact the end of the matter because the justices sitting in this case, like any other tribunal dealing with criminal matters in England and sitting under English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think that it would be unfair or oppressive to allow that to be done. In getting an assessment of what this discretion means, justices ought, I think, to stress to themselves that the discretion is not a discretion which arises only in drug cases. It is not a discretion which arises only in cases where police can enter premises. It is a discretion which every judge has all the time in respect of all the evidence which is tendered by the prosecution. It would probably give justices some idea of the extent to which this discretion is used if one asks them whether they are appreciative of the fact that they have the discretion anyway, and it may well be that a number of experienced justices would be quite ignorant of the possession of this discretion. That gives them, I hope, some idea of how relatively rarely it is exercised in our courts. But if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they had misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial. I cannot stress the point too strongly that this is a very exceptional situation, and the simple, unvarnished fact that evidence was obtained by police officers who have gone in without bothering to get a search warrant is not enough to justify the justices in exercising their discretion to keep the evidence out."

Thus, this is yet another case in which it has been held wrong to exclude evidence illegally or unfairly obtained whilst asserting the existence of a

discretion to be exercised in some exceptional case. But, with great respect, if the test whether or not a case is exceptional is that stated in this passage by Lord Widgery C.J., one asks why it is that the alleged discretion has almost invariably been exercised so as to admit the evidence and that when, as in Jeffrey v. Black [1978] Q.B. 490, a lower court had

excluded the evidence, the Divisional Court had nonetheless held as a matter of law that it ought to have been admitted. The Divisional Court does not appear to have been reminded by counsel of what had been said earlier in Reg. v. Mealey, 60 Cr.App.R. 59.

The only case cited to us where the so-called discretion has been exercised in favour of the accused is Reg. v. Payne [1963] 1 W.L.R. 637. The appellant was charged with driving a car whilst under the influence of drink. He was convicted. He had consented to be examined by a doctor in order to see whether he was ill or disabled. That doctor was called by the Crown to give evidence that the appellant was under the influence of drink. The trial judge had admitted the evidence. The conviction was quashed. The report in the Criminal Appeal Reports shows (as other reports of this case do not) that counsel for the Crown conceded the existence of a discretion to exclude this evidence. The conviction was quashed on the ground that the evidence, though admissible, ought not to have been admitted, because if the appellant had realised that the doctor would give evidence, he might not have consented to the examination taking place.

With profound respect to the court in question, we find this reasoning difficult to follow in principle. If it were a ground for exclusion that the appellant might have acted differently had he been aware of the fact that the result of the examination might be used in evidence against him, it is difficult to see why the same principle should not have been applied in, say, Reg. v. Murphy [1965] N.I. 138 where the evidence was obtained by a trick, or in Kuruma v. The Queen [1955] A.C. 197 or in Jeffrey v. Black [1978] Q.B. 490 where it had been obtained illegally. The test cannot logically be different according to the gravity of the crime under investigation, with one test for murder or terrorism and another for the perhaps less serious offence of drunken driving.

We find it difficult to put the decision in Reg. v. Payne [1963] 1 W.L.R. 637 into the general pattern which we believe the cases which we have cited demonstrate. We say this with respectful diffidence, not only in view of the constitution of the court concerned in Payne's case, but because in King v. The Queen [1969] 1 A.C. 304, the Judicial Committee, at p. 317, treated Payne's case as authority for the broad proposition that a judge has a discretion to exclude evidence unfairly obtained. In the immediately preceding passage, at p. 316, however, the Judicial Committee relied upon Noor Mohamed v. The King [1949] A.C. 182, Harris v. Director of Public Prosecutions [1952] A.C. 694 and also Kuruma v. The Queen [1955] A.C. 197 as authority for this proposition, a view which, if our analysis of those cases be correct, is, with great respect, difficult to accept. Moreover, in King v. The Queen[1969] 1 A.C. 304 counsel for the Crown appears to have accepted that this discretion existed: see p. 305. Certainly King's case is yet another

example of a case, like Kuruma v. The Queen [1955] A.C. 197 and Reg. v. Murphy [1965] N.I. 138, where the court, whilst asserting the existence of the alleged discretion, has not applied it in circumstances in which the evidence had been obtained not merely unfairly but also illegally.

It must be remembered that many of the cases to which we have been referred were decided before it was finally held that the doctrine of entrapment had no place in English law. Mr. Denison for the Crown urged that to uphold the defendants' contention would be to reintroduce that doctrine by, as it were, a back door. If entrapment, which means no more than that a person has been induced by an informer or a police officer to commit a crime which would not otherwise have been committed, affords no defence, it is in our view impossible to assert the existence of some rule of law or of some judicial discretion which, if exercised so as to exclude the evidence in question, must produce precisely the same result as if the doctrine of entrapment were available to afford the accused person a defence in law to the charge against him.

During the argument of the appeal the example was given of a police officer who infiltrated a

terrorist organisation, maybe at great personal risk to himself. The organisation, realising that detection was imminent, decide to move a quantity of explosives from its present hiding place. The police officer, believing, as a result of his infiltration, that a particular householder somewhere in a London suburb was a secret sympathiser with the terrorists and would be a willing recipient of the explosives for safe custody, himself takes the explosives to that person's house. The householder then willingly receives the explosives. Subsequently he is arrested and sought to be convicted on the basis of the police officer's own evidence. It is beyond question that the householder would not have committed the offence charged but for the action of the officer who himself in this example would have committed two offences, one of possessing, albeit for a short time, the explosives in question, the other of inciting the householder to take possession of the explosives. Can it in such a case be seriously argued that that officer's evidence is inadmissible or that a discretion exists to exclude it? The officer has committed a crime. He has caused a crime to be committed which would not otherwise have been committed. He has been guilty of deception. He has obtained evidence against the householder by a trick. Few perhaps would regard his actions as morally reprehensible, or as otherwise than an essential step in the detection of a serious crime. Subjective judicial views of what is morally permissible or reprehensible are an unsafe guide to the administration of the criminal law and to the proper exercise of judicial discretion.

Mr. Giovene made an eloquent appeal to us to appreciate that to hold that such evidence was admissible or that no discretion could properly be exercised in such circumstances so as to exclude such evidence, was for this court to abdicate its proper function of standing between possible oppressive action by the police on the one hand and an accused person in peril on the other. Such an appeal can never be allowed to fall on deaf judicial ears. But other safeguards and sanctions

are available to protect accused persons from such oppression without the courts arrogating to themselves the right to determine if a particular prosecution should proceed. A police officer who goes too far may himself be prosecuted for the crime which he has committed or for inciting another to commit a crime. Or he may be disciplined. Or if he enters premises illegally or searches a person or his property illegally he may be held liable for damages for trespass. Experience shows that expressions of judicial disapproval when justified are not without their effect as a deterrent to reprehensible or arbitrary police behaviour. Moreover, in a proper case the courts can always mitigate the penalty, as was done in Reg. v. Birtles [1969] 1 W.L.R. 1047 and Reg. v. McCann, 56 Cr.App.R. 359. But whilst ever anxious to protect an accused person against the risks of oppression, a judge cannot, we think, take upon himself the responsibility for investigating the propriety of the conduct of police officers or other people, otherwise than in relation to the admissibility of alleged confessions or admissions, at a trial within a trial, still less of passing a necessarily subjective judgment on the ethics of the police or the prosecution, a judgment from which the prosecution has no right of appeal. We venture to repeat and adopt what Lord MacDermott C.J. said in this connection in Reg. v. Murphy [1965] N.I. 138, 147. What he said was the position in 1965 is unhappily equally true today.

It is for these reasons we find ourselves, with respect, unable to agree with the reasoning which led Judge Gillis to rule as he did in Reg. v. Ameer and Lucas [1977] Crim.L.R. 104. We think that Judge Buzzard's ruling in the present case was correct. In conclusion it may assist if we summarise our views as follows.

1. The statements in Noor Mohamed v. The King [1949] A.C. 182 and in Harris v. Director of Public Prosecutions [1952] A.C. 694 were directed to principles applicable to the cases there in question, namely "similar fact" cases where the question was whether evidence of little probative value but of highly prejudicial effect should be admitted.

2. The courts have and always have had power to exclude such evidence since it is always the duty of the court to safeguard an accused person against the risk of wrongful conviction

in consequence of the admission of evidence of that kind, as it is in the case of confessions seemingly improperly obtained.

3. That principle operates to qualify the otherwise absolute rule that evidence which is relevant is admissible, however that evidence is obtained and whether illegally, unfairly, by trick or other misrepresentation.

4. That qualification does not, however, justify a judge in refusing to admit evidence of obvious probative value because it has been obtained through the activities of a police officer or an informer, or because the offence charged would not or might not have been committed but for those activities, and a judge in our judgment has no discretion to refuse to admit such evidence.

5. To hold otherwise would be to reintroduce into English law the defence of entrapment which it has now been held has no place in our legal system.

6. Wide words have from time to time been used suggesting the existence of some discretionary power to exclude evidence of the kind referred to under 4 above. Such language has, with respect, sometimes been based upon a misunderstanding of, and of the limits of, what was said in Noor Mohamed v. The King [1949] A.C. 182, Harris v. Director of Public Prosecutions [1952] A.C. 694 and in other comparable cases.

7. The fact that despite the use of such wide words, no case save Reg. v. Payne [1963] 1 W.L.R. 637 has been cited to us in which such a discretion has been exercised in favour of excluding evidence of this kind raises doubts in our minds whether such a discretion can truly be said to exist; if the principle upon which such discretion could be exercised is that stated in some of the cases, one would have thought that that discretion must have been exercised the other way in, for example, Kuruma v. The Queen [1955] A.C. 197, Reg. v. Murphy [1965] N.I. 138, King v. The Queen [1969] 1 A.C. 304 and Jeffrey v. Black [1978] Q.B. 490.

8. If, however, there is a residual discretion of the kind contended for, it can, we think, only be where the actions of the prosecution amount to an abuse of the process of the court and are oppressive in that sense. All courts have an inherent jurisdiction to protect their process against abuse from any quarter. But in the instant case and in the cases cited, the evidence led or sought to be led fell very far short of being oppressive in that sense. Compare the views of Lord Salmon and of Lord Edmund-Davies in Reg. v. Humphrys [1977] A.C. 1 and of Lord Devlin in Connelly v. Director of Public Prosecutions [1964] A.C. 1254, 1360. It will have been observed that the word "oppressive" occurs in a number of the citations we have made.

9. If a court is satisfied that a crime has been committed which in truth would not have been committed but for the activities of the informer or of police officers concerned, it can, if it thinks it right so to do, mitigate the penalty accordingly.

We would add for the sake of completeness that we have been referred to part of Law Commission Report on Defences of General Application (Law Com. No. 83) dated July 28, 1977, paragraphs 5.7 to 5.21, which discuss the cases we have analysed in this judgment. Paragraph 5.20 reads thus:

"It is clear from this review of the law that no defence of entrapment exists in English law. It is less clear to what extent there is a discretion in the courts, by exclusion of evidence, to bring about the same result as a general defence of entrapment would achieve. But we think that this lack of clarity is due to a failure to distinguish between causing, by incitement and encouragement, the commission of an offence which would not otherwise have been committed, and obtaining evidence unfairly of an offence which had already been committed. It is evident that the first does not provide a defence; the second, despite the attempts to use the discretion, is not, we think, relevant in cases of entrapment such as we are here

considering. Save as a matter to be taken into account in sentencing, it would not, therefore,

seem that the improper conduct of the police or informers acting as agents provocateurs can, in English law, properly assist a defendant. If this view of the law is correct, the courts cannot, by ruling either as to substantial merits or as to the admission of evidence, exercise that indirect control of police activity which has been thought desirable in other jurisdictions. But they no doubt exercise a substantial influence by the strong expressions of judicial disapproval referred to in the previous paragraphs of this report, and in very flagrant cases they can, and generally do, order that the papers be passed to the Director of Public Prosecutions."

We have carefully considered the suggested distinction between causing by incitement and encouragement the commission of an offence which would not otherwise have been committed and obtaining evidence unfairly of an offence which has already been committed. Indeed Mr. Denison relied upon this suggested distinction in support of his arguments. But we respectfully suggest that this is rather a valiant attempt to rationalise decisions which are not easily susceptible of rationalisation with one another, than a statement of a principle that can be logically supported. In each type of case an offence has allegedly been committed and in each case the question should be: is the Crown entitled to seek to prove the commission of the offence by leading the evidence which is objected to? In each case in our view the answer is "Yes," if that evidence be relevant and not only of minimal probative value, subject only to the possible residual power to exclude it in the circumstances we have postulated in proposition 8 above. We have, however, reached the same conclusion as that expressed in this paragraph as to the present state of the law. The appeals are dismissed.

JUDGMENTBY-2: LORD DIPLOCK

JUDGMENT-2:
LORD DIPLOCK: My Lords, the appellant was indicted at the Old Bailey before Judge Buzzard and a jury for conspiracy to utter counterfeit American bank notes. On his arraignment he pleaded not guilty to the charge and, in the absence of the jury, alleged, through his counsel, that he had been induced to commit the offence by an informer acting on the instructions of the police, and that, but for such persuasion, he would not have committed any crime of the kind with which he was charged. Faced, as he was, by recent decisions of the Criminal Division of the Court of Appeal that "entrapment" is no defence in English law (Reg. v. McEvilly (1973) 60 Cr.App.R. 150; Reg.

v. Mealey (1974) 60 Cr.App.R. 59), counsel for the appellant sought to achieve by a different means the same effect as if it were. He submitted that if the judge were satisfied at a "trial within a trial" that the offence was instigated by an agent provocateur acting on the instructions of the police and, but for this, would not have been committed by the accused, the judge had a discretion to refuse to allow the prosecution to prove its case by evidence.

In support of this submission counsel was able to cite a number of dicta from impressive sources which, on the face of them, suggest that judges have a very wide discretion in criminal cases to exclude evidence tendered by the prosecution on the ground that it has been unfairly obtained. In addition there is one actual decision of the Court of Criminal Appeal in Reg. v. Payne [1963] 1 W.L.R. 637 where a conviction was quashed upon the ground that the judge ought to have exercised his discretion to exclude admissible evidence upon that ground - though this was not a case of entrapment. Moreover there had also been a recent decision at the Central Criminal Court (Reg. v. Ameer and Lucas [1977] Crim.L.R. 104) in a case which did involve an agent provocateur where Judge Gillis, after a lengthy trial within a trial, had exercised his discretion by refusing to allow the prosecution to call any evidence to prove the commission of the offence by the accused.

In order to avoid what promised to be a lengthy "trial within a trial," which would be fruitless

if Judge Buzzard were to rule as a matter of law that he had no discretion to exclude relevant evidence tendered by the prosecution to prove the commission of the offence, even though it had been instigated by an agent provocateur and was one which the accused would never have committed but for such inducement, the judge first heard legal submissions on this question. He ruled that even upon that assumption he had no discretion to exclude the prosecution's evidence. In consequence of this ruling the appellant withdrew his plea of not guilty and pleaded guilty.

It is only fair to the police to point out that there never was a trial within a trial. The judge's ruling made it unnecessary to go into the facts relating to the appellant's claim that he was induced by a police informer to commit a crime of a kind which but for such persuasion he would never have committed; so no evidence was ever called to prove that there had been any improper conduct on the part of the police or of the prosecution.

The appeal to the Criminal Division of the Court of Appeal (Roskill and Ormrod L.JJ. and Park J.) was dismissed. Their judgment which was delivered by Roskill L.J. includes a helpful and wide-ranging review of the previous cases, embracing not only those in which agents provocateurs had been involved but also those in which the existence of a wide discretion in the judge to exclude any evidence tendered by the prosecution which he considered had been unfairly obtained, had been acknowledged in obiter dicta by courts of high authority. As a result of their examination of these authorities they certified as the point of law of general importance involved in their discretion, a much

wider question than is involved in the use of agents provocateurs. It is, ante, p. 424F:

"Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and of more than minimal probative value."

I understand this question as inquiring what are the circumstances, if there be any, in which such a discretion arises; and as not being confined to trials by jury. That the discretion, whatever be its limits, extended to whoever presides in a judicial capacity over a criminal trial, whether it be held in the Crown Court or in a magistrates' court, was expressly stated by Lord Widgery C.J. in Jeffrey v. Black [1978] Q.B. 490, an appeal by the prosecution to a Divisional Court by way of case stated from magistrates who had exercised their discretion to exclude evidence of possession of drugs that had been obtained by an illegal search of the accused's room by the police. The Divisional Court held that the magistrates had exercised their discretion wrongly in the particular case; but Lord Widgery C.J., while stressing that the occasions on which the discretion ought to be exercised in favour of excluding admissible evidence would be exceptional, nevertheless referred to it as applying to "all the evidence which is tendered by the prosecution" and described its ambit in the widest terms, at p. 498:

"... if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial."

One or other of the various dyslogistic terms which Lord Widgery uses to describe the kind of conduct on the part of the police that gives rise to judicial discretion to exclude particular pieces of evidence tendered by the prosecution can be found in earlier pronouncements by his predecessor Lord Parker C.J., notably in Callis v. Gunn [1964] 1 Q.B. 495, 502, where he adds to them false representations, threats and bribes; while unfairness and trickery are referred to in dicta to be found in a judgment of the Privy Council in Kuruma v. The Queen [1955] A.C. 197, 204, the case which is generally regarded as having first suggested the existence of a wide judicial discretion of this kind. What is unfair, what is trickery in the

context of the detection and prevention of crime, are questions which are liable to attract highly subjective answers. It will not have come as any great surprise to your Lordships to learn that those who preside over or appear as advocates in criminal trials are anxious for guidance as to whether the discretion really is so wide as these imprecise expressions would seem to suggest and, if not, what are its limits. So, although it may not be strictly necessary to answer the certified question in its full breadth in

order to dispose of the instant appeal I think that your Lordships should endeavour to do so.

Before turning to that wider question however, I will deal with the narrower point of law upon which this appeal actually turns. I can do so briefly. The decisions in Reg. v. McEvilly, 60 Cr.App.R. 150 and Reg. v. Mealey, 60 Cr.App.R. 59 that there is no defence of "entrapment" known to English law are clearly right. Many crimes are committed by one person at the instigation of others. From earliest times at common law those who counsel and procure the commission of the offence by the person by whom the actus reus itself is done have been guilty themselves of an offence, and since the abolition by the Criminal Law Act 1967 of the distinction between felonies and misdemeanours, can be tried, indicted and punished as principal offenders. The fact that the counsellor and procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in his case.

My Lords, this being the substantive law upon the matter, the suggestion that it can be evaded by the procedural device of preventing the prosecution from adducing evidence of the commission of the offence does not bear examination. Let me take first the summary offence prosecuted before magistrates where there is no practical distinction between a trial and a "trial within a trial." There are three examples of these in the books, Brannan v. Peek [1948] 1 K.B. 68; Browning v. 1. W. H. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172; Sneddon v. Stevenson [1967] 1 W.L.R. 1051. Here the magistrates in order to decide whether the crime had in fact been instigated by an agent provocateur acting upon police instructions would first have to hear evidence which ex hypothesi would involve proving that the crime had been committed by the accused. If they decided that it had been so instigated, then, despite the fact that they had already heard evidence which satisfied them that it had been committed, they would have a discretion to prevent the prosecution from relying on that evidence as proof of its commission. How does this differ from recognising entrapment as a defence - but a defence available only at the discretion of the magistrates?

Where the accused is charged upon indictment and there is a practical distinction between the trial and a "trial within a trial," the position, as it seems to me, would be even more anomalous if the judge were to have a discretion to prevent the prosecution from adducing evidence before the jury to prove the commission of the offence by the accused. If he exercised the discretion in favour of the accused he would then have to direct the jury to acquit. How does this differ from recognising entrapment as a defence - but a defence for which the necessary factual foundation is to be found not by the jury but by the judge and even where the factual foundation is so found, the defence is available only at the judge's discretion.

My Lords, this submission goes far beyond a claim to a judicial discretion to exclude evidence that has been obtained unfairly or by trickery; nor in any of the English cases on agents provocateurs that have come before appellate courts has it been suggested that it exists.

What it really involves is a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge. The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to

acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence. Nevertheless the existence of such a discretion to exclude the evidence of an agent provocateur does appear to have been acknowledged by the Courts-Martial Appeal Court of Northern Ireland in Reg. v. Murphy [1965] N.I. 138. That was before the rejection of "entrapment" as a defence by the Court of Appeal in England; and Lord MacDermott C.J. in delivering the judgment of the court relied upon the dicta as to the existence of a wide discretion which appeared in cases that did not involve an agent provocateur. In the result he held that the court-martial had been right in exercising its discretion in such a way as to admit the evidence.

I understand your Lordships to be agreed that whatever be the ambit of the judicial discretion to exclude admissible evidence it does not extend to excluding evidence of a crime because the crime was instigated by an agent provocateur. In so far as Reg. v. Murphy suggests the contrary it should no longer be regarded as good law.

I turn now to the wider question that has been certified. It does not purport to be concerned with self incriminatory admissions made by the accused himself after commission of the crime though in dealing with the question I will find it necessary to say something about these. What the question is concerned with is the discretion of the trial judge to exclude all other kinds of evidence that are of more than minimal probative value.

Recognition that there may be circumstances in which in a jury trial the judge has a discretion to prevent particular kinds of evidence that is admissible from being adduced before the jury, has grown up piecemeal. It appears first in cases arising under proviso (f) of section 1 of the Criminal Evidence Act 1898, which sets out the circumstances in which an accused may be cross-examined as to his previous convictions or bad character. The relevant cases starting in 1913 with Rex v. Watson (1913) 109 L.T. 335 are conveniently cited in the speech of Lord Hodson in Reg. v. Selvey [1970] A.C. 304, a case in which this House accepted that in such cases the trial judge had a discretion to prevent such cross-examination, notwithstanding that it was strictly admissible under the statute, if he was of opinion that its prejudicial effect upon the jury was likely to outweigh its probative value.

Next the existence of a judicial discretion to exclude evidence of "similar facts," even where it was technically admissible, was recognised by Lord du Parcq, delivering the opinion of the Privy Council in Noor Mohamed v. The King [1949] A.C. 182, 192. He put the grounds which justified its exercise rather more narrowly than they had been put in the "previous conviction" cases to which I have been

referring; but in Harris v. Director of Public Prosecutions [1952] A.C. 694, 707, Viscount Simon, with whose speech the other members of this House agreed, said that the discretion to exclude "similar facts" evidence should be exercised where the "probable effect" (sc. prejudicial to the accused) "would be out of proportion to its true evidential value."

That phrase was borrowed from the speech of Lord Moulton in Rex v. Christie [1914] A.C. 545, 559. That was neither a "previous conviction" nor a "similar facts" case, but was one involving evidence of an accusation made in the presence of the accused by the child victim of an alleged indecent assault and the accused's failure to answer it, from which the prosecution sought to infer an admission by the accused that it was true. Lord Moulton's statement was not confined to evidence of inferential confessions but was general in its scope and has frequently been cited as applicable in cases of cross-examination as to bad character or previous convictions under the Criminal Evidence Act 1898 and in "similar facts" cases. So I would hold that there has now developed a general rule of practice whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value.

Ought your Lordships to go further and to hold that the discretion extends more widely than this, as the comparatively recent dicta to which I have already referred suggest? What has been regarded as the fountain head of all subsequent dicta on this topic is the statement by Lord Goddard delivering advice of the Privy Council in Kuruma v. The Queen [1955] A.C. 197. That was a case in which the evidence of unlawful possession of ammunition by the accused was obtained as a result of an illegal search of his person. The Board held that this evidence was admissible and had rightly been admitted; but Lord Goddard although he had earlier said at p. 203 that if evidence is admissible "the court is not concerned with how the evidence was obtained," nevertheless went on to say, at p. 204:

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasised in the case before this Board of Noor Mohamed v. The King [1949] A.C. 182, and in the recent case in the House of Lords, Harris v. Director of Public Prosecutions [1952] A.C. 694. If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

Up to the sentence that I have italicised there is nothing in this passage to suggest that when Lord Goddard spoke of admissible evidence operating "unfairly" against the accused he intended to refer to any wider aspect of unfairness than the probable prejudicial effect of the evidence upon the minds of the jury outweighing its true evidential value; though he no doubt also had in mind the discretion that had long been exercised in England under the Judges' Rules to refuse to admit confessions by the accused made after the crime even though

strictly they may be admissible. The instance given in the passage I have italicised appears to me to deal with a case which falls within the latter category since the document "obtained from a defendant by a trick" is clearly analogous to a confession which the defendant has been unfairly induced to make, and had, indeed, been so treated in Rex v. Barker [1941] 2 K.B. 381 where an incriminating document obtained from the defendant by a promise of favours was held to be inadmissible.

It is interesting in this connection to observe that the only case that has been brought to your Lordships' attention in which an appellate court has actually excluded evidence on the ground that it had been unfairly obtained (Reg. v. Payne [1963] 1 W.L.R. 637) would appear to fall into this category. The defendant, charged with drunken driving, had been induced to submit himself to examination by a doctor to see if he was suffering from any illness or disability, upon the understanding that the doctor would not examine him for the purpose of seeing whether he were fit to drive. The doctor in fact gave evidence of the defendant's unfitness to drive based upon his symptoms and behaviour in the course of that examination. The Court of Criminal Appeal quashed the conviction on the ground that the trial judge ought to have exercised his discretion to exclude the doctor's evidence. This again, as it seems to me, is analogous to unfairly inducing a defendant to confess to an offence, and the short judgment of the Court of Criminal Appeal is clearly based upon the maxim nemo debet prodere se ipsum.

In no other case to which your Lordships' attention has been drawn has either the Court of Criminal Appeal or the Court of Appeal allowed an appeal upon the ground that either magistrates in summary proceedings or the judge in a trial upon indictment ought to have exercised a discretion to exclude admissible evidence upon the ground that it had been obtained unfairly or by trickery or in some other way that is morally reprehensible; though they cover a wide gamut of apparent improprieties from illegal searches, as in Kuruma v. The Queenitself and in Jeffrey v. Black [1978] Q.B. 490 (which must be the high water mark of this kind of illegality) to the clearest cases of evidence obtained by the use of agents provocateur. Of the latter an outstanding example is to be found in Browning v. J. W. H. Watson (Rochester) Ltd.[1953] 1 W.L.R. 1172 where Lord Goddard C.J. remitted the case to

the magistrates with a direction that the offence had been proved, but pointedly reminded them that it was open to them to give the defendant an absolute discharge and to award no costs to the prosecution.

Nevertheless it has to be recognised that there is an unbroken series of dicta in judgments of appellate courts to the effect that there is a judicial discretion to exclude admissible evidence which has been "obtained" unfairly or by trickery or oppressively, although except in Reg. v. Payne [1963] 1 W.L.R. 637, there never has been a case in which those courts have come across conduct so unfair, so tricky or so oppressive as to justify them in holding that the discretion ought to have been exercised in favour of exclusion. In every one of the cases to which your Lordships have been referred where such dicta appear, the source

from which the evidence sought to be excluded had been obtained has been the defendant himself or (in some of the search cases) premises occupied by him; and the dicta can be traced to a common ancestor in Lord Goddard's statement in Kuruma v. The Queen [1955] A.C. 197 which I have already cited. That statement was not, in my view, ever intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence upon the minds of the jury that would be out of proportion to its true evidential value; and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect. As a matter of language, although not as a matter of application, the subsequent dicta go much further than this; but in so far as they do so they have never yet been considered by this House.

My Lords, I propose to exclude, as the certified question does, detailed consideration of the role of the trial judge in relation to confessions and evidence obtained from the defendant after commission of the offence that is tantamount to a confession. It has a long history dating back to the days before the existence of a disciplined police force, when a prisoner on a charge of felony could not be represented by counsel and was not entitled to give evidence in his own defence either to deny that he had made the confession, which was generally oral, or to deny that its contents were true. The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is, in my view, now to be found in the maxim nemo debet prodere se ipsum, no one can be required to be his own betrayer or in its popular English mistranslation "the right to silence." That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.

Outside this limited field in which for historical reasons the function of the trial judge extended to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats, favour or trickery to provide evidence against himself, your Lordships should, I think, make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.

A fair trial according to law involves, in the case of a trial upon indictment, that it should take place before a judge and a jury; that the case against the accused should be proved to the satisfaction of the jury

beyond all reasonable doubt upon evidence that is admissible in law; and, as a corollary to this, that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled and the jury receive correct instructions from the judge as to the law applicable to the case, the requirement that the accused should have a fair trial according to law is, in my view, satisfied; for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason. If your Lordships so hold you will be reverting to the law as it was laid down by Lord Moulton in Rex v. Christie [1914] A.C. 545, Lord du Parcq in Noor Mohamed v. The King [1949] A.C. 182 and Viscount Simon in Harris v. Director of Public Prosecutions [1952] A.C. 694 before the growth of what I believe to have been a misunderstanding of Lord Goddard's dictum in Kuruma v. The Queen [1955] A.C. 197.

I would accordingly answer the question certified in terms which have been suggested by my noble and learned friend, Viscount Dilhorne, in the course of our deliberations on this case. (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur. I would dismiss this appeal.

JUDGMENTBY-3: VISCOUNT DILHORNE

JUDGMENT-3:
VISCOUNT DILHORNE: My Lords, the Court of Appeal (Criminal Division) (Roskill and Ormrod L.JJ. and Park J.) when dismissing the appellant's appeal from the ruling of Judge Buzzard, certified that the following point of law of general public importance was involved, ante, p. 424F:

"Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances" (my emphasis) "in which such evidence is relevant and of more than minimal probative value."

Judge Buzzard had ruled that, if he had discretion to refuse to admit evidence for the prosecution to prove the offences charged, which, he was prepared to assume for the purpose of the submissions made to him, the appellant had been induced to commit by an agent provocateur and which would not otherwise have been committed, it would be inappropriate to exercise it in this case. He doubted whether he had discretion to refuse

to admit relevant admissible evidence on the ground that it had been unfairly obtained.

So if the question certified is answered in the affirmative, it would have made no difference to Judge Buzzard's decision. On his rejection of the submissions the appellant pleaded guilty to the first count of the indictment charging him with conspiracy to utter counterfeit bank notes and was sentenced to 18 months' imprisonment, a sentence which, we were told, he has now served.

In Reg. v. Ameer and Lucas [1977] Crim.L.R. 104 Judge Gillis held that he had a discretion to

exclude evidence which had been obtained as a result of the activities of an agent provocateur; and in the exercise of that discretion, he ruled that the evidence for the prosecution was inadmissible with the result that the accused were acquitted of serious charges. A similar course was taken in Reg. v. Foulder [1973] Crim. L.R. 45 and in Reg. v. Burnett [1973] Crim.L.R. 748.

One of the questions to be decided in this appeal is whether these cases were rightly decided. If they were, it means, to quote from Judge Buzzard's ruling, that

"facts which afford no defence to the charge should nevertheless require the judge to secure the defendant's acquittal before any evidence is heard by the jury."

If the answer to the question certified is that a judge has not a general and unfettered discretion to exclude relevant admissible evidence, has he discretion to do so in some circumstances; and, if so, what are those circumstances and what are the criteria on which the exercise of that discretion should be based? These appear to me to be the questions to be resolved in this appeal.

That a judge has such a discretion in some circumstances is now established beyond all doubt. He can refuse to allow the cross-examination of an accused as to character when the provisions of the Criminal Evidence Act 1898 would permit it and he can refuse to allow the prosecution to call evidence tending to prove the commission of offences other than those charged. In my opinion these are not the only cases in which he has that discretion. He can in my opinion disallow the use in any trial of admissible relevant evidence if in his opinion its use would be accompanied by effects prejudicial to the accused which would outweigh its probative value.

In Reg. v. Selvey [1970] A.C. 304, a decision of this House which somehow escaped the attention of the Court of Appeal and of counsel, the Crown contended that a judge had no discretion to refuse to permit cross-examination as to character when the Criminal Evidence Act 1898 sanctioned it. Dealing with this contention, I said after reviewing a number of cases, at p. 341:

"In the light of what was said in all these cases by judges of great eminence, one is tempted to say, as Lord Hewart said in Rex v. Dunkley [1927] 1 K.B. 323 that it is far too late in the day even to consider the argument that a judge has no such discretion. Let it suffice for me to say that in my opinion the existence of such a discretion is now clearly established."

Lord Hodson in the same case at p. 346 said that there were two answers to the argument that a judge had no such discretion:

"First, there is a long line of authority to support the opinion that there is such a discretion to be exercised under this subsection. In the second place, what is I think more significant, there is abundant authority that in criminal eases there is discretion to exclude evidence, admissible in law, of which the prejudicial effect against the accused outweighs its probative value in the opinion of the trial judge."

And Lord Pearce at p. 360 said the discretion came

"from the inherent power of the courts to secure a fair trial for the accused or, to use the words of Viscount Simon [in Harris v. Director of Public Prosecutions [1952] A.C. 694, 707 'the duty of a judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused'."

In the "similar fact" cases of which Noor Mohamed v. The King[1949] A.C. 182 and Harris v.

Director of Public Prosecutions [1952] A.C. 694 are examples, a similar conclusion was reached. That the use of evidence of which the probative value is outweighed by its prejudicial effect should not occur appears first to have been clearly stated in Rex v. Christie [1914] A.C. 545 in the speeches of Lord Moulton and Lord Reading. That was a case in which the admissibility of a statement made in the presence of the accused had to be considered and the fact that their statements were made in that ease is a strong indication that the exercise of this power by a judge is not limited to "character" and "similar fact" cases.

I referred in Reg. v. Selvey [1970] A.C. 304 to the overriding duty of the judge to ensure that a trial is fair. His discretion to control the use of relevant admissible evidence is exercised in the discharge of this duty. It is the use of the evidence, not, save in relation to confessions and admissions by the accused, the manner in which it has been obtained with which he is concerned.

Support for this conclusion is to be found in the judgment of Lord Goddard in Kuruma v. The Queen [1955] A.C. 197 where it was contended that evidence illegally obtained was inadmissible. He rejected this contention, saying, at p. 203:

"... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained" (my emphasis.)

He went on to say, at p. 204:

"No doubt in a criminal ease the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused"

and then referred to Noor Mohamed v. The King [1949] A.C. 182 and Harris v. Director of Public Prosecutions [1952] A.C. 694. Pausing here, in view of his reference to those eases one might conclude that when he

said "operate unfairly against an accused," he meant unfairly in the sense that the prejudicial effect of the evidence outweighed its probative value; but he went on to say, at p. 204:

"If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

This instance is not an instance of evidence which a judge can exclude on account of its prejudicial effect as compared with its probative value and is not easily reconcilable with his statement that the court is not concerned with how evidence was obtained. Perhaps when he said this, Lord Goddard was thinking of admissions and confessions when the court is concerned with the manner in which they were obtained, and of the decision in Rex v. Barker [1941] 2 K.B. 381, 385 where it was held that fraudulently prepared documents produced to a tax inspector stood "on precisely the same footing as an oral or a written confession... brought into existence as the result of... a promise, inducement or threat."

In Brannan v. Peek [1948] 1 K.B. 68 Lord Goddard C.J. strongly criticised the conduct of a police officer in tricking the accused into the commission of an offence and in Browning v. J. W. H. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172, 1177, after saying, "No court in England has ever liked action by what are generally called agents provocateurs, resulting in the imposition of criminal liability" and sending the case back, holding that the offence was proved, he reminded the magistrates that they could grant an absolute discharge without making any order as to costs. If he had thought that the magistrates in their discretion could have refused to admit evidence on the ground that it was unfairly obtained and that the accused had been tricked into its commission, there can be little doubt that he would have said so in this case and also have referred to it in Brannan v. Peek [1948] 1 K.B. 68.

In Reg. v. Payne [1963] 1 W.L.R. 637 the accused was persuaded to allow himself to be examined by a doctor on being told that it was no part of the doctor's duty to examine him in order to give an opinion as to his fitness to drive. The doctor gave evidence that the accused was unfit to drive. Lord Parker C.J. held, at p. 639, that in the exercise of discretion his evidence ought not to have been admitted

"... on the basis that if the defendant realised that the doctor was likely to give evidence on that matter, he might refuse to subject himself to examination."

The accused was tricked into allowing the examination and the ratio of this decision appears to be that evidence of the result of the examination should not have been admitted without the accused's consent to an examination for that purpose. It is not, I think, necessary to decide whether that case was rightly decided. If Lord Parker based his conclusion on the reasons he gave in Callis v. Gunn [1964] 1 Q.B. 495, then I think it was wrongly decided. In Callis v. Gunn after citing Lord Goddard's statement in Kuruma v. The Queen [1955] A.C. 197 that in every

case a judge has a discretion to disallow evidence if its admission would operate unfairly against the accused, Lord Parker said, at p. 501:

"... in considering whether admissibility would operate unfairly against a defendant one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. That is the general principle."

And, at p. 502, that the overriding discretion

"... would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort."

In Jeffrey v. Black [1978] Q.B. 490 Lord Widgery C.J. expressed the same view, saying that it was open to justices to apply their discretion and to decline to allow evidence to be given if it had been obtained by police officers by trickery, oppressive conduct, unfairly or as a result of behaviour which was morally reprehensible. With great respect I do not think that these observations were correct. I have not been able to find any authority for the general principle enunciated by Lord Parker or for these statements by him and by Lord Widgery. If there is any authority for it, it conflicts with Lord Goddard's statement in Kuruma v. The Queen [1955] A.C. 197 that the court is not concerned with how evidence is obtained. If obtained in one of the ways referred to, its credibility may be impaired. That will be a matter for the jury to consider. It cannot be said that in addition to the probative value of evidence so obtained, it has a prejudicial effect such as to render the trial unfair to the accused if it is admitted.

It has been held, rightly in my opinion, that entrapment does not constitute a defence to a charge (Reg. v. McEvilly, 60 Cr.App.R. 150; Reg. v. Mealey, 60 Cr.App.R. 59). It would indeed be odd if, although proof that he was incited to commit an offence which he would not otherwise have done is no defence to a charge, he could not be convicted of the offence as a result of the exclusion of admissible evidence in the exercise of judicial discretion. In Kuruma v. The Queen [1955] A.C. 197 evidence was not held to be inadmissible because it was illegally obtained. Evidence so obtained must surely be regarded as unfairly obtained. Evidence may be obtained unfairly though not illegally but it is not the manner in which it has been obtained but its use at the trial if accompanied by prejudicial effects outweighing its probative value and so rendering the trial unfair to the accused which will justify the exercise of judicial discretion to exclude it.

Where the trial is with a jury, the judge can hear argument and decide whether or not to

exercise his discretion in the absence of the jury. In a trial in a magistrates' court, that is not possible. When considering the admissibility of any evidence, the magistrates must know what evidence it is proposed to tender. If they decide that it is inadmissible, they will ignore it in reaching their conclusion. In the same way, it falls upon them to decide whether on account of its prejudicial effect outweighing its probative value, certain evidence should

not be given. Again they will be informed of the nature of the evidence and if they rule that it should not be admitted, they no doubt will ignore it in reaching their conclusion.

I do not think that it is possible just to give an affirmative or negative answer to the question certified. My answer to it has with my consent been incorporated by my noble and learned friend, Lord Diplock, in his speech and so I need not repeat it.

In my opinion Reg. v. Ameer and Lucas [1977] Crim.L.R. 104, Reg. v. Foulder [1973] Crim.L.R. 45 and Reg. v. Burnett [1973] Crim.L.R. 748 were wrongly decided and this appeal should be dismissed.

JUDGMENTBY-4: LORD SALMON

JUDGMENT-4:
LORD SALMON: My Lords, this is a strange appeal which plainly has no hope of succeeding.

The appellant was convicted at the Central Criminal Court of conspiring with others to utter counterfeit U.S.A. banknotes knowing them to be forged and with intent to defraud.

Before the case for the Crown was opened, counsel for the accused adopted the rather strange course of applying to the trial judge to have a "trial within a trial" before the trial itself began. He asserted that if he succeeded on "the trial within the trial," the judge would be obliged to rule that the Crown could adduce no evidence against the accused and the jury would then be directed to bring in a verdict of not guilty. Counsel then explained to the judge the facts upon which he proposed to rely. They were as follows: Whilst the accused had been a prisoner in Brixton Prison, he met a fellow prisoner called Scippo who, unbeknown to the accused, was alleged to be a police informer and an agent provocateur. Shortly before the accused was about to be released, Scippo, who seemed to think (rightly) that the accused's business, or part of it, was to deal in forged banknotes, told the accused that he knew of a safe buyer of forged banknotes and that he would arrange for this buyer to get in touch with the accused by telephone. Soon after the accused left prison he was telephoned by a man who posed as a keen buyer of forged banknotes and inquired whether the accused would sell him any. The accused said that he would, and a rendezvous was arranged at which the deal was to be completed. The accused had no idea that the man with whom he had been speaking may, in fact, have been a sergeant in the police force.

The accused and some of his associates went to the rendezvous carrying with them a large number of forged U.S. $ banknotes and walked straight into a police trap. The forged notes were confiscated and the accused and his comrades were arrested.

Counsel for the accused hoped to prove the facts which he had opened by the evidence of the police sergeant and Scippo during "the trial within the trial" for which he was asking. Counsel submitted that if these facts were proved: (1) they would establish that the accused had been induced by an agent provocateur, i.e., the sergeant or Scippo or both, to commit the crime with which he was charged and which, but for the inducement, he would never have convicted, and that accordingly the law required the judge to disallow any evidence of the accused's guilt

to be called by the Crown; alternatively (2) (a) the trial judge had a discretion to reject any evidence of the offence because it had been unfairly obtained and (b) he was bound by the

authorities to exercise that discretion in the accused's favour.

The judge held, rightly, in my view, that he had no such discretion and rejected the submissions made on behalf of the accused. The accused then withdrew his plea of not guilty, pleaded guilty and was sentenced to 18 months' imprisonment.

The Court of Appeal (Criminal Division) dismissed the appellant's appeal from the trial judge's findings and the appellant now appeals to your Lordships' House.

My Lords, it is now well settled that the defence called entrapment does not exist in English law: Reg. v. McEvilly, 60 Cr.App.R. 150; Reg. v. Mealey, 60 Cr.App.R. 59. A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom. This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt - for this would amount to giving the judge the power of changing or disregarding the law. It would moreover be seriously detrimental to public safety and to law and order, if in such circumstances, the law immunised an accused from conviction. There are, however, circumstances in which an accused's punishment in such a case might be mitigated, and sometimes greatly mitigated.

It is only fair to observe that in the present case there was not a shred of evidence that the police sergeant was an agent provocateur. Even if he had been told by an informer that the accused was a hardened dealer in forged bank notes, it would, I think, have been his duty to carry out a test to discover whether this information was correct, which events show that it obviously was. No doubt, the accused would not have committed the crime of trying to sell forged bank notes to the police had he known it was the police. There can, however, be little doubt that he would have tried to sell the forged notes to anyone else whom he "considered safe."

I would now refer to what is, I believe, and hope, the unusual case, in which a dishonest policeman, anxious to improve his detection record, tries very hard with the help of an agent provocateur to induce a young man with no criminal tendencies to commit a serious crime; and ultimately the young man reluctantly succumbs to the inducement. In such a case, the judge has no discretion to exclude the evidence which proves that the young man has committed the offence. He may, however, according to the circumstances of the case, impose a mild punishment upon him or even give him an absolute or conditional discharge and refuse to make any order for costs against him. The policeman and the informer who had acted together in inciting him to commit the crime should however both be prosecuted and suitably punished. This would be a far safer and more effective way of preventing such inducements to commit crimes from being made, than a rule that no evidence should be allowed to prove that the crime in fact had been committed.

At common law the person who successfully persuades or induces

("counsels or procures") another to commit an offence has always himself been guilty of a criminal offence and, since the Criminal Law Act 1967, he can be indicted and punished as a principal offender. He is regarded as being as guilty as the man he has incited to commit the crime - and often far more culpable.

It is perhaps worth observing that the law relating to crimes caused by duress is quite different from the law relating to crimes caused by incitement. As the law now stands, a man who commits any offence under duress except murder in the first degree is entitled to a clear acquittal. I think that serious consideration should be given to reforming this branch of the law particularly in view of the mounting wave of terrorism; but this could only be done by statute. I respectfully agree with that great criminal lawyer Sir James Fitzjames Stephen when he wrote: "... compulsion by threats ought in no case whatever to be admitted as an

excuse for crime, though it may and ought to operate in mitigation of punishment in most though not in all cases." (History of the Criminal Law of England (1883) vol. 2, p. 108). The punishment would certainly vary according to the circumstances of the case; sometimes it might be minimal: see the majority judgment in Abbott v. The Queen [1977] A.C. 755.

It follows that Reg. v. Ameer and Lucas [1977] Crim.L.R. 104 which laid down that a trial judge has a discretion to exclude evidence of the accused's guilt called by the Crown because it had been improperly obtained by the activities of an agent provocateur was wrongly decided and should be overruled.

There remains the point of law which has been certified to be of general public importance thus, ante, p. 424F:

"Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?"

This question relates no doubt to an interesting and important branch of the criminal law about which a learned treatise might well be written. But, so far as this appeal is concerned, the answer to this question can only be obiter. I very much doubt the value of obiter dicta, but out of respect for your Lordships and for the Court of Appeal which has posed the question, I will deal with it shortly, without reciting in detail the authorities which your Lordships have already so thoroughly analysed.

I do not propose to comment upon the obiter dicta in Callis v. Gunn[1964] 1 Q.B. 495, 501, or in Jeffrey v. Black [1978] Q.B. 490, 498, or in any of the many other cases which attempt to define the nature of the prosecution's evidence and the circumstances in which it may be excluded in order to preserve the fairness of the trial. In my opinion, the decision as to whether evidence may be excluded depends entirely upon the particular facts of each case and the circumstances surrounding it - which are infinitely variable.

I consider that it is a clear principle of the law that a trial judge has the power and the duty to ensure that the accused has a fair trial. Accordingly, amongst other things, he has a discretion to exclude legally

admissible evidence if justice so requires: see Lord Reid's speech in Myers v. Director of Public Prosecutions [1965] A.C. 1001, 1024.

It follows that:

1. An accused cannot be convicted unless the prosecution proves his guilt beyond a reasonable doubt. To allow an accused to be convicted when there is no evidence before the court capable of proving his guilt beyond a reasonable doubt would obviously be unfair.

2. A confession by an accused which has been obtained by threats or promises is inadmissible as evidence against him, because to admit it would be unfair.

3. The judge has a discretion to exclude evidence procured, after the commission of the alleged offence, which although technically admissible appears to the judge to be unfair. The classical example of such a case is where the prejudicial effect of such evidence would be out of proportion to its evidential value. Harris v. Director of Public Prosecutions [1952] A.C. 694, 707; Kuruma v. The Queen [1955] A.C. 197; Reg. v. Selvey[1970] A.C. 304.

4. Very recently, at "a trial within a trial" an accused gave evidence (accepted as true by the judge) that a confession upon which the Crown wished to rely was forced out of him; but nevertheless the accused admitted in cross-examination that the confession was true. The

Privy Council ruled that when the trial was resumed the Crown could not offer evidence or cross-examine the accused about anything he had said at the "trial within a trial." To allow the Crown to do so would have been unfair: see Wong Kam-ming v. The Queen [**1980**] A.C. 247.

I recognise that there may have been no categories of cases, other than those to which I have referred, in which technically admissible evidence proffered by the Crown has been rejected by the court on the ground that it would make the trial unfair. I cannot, however, accept that a judge's undoubted duty to ensure that the accused has a fair trial is confined to such cases. In my opinion the category of such cases is not and never can be closed except by statute. I understand that the answer given by my noble and learned friend, Lord Diplock, to the certified question accepts the proposition which I have just stated. On that basis, I respectfully agree with that answer.

My Lords, I would dismiss the appeal.

JUDGMENTBY-5: LORD FRASER OF TULLYBELTON

JUDGMENT-5:
LORD FRASER OF TULLYBELTON: My Lords, the appellant was charged with conspiring to utter forged U.S. dollar notes. He alleged that he had been induced by an agent provocateur to commit the offence and that he would not have committed it if he had not been so induced. The appellant accepts that the doctrine commonly known as entrapment has no place in English law and therefore that his allegations, if proved, would not constitute a defence to the charge against him. The law to that effect is well established by decisions - see Reg. v. McEvilly, 60 Cr.App.R. 150 and Reg. v. Mealey, 60 Cr.App.R. 59 - the correctness of which is not challenged in this appeal. These decisions appear to me to be right in principle. The assertion by an accused person that he has been

induced by some other person to commit a crime necessarily involves admitting that he has in fact committed the crime. Ex hypothesi he must have done the necessary act and have done it intentionally in response to the inducement. All the elements, factual and mental, of guilt are thus present and no finding other than guilty would logically be possible. The degree of guilt may be modified by the inducement and that can appropriately be reflected in the sentence - see Reg. v. Birtles[1969] 1 W.L.R. 1047 and Browning v. J. W. H. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172 where Lord Goddard C.J. pointed out that the court could even grant an absolute discharge in such circumstances. That is, I believe, in accordance with common understanding; so when Eve, taxed with having eaten the forbidden fruit, replied "the serpent beguiled me," her excuse was, at most, a plea in mitigation and not a complete defence.

Nevertheless, although entrapment is not a defence and therefore not a matter for the jury to consider on the facts, it is argued for the appellant that the same result can be achieved by the judge, in the exercise of a discretion, excluding all evidence of an offence which has been procured by an agent provocateur. If that were the law, it would be very remarkable, but I am satisfied that it is not so. In my opinion there is no doubt that, whatever discretion the judge may have in his conduct of a criminal trial, it could not extend so as to allow him to exclude the evidence in a case such as the present. I reach that opinion on two grounds. First, there are several reported cases in which the courts have expressed strong disapproval of the activities of agents provocateurs without suggesting that their evidence should be excluded: see for example Brannan v. Peek [1948] 1 K.B. 68 and Browning v. J. W. H. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172. Secondly, the relevant discretion of the judge is the discretion to exclude evidence because the evidence itself is objectionable on certain grounds. But the present case does not truly raise a question of evidence at all. On the assumed facts here, the evidence against the accused would not have been obtained improperly and would not be open to any objection as evidence. The objection to admitting it

would be that the accused had been unfairly induced to commit the offence which the evidence tended to prove, and that would be in effect letting in the defence of entrapment. Accordingly I am of opinion that the evidence was rightly admitted by the learned judge in this case.

The certified question raises a much more general question as to what discretion to exclude legally admissible evidence is enjoyed by the judge at a criminal trial in England. The starting point is, in my opinion, that by the law of England all evidence which is relevant is also admissible: see Kuruma v. The Queen [1955] A.C. 197, 203, Lord Goddard. Nevertheless evidence that is admissible in law may, in certain cases, be excluded by the judge in the exercise of a discretion which he undoubtedly possesses. On such case is where evidence of "similar facts" would be admissible, for example to prove guilty intent or to exclude a defence of accident, but where the judge considers that its effect in prejudicing the jury against the accused would exceed its value in tending to prove his guilt. The judge in these circumstances has a discretion to exclude the evidence not only if its probative weight is "trifling" - see Noor Mohamed v. The King[1949] A.C. 182, 192 - but whenever its prejudicial effect would be "out

of proportion to its true evidential value" - see Harris v. Director of Public Prosecutions [1952] A.C. 694, 707, Viscount Simon quoting Lord Moulton in Rex v. Christie [1914] A.C. 545. I read the latter expression as meaning that the discretion can be exercised where the prejudicial value of the evidence would greatly exceed its probative value. Another such case is that a judge has a discretion to exclude evidence of the previous record or character of the accused and to refuse to allow him to be cross-examined as to his character notwithstanding that such evidence or cross-examination may be legally admissible under section 1 (f) (ii) of the Criminal Evidence Act 1898. In Reg. v. Selvey [1970] A.C. 304, 341, Viscount Dilhorne said that the existence of such a discretion was "now clearly established."

These cases are in my opinion examples of the exercise of a single discretion founded upon the duty of the judge to ensure that every accused person has a fair trial. That is the basis upon which it was put by Lord Goddard in Kuruma v. The Queen [1955] A.C. 197 where he said, at p. 204:

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

If there were not some underlying discretionary power it would be difficult to explain how the judges were able, when the Criminal Evidence Act 1898 came into force, to exclude legally admissible evidence of the type to which I have referred. The statute does not in terms confer a discretion.

The important question is whether the discretion (a) is limited to excluding evidence which is likely to have prejudicial value out of proportion to its evidential value or (b) extends to excluding other evidence which might operate unfairly against the accused and, if so, how far it extends. On the best consideration that I can give to the authorities, I have reached the opinion that the discretion is not limited to excluding evidence which is likely to have prejudicial effects out of proportion to its evidential value. I take first the judgment of Lord Goddard in Kuruma v. The Queen, from which I have already quoted. It is true that immediately after saying the judge has discretion to disallow evidence if the strict rules "would operate unfairly against the accused," Lord Goddard referred to the cases of Noor Mohamed v. The King [1949] A.C. 182 and Harris v. Director of Public Prosecutions [1952] A.C. 694, and might therefore seem to have had in mind only cases that would fall within alternative (a) above. But he went on as follows [1955] A.C. 197, 204:

"If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. It was

this discretion that lay at the root of the ruling of Lord Guthrie in H.M. Advocate v. Turnbull, 1951 J.C. 96. The other cases from Scotland to which their Lordships' attention was drawn, Rattray v. Rattray (1897) 25 R. 315, Lawrie v. Muir, 1950 J.C. 19 and Fairley v. Fishmongers of London, 1951 J.C. 14, all support the view that if the evidence is relevant it is admissible and the court is not concerned with how

it is obtained. No doubt their Lordships in the Court of Justiciary appear at least to some extent to consider the question from the point of view whether the alleged illegality in the obtaining of the evidence could properly be excused..."

I find this passage difficult to follow. The case of Lawrie v. Muir, 1950 J.C. 19 was one in which the court held that evidence obtained by an illegal search of the accused's business premises was not admissible,because the illegality could not be excused. With the greatest respect, the case does not seem to me to support the proposition, for which it was cited by Lord Goddard, that if evidence is relevant it is admissible. On the contrary, I think it is an application of the principle, well established in Scots criminal law, that "an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible": see Lord Justice-General Cooper at p. 27 quoting from Lord Justice-Clerk Aitchison in H.M. Advocate v. M'Guigan, 1936 J.C. 16, 18. A few lines lower down Lord Cooper said: "Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned." Nor can I agree that what lay at the root of Lord Guthrie's decision in H.M. Advocate v. Turnbull, 1951 J.C. 96 to exclude documentary evidence was that the evidence had been obtained from the accused by a trick. The case is in my opinion another example of evidence obtained from premises occupied by an accused person, by an irregularity which could not be excused. Lord Guthrie's final reason was that it was unfair to the accused to admit the evidence. He said, at pp. 103-104:

"If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of opinion that a fair trial upon these charges is rendered impossible."

The decision in H.M. Advocate v. Turnbull may be contrasted with the decision in Jeffrey v. Black [1978] Q.B. 490, 498, where it was held that the justices would not have been entitled to exclude evidence "simply because the evidence in question had been obtained by police officers who had entered [the accused's residence] without the appropriate authority." It is not particularly surprising that the two decisions may not be easily reconcilable because the law on this matter is not the same in Scotland as it is in England, as has been judicially recognised on both sides of the border: see King v. The Queen [1969] 1 A.C. 304, 315, per Lord Hodson and Chalmers v. H.M. Advocate,1954 J.C. 66, 77-78, per Lord Justice General Cooper. In Chalmers Lord Cooper (pp. 77-78) referred to "the English courts being in use to admit certain evidence which would fall to be rejected in Scotland..." But the principles of fairness to the accused applied by Lord Guthrie in H.M. Advocate v. Turnbull, 1951 J.C. 96 seems to be the same as that stated by Lord Widgery C.J. in Jeffrey v. Black[1978] Q.B. 490 where he said, at pp. 497-498:

"... the justices sitting in this case, like any other tribunal dealing with criminal matters in England and sitting under the English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think that it would be unfair or oppressive to allow that to be done."

That was the principle that seems to have been recognised by Lord Goddard in his reference to H.M. Advocate v. Turnbull, 1951 J.C. 96 and treated by him as applicable in England.

Lord Goddard's opinion in Kuruma v. The Queen [1955] A.C. was accepted by Lord Parker C.J. in Callis v. Gunn [1964] 1 Q.B. 495, who said, at p. 501:

"... as Lord Goddard C.J. points out, and indeed as is well known, in every criminal case a judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against a defendant. I would add that in considering whether admissibility would operate unfairly against a defendant one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. That is the general principle."

Later in his judgment at p. 502, Lord Parker referred to the judge's "overriding discretion."

Essentially the same principle was stated in King v. The Queen [1969] 1 A.C. 304 where Lord Hodson, giving the judgment of the Judicial Committee, said, at p. 319:

"Having considered the evidence and the submissions advanced, their Lordships hold that there is no ground for interfering with the way in which the discretion has been exercised in this case. This is not in their opinion a case in which evidence has been obtained by conduct of which the Crown ought not to take advantage. If they had thought otherwise they would have excluded the evidence even though tendered for the suppression of crime."

I recognise that there does not appear to be any decision by an appellate court in England clearly based upon an exercise of the discretion except when the excluded evidence either (1) is more prejudicial than probative or (2) relates to an admission or confession. I do not regard the case of Reg. v. Payne [1963] 1 W.L.R. 637 as an authority in favour of such a discretion. The Court of Criminal Appeal held that evidence described by Lord Parker C.J. at p. 639 as "clearly admissible" ought to have been excluded and the conviction was quashed on that ground. The evidence in question was that of a doctor relating to a medical examination of an accused person who was charged with driving a motor car under the influence of drink. The accused had been induced by a trick to permit (and, I would suppose, co-operate in) a medical examination of himself and thus to provide material for incriminating evidence by the doctor who examined him and I regard the decision as being based, at least in part, on the maxim nemo tenetur se ipsum accusare. But notwithstanding the absence of direct decision on the point, the dicta are so numerous and so authoritative that I do not think that it would be right to disregard them, or to treat them as applicable only to cases where the prejudicial effect of the evidence would outweigh its probative value. If they had been intended to have such a limited application, the references to the Scottish cases would be inexplicable. In any event, I would be against cutting down their application to that extent.

On the other hand, I doubt whether they were ever intended to apply to evidence obtained from sources other than the accused himself or from premises occupied by him. Indeed it is not easy to see how evidence obtained from other sources, even if the means for obtaining it were improper, could lead to the accused being denied a fair trial. I accordingly agree with my noble and learned friends that the various statements with regard to the discretion to which I have referred should be treated as applying only to evidence and documents obtained from an accused person or from premises occupied by him. That is enough to preserve the important principle that the judge has an overriding discretion to exclude evidence, the admission of which would prevent the accused from having a fair trial. That discretion will be preserved if the question in this appeal is answered in the way proposed in paragraph (2) at the end of the speech of my noble and learned friend, Lord Diplock, with which I agree.

The result will be to leave judges with a discretion to be exercised in accordance with their individual views of what is unfair or oppressive or morally reprehensible. These adjectives do undoubtedly describe standards which are largely subjective and which are therefore liable to variation. But I do not think there is any cause for anxiety in that. Judges of all courts are accustomed to deciding what is reasonable and to applying other standards containing a large subjective element. In exercising the discretion with which this appeal is concerned,

judges will have the benefit of the decision of this House fixing certain limits beyond which they should not go and they will also have valuable guidance of a more general nature in the opinion of Lord Widgery C.J. in Jeffrey v. Black [1978] Q.B. 490. I do not think it would be practicable to attempt to lay down any more precise rules because the purpose of the discretion is that it should be sufficiently wide and flexible to be capable of being exercised in a variety of circumstances that may occur from time to time but which cannot be foreseen.

I have referred throughout to evidence being excluded by the judge from consideration by the jury, but it follows of course that the same evidence ought to be excluded by magistrates from their own consideration in cases where they are the judges both of law and of fact.

I would dismiss the appeal, and answer the question in the way proposed by my noble and learned friend, Lord Diplock.

JUDGMENTBY-6: LORD SCARMAN

JUDGMENT-6:
LORD SCARMAN: My Lords, the certified question, though superficially concerned with the exercise of a criminal judge's discretion as to the admission of evidence, raises profound issues in the administration of criminal justice. What is the role of the judge? How far does his control of the criminal process extend? It is his duty, as we all know, to ensure that an accused has a fair trial: but what does "fair" mean in this context? And does not the prosecution also have rights which the judge may not by the exercise of his discretion override? These problems lie at the root of the criminal justice of a free society.

The drama of the common law wears two faces. The first, and sterner, face is that subject to exceptions, of which hearsay evidence is

far the most important evidence which a judge rules relevant is admissible, however obtained. "It matters not how you get it, if you steal it even, it would be admissible..." - this was the stark assertion of principle by Crompton J. in Reg. v. Leatham (1861) 8 Cox C.C 498, 501. The modern formulation of the principle is to be found in the opinion of the Judicial Committee of the Privy Council prepared by Lord Goddard C.J. in Kuruma v. The Queen [1955] A.C. 197, 203:

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

Consistently with this general rule of evidence the courts have resisted all attempts to introduce into English substantive law a defence of entrapment: Reg. v. McEvilly, 60 Cr.App.R. 150. In Reg. v. Mealey,60 Cr.App.R. 59, Lord Widgery C.J. said bluntly, at p. 62:

"It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty."

Brannan v. Peek [1948] 1 K.B. 68, Browning v. J. W. H. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172, Reg. v. Birtles [1969] 1 W.L.R. 1047, illustrate that this is the practice of the courts, even when strongly critical of police methods in the obtaining of evidence. The authorities are, my Lords, soundly based. It would be wrong in principle to import into our law a defence of entrapment. Incitement is no defence in law for the person incited to crime, even though the inciter is himself guilty of crime and may be far the more culpable. It would confuse the law and create unjust distinctions if incitement by a policeman or an official exculpated him whom they incited to crime whereas incitement by others - perhaps

exercising much greater influence - did not. There are other more direct, less anomalous, ways of controlling police and official activity than by introducing so dubious a defence into the law. The true relevance of official entrapment into the commission of crime is upon the question of sentence when its mitigating value may be high: see Reg. v. Birtles.

The second, and merciful, face of the law is the criminal judge's discretion to exclude admissible evidence if the strict application of the law would operate unfairly against the accused. Viscount Simon so described the discretion in Harris v. Director of Public Prosecutions[1952] A.C. 694, but immediately proceeded to limit its scope. He said, at p. 707:

"If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect 'would be out of proportion to its true evidential value' (per Lord Moulton in Rex v. Christie [1914] A.C. 545, 559 Such an intimation rests entirely within the discretion of the judge."

In this passage Lord Simon was certainly not envisaging a power in the judge to stop the prosecution prosecuting, or presenting admissible evidence in support of its case. He was speaking not of judicial power but of judicial influence; of a judicial practice, not a rule of law. In so limiting the discretion he was agreeing with the views expressed by this House in Rex v. Christie [1914] A.C. 545, and in no way differing from the famous interjection of Lord Halsbury L.C. (reported only in the Criminal Appeal Reports, 10 Cr.App.R. 141, 149) that he:

"must protest against the suggestion that any judge has the right to exclude evidence which is in law admissible, on the ground of prudence or discretion, and so on."

I do not review the authorities as to the existence and scope of the discretion: for the task has already been done by others of your Lordships and by the Court of Appeal. There is also a valuable review of the law by the Law Commission: Law Com. 83 (Criminal Law. Report on Defences of General Application) (1977), paras. 5.7 to 5.20. The problem is, however, complex. Is there one discretion or are there several? What is the scope of it (or each of them)? Upon what principles should the discretion be exercised in modern conditions?

In my judgment, certain broad conclusions emerge from a study of the case law. They are:

(1) that there is one general discretion, not several specific or limited discretions;

(2) that the discretion now extends further than was contemplated by Lord Halsbury and Lord Moulton in Christie's case, or even by Lord Simon in Harris v. Director of Public Prosecutions [1952] A.C. 694: it is now the law that "a judge has a discretion to exclude legally admissible evidence if justice so requires" (Lord Reid in Myers v. Director of Public Prosecutions [1965] A.C. 1001, 1024);

(3) that the formula of prejudicial effect outweighing probative value, which has been developed in the "similar fact" cases, is not a complete statement of the range or the principle of the discretion;

(4) that the discretion is, however, limited to what my noble and learned friend, Viscount Dilhorne, calls the "unfair use" of evidence at trial: it does not confer any judicial power of veto upon the right of the prosecution to prosecute or to present in support of the prosecution's case admissible evidence, however obtained.

These broad conclusions leave unresolved the critical question as to the limits of the discretion and the principle upon which it is founded. It may be, as Lord MacDermott C.J. said in Reg. v. Murphy [1965] N.I. 138, 149, that unfairness, which will be found to be its

modern justification, cannot be closely defined. One must, however, emerge from the last refuge of legal thought - that each case depends on its facts - and attempt some analysis of principle.

It is tempting to accept that there are several discretions specific to certain situations. Certainly the law has developed by reference to specific situations in which admissible evidence has been either excluded or said to be liable, at the judge's discretion, to be excluded.

A discretion has been recognised to exclude "similar fact" evidence where its prejudicial effect would outweigh its probative value: Noor Mohamed v. The King [1949] A.C. 182. A discretion to refuse to permit a cross-examination of the accused to his record, though permissible under the Criminal Evidence Act 1898, was recognised by this House in Reg. v. Selvey [1970] A.C. 304. Other relevant evidence may also be excluded. Examples are: a voluntary confession obtained in breach of the Judges' Rules; evidence obtained where the defendant has been misled into providing it (Reg. v. Payne [1963] 1 W.L.R. 637); evidence obtained illegally after the commission of the offence (Kuruma v. The Queen [1955] A.C. 197). The instances of actual exclusion are rare: but too many distinguished judges have said that the discretion exists for there to be any doubt that it does.

Notwithstanding its development case by case, I have no doubt that the discretion is now a general one in the sense that it is to be exercised whenever a judge considers it necessary in order to ensure the accused a fair trial. Reg. v. Selvey [1970] A.C. 304 can be seen to be of critical importance. Viscount Dilhorne, though he was directing his attention to the specific situation in that case (cross-examination of the accused to his record) referred to cases concerned with other situations, e.g. Rex v. Christie [1914] A.C. 545, Noor Mohamed v. The King [1949] A.C. 182, Harris v. Director of Public Prosecutions [1952] A.C. 694 and Kuruma v. The Queen [1955] A.C. 197, and concluded by saying, at pp. 341-342:

"It [i.e. its exercise] must depend on the circumstances of each case and the overriding duty of the judge to ensure that a trial is fair" (my emphasis).

Lord Hodson, Lord Guest and Lord Pearce, with whom Lord Wilberforce agreed, were clearly of the opinion that the discretion was a general one. Lord Hodson said at p. 349: "Discretion ought not to be confined save by the limits of fairness." Lord Guest said, at p. 352, that the discretion "springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused": and Lord Pearce echoed his words at p. 360F.

The review of the authorities by this House in Selvey's case reveals how comparatively recent a judicial development this discretion is. Its history is associated with the recognition of the admissibility of "similar fact" evidence. As this rule of evidence became established, judges were alert to prevent its abuse where probative value was slight and prejudicial effect upon a jury likely to be great. But other more basic matters contributed to the development: in particular, the common law principle against self-incrimination, and the side-effects of the Criminal Law Evidence Act 1898 which by conferring upon the accused the right to give evidence on his own behalf exposed him to the perils of cross-examination. Against this comparatively modern background the judges have had to discharge their duty of ensuring the accused a fair trial. Long before 1898, however, the courts were faced with the problem of reconciling fairness at trial with the admissibility of evidence obtained as a

consequence of an inadmissible confession. The problem was resolved in Rex v. Warickshall (1783) 1 Leach 263 by the court declaring, at p. 300:

"Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived;..."

The discovery of the stolen goods in that case, or (as in Reg. v. Berriman (1854) 6 Cox 388) the finding of the remains of the corpse, is the best possible evidence of the truth of the confession (compare and contrast the Canadian approach in the Supreme Court decision Reg. v. Wray (1970) 11 D.L.R. (3d) 673): but in English law the confession is inadmissible, not because it is unreliable (its reliability is established by what has been found), but because to admit it would be unfair. Similar considerations influenced the judges after 1898 in protecting an accused from a permissible cross-examination to his record or in excluding admissible "similar fact" evidence. At first, the judge would be expected to use his influence (Reg. v. Christie [1914] A.C. 545) to dissuade the prosecution from doing what the statute or the common law allowed: but by the time Kuruma v. The Queen [1955] A.C. 197 was decided influence had become power. Lord Goddard C.J. was able to say, in that case, at p. 204:

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

Rex v. Christie [1914] A.C. 545 is, therefore, only a staging-post in the development of the law. The modern discretion is a general one to be exercised where fairness to the accused requires its exercise.

Authority, therefore, strongly suggests that the discretion is based upon, and is co-extensive with, the judge's duty to ensure that the accused has a fair trial according to law. The two faces of the law reveal the nature and limits of this duty. The accused is to he tried according to law. The law, not the judge's discretion, determines what is admissible evidence. The law, not the judge, determines what defences are available to the accused. It is the law that, subject to certain recognised exceptions, evidence which is relevant is admissible. It is the law that there is no defence of entrapment. The judge may not use his discretion to prevent a prosecution being brought merely because he disapproves of the way in which legally admissible evidence has been obtained. The judge may not by the exercise of his discretion to exclude admissible evidence secure to the accused the benefit of a defence unknown to the law. Judges are not responsible for the bringing or abandonment of prosecutions: nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury. For legislation would be needed to introduce a defence of entrapment: and, if it were to be introduced, it would be for the jury to decide whether in the particular case effect should be given to it.

I can now answer the questions posed at the beginning of this opinion. The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither

initiates nor stifles a prosecution. Save in the very rare situation, which is not this case, of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial. The Judges' Rules, for example, are not a judicial control of police interrogation, but notice that, if certain steps are not taken, certain evidence, otherwise admissible, may be excluded at the trial. The judge's control of the criminal process begins and ends with trial, though his influence may extend beyond its beginning and conclusion. It follows that the prosecution has rights, which the judge may not override. The right to prosecute and the right to lead admissible evidence in support of its case are not subject to judicial control. Of course when the prosecutor reaches court, he becomes subject to the directions as to the conduct of the trial by the judge, whose duty it then is to see that the accused has a fair trial according to law.

What does "fair" mean in this context? It relates to the process of trial. No man is to be compelled to incriminate himself; nemo tenetur se ipsum prodere. No man is to be convicted save upon the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary. If legally admissible evidence be tendered which

endangers these principles (as, for example, in Reg. v. Payne [1963] 1 W.L.R. 637), the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in the law to secure him a fair trial; but he has no power to exclude admissible evidence of the commission of a crime, unless in his judgment these principles are endangered.

In the light of these principles this appeal presents no difficulty. The learned trial judge dealt with the case upon certain assumptions. He said:

"For the purposes of these submissions I am prepared to assume that **Sang** was induced by an agent provocateur to commit these crimes, and that he would not have committed them if he had not been so induced."

The crimes were conspiracy to utter counterfeit bank notes (U.S. dollars) and unlawful possession of forged notes. After a full and illuminating review of the case law the judge drew a distinction between "evidence being unfairly obtained and activity being unfairly induced." He held that the discretion arose only in the case of evidence unfairly obtained. The distinction is a genuine one; it does not, however, answer the question which the judge must ask himself. That question is whether the use of the evidence at the trial would be fair or unfair to the accused. And fairness has to be determined in the light of the principles to which I have referred and in the context of the particular facts. In the present case, the (assumed) evidence of crime was clear. The fact that the criminal conduct was (upon the assumptions made) incited by an "agent provocateur" did not, as a matter of law, diminish its criminality or weaken the probative value of the evidence. There was, therefore, no justification for the exercise of the discretion to exclude the evidence. Had the evidence of crime which was legally admissible been excluded, the judge would have made prosecution impossible for a crime of which

there was available unimpeachable and credible evidence: and, in so doing, would have exceeded his function. I would, therefore, dismiss the appeal.

My Lords, I am acutely aware that the rest of my speech is obiter. I trespass upon your Lordships' time only because, unless I do so, I am unable to answer the question certified by the Court of Appeal.

The development of the discretion has, of necessity, been largely associated with jury trial. In the result, legal discussion of it is apt to proceed in terms of the distinctive functions of judge and jury. No harm arises from such traditional habits of thought, provided always it be borne in mind that the principles of the criminal law and its administration are the same, whether trial be (as in more than 90 per cent. of the cases it is) in the magistrates' court or upon indictment before judge and jury. The magistrates are bound, as is the judge in a jury trial, to ensure that the accused has a fair trial according to law; and have the same discretion as he has in the interests of a fair trial to exclude legally admissible evidence. No doubt, it will be rarely exercised. And certainly magistrates would be wise not to rule until the evidence is tendered and objection is taken. Assumptions, such as Judge Buzzard made in this case, should never be made by magistrates. They must wait and see what is tendered; and only then, if objection be taken, rule. When asked to rule, they should bear in mind that it is their duty to have regard to legally admissible evidence, unless in their judgment the use of the evidence would make the trial unfair. The test of unfairness is not that of a game: it is whether in the light of the considerations to which I have referred the evidence, if admitted, would undermine the justice of the trial. Any closer definition would fetter the sense of justice, upon which in the last resort all judges have to rely: but any extension of the discretion, such as occurred in Reg. v. Ameer and Lucas [1977] Crim.L.R. 104 - to which my noble and learned friends, Lord Diplock and Viscount Dilhorne, have referred with disapproval - would also undermine the justice of the trial. For the conviction of the guilty is a public interest, as is the acquittal of the innocent. In a just society both are needed.

The question remains whether evidence obtained from an accused by deception, or a trick, may be excluded at the discretion of the trial judge. Lord Goddard C.J. thought it could be: Kuruma v. The Queen[1955] A.C. 197, 204, Lord Parker C.J. and Lord Widgery C.J. thought so too: see Callis v. Gunn [1964] 1 Q.B. 495, 502 and Jeffrey v. Black [1978] Q.B. 490. The dicta of three successive Lord Chief Justices are not to be lightly rejected. It is unnecessary for the purposes of this appeal, to express a conclusion upon them. But, always provided that these dicta are treated as relating exclusively to the obtaining of evidence from the accused, I would not necessarily dissent from them. If an accused is misled or tricked into providing evidence (whether it be an admission or the provision of fingerprints or medical evidence or some other evidence), the rule against self-incrimination - nemo tenetur se ipsum prodere - is likely to be infringed. Each case must, of course, depend on its circumstances. All I would say is that the principle of fairness, though concerned exclusively with the use of evidence at trial, is not susceptible to categorisation or classification and is wide enough in some circumstances to embrace the

way in which, after the crime, evidence has been obtained from the accused.

For these reasons I agree with the answer to the certified question in the terms proposed by my noble and learned friends, Lord Diplock and Viscount Dilhorne.

In reaching my conclusion that the discretion is a general one designed to ensure the accused a fair trial, I am encouraged by what I understand to be the Scots law. Such research as I have been able to make makes clear that the Scots judges recognise such a discretion. Indeed, I think they go further than the English law, the Scots principle being that evidence illegally or unfairly obtained is inadmissible unless in the exercise of its discretion the court allows it to be given. Sheriff MacPhail in his massive research paper on the Law of Evidence in Scotland (April 1979) describes the existing law in these terms (para. 21.01):

"In criminal cases, on the other hand, evidence illegally or irregularly obtained is inadmissible unless the illegality or irregularity associated with its procurement can be excused by the court."

It would appear that the principal authority is the full bench case of Lawrie v. Muir, 1950 J.C. 19, in which Lord Justice-General Cooper, after saying that irregularities require to be excused, continued, at p. 27:

"In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick."

How far the Scots judges have extended "the discretionary principle of fairness to the accused" I am not qualified to say. It is, however, plain that by the law of Scotland it may be invoked in a case where after the commission of the crime, illegal or irregular methods have been used to obtain evidence from the accused: see also H.M. Advocate v. Turnbull,1951 J.C. 96, 103, per Lord Guthrie. Though differences of emphasis and scope are acceptable, it would be, I think, unfortunate if the "discretionary principle of fairness to the accused" was not recognised in all the criminal jurisdictions of the United Kingdom. Indeed, it must be a fundamental principle in all British criminal jurisdictions that the court is under the duty to ensure the accused a fair trial: and I do not believe that a judge can effectually discharge his duty without, at the very least, the availability of the discretion I have endeavoured to describe.

[Reported by A. G. B. HELM, ESQ., Barrister-at-Law]

F.C.

DISPOSITION:
Appeals dismissed.

Certificate that point of law of general public importance involved, namely, "Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and of more than minimal probative value."

Leave to appeal refused but legal aid, solicitor and one counsel granted, for application to the House of Lords, and in event of application being granted, legal aid for solicitor and two counsel.

Appeal dismissed.

SOLICITORS:
Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions.

February 15, 1979. The Appeal Committee of the House of Lords (Viscount Dilhorne, Lord Salmon and Lord Scarman) allowed a petition by the defendant **Sang** for leave to appeal.

Solicitors: Hughmans; Director of Public Prosecutions.