SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-PT

Before: Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lissack

Registrar: Robin Vincent

Date filed: March 4, 2005

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

KANU – MOTION TO DISCLOSE PROSECUTION MATERIALS AND/OR OTHER INFORMATION PERTAINING TO REWARDS PROVIDED TO PROSECUTION TRIAL WITNESSES

Office of the Prosecutor:

Luc Coté
Robert Petit
Boi Tia-Stevens

Defense Counsel:

Geert-Jan A. Knoops, Lead Counsel
Carry J. Knoops, Co-Counsel
A.E. Manly-Spain, Co-Counsel

I Introduction

1. The Kanu Defense filed a draft agenda for the 1 March Status Conference on February 17, 2005, to the Defense Office of the Special Court.[1]

2. In the draft agenda, mention was made of the *R. v. Rasheed* case (mistakenly referred to as R. v. Rashid), which reference was put in the context of disclosure of any agreements between the Prosecution and its witnesses.

3. This Motion is meant to not only file the appropriate *Rasheed* authority, but also to seek for disclosure of Prosecution materials pertaining to any reward provided to its trial witnesses for giving information and/or testimony at trial.

II Legal Argument

4. This Motion sets forth two legal authorities, one relating to a judgment from a domestic Court of Appeals within a common law system (the United Kingdom), and the second one relating to a decision of the European Court of Human Rights, which scrutinizes a decision of a court of appeal within a civil law system (the Netherlands). The Defense respectfully submits that the Special Court for Sierra Leone is able to adjudicate this Motion based upon these two authorities.

5. In the first legal authority, that of the Court of Appeals (Criminal Division) in the case of *R. v. Rasheed* (an appeal by Mr. Abdul Rasheed against his convictions at Birmingham Count Court), rendered by the honorable judges Steyn, Kennedy, and Mance, the following was decided: [2]

   - The (common law) duty to disclose extends to any material casting doubt upon the reliability of a witness in the proceedings.

[1] Unfortunately, this draft agenda was, due to miscommunication, not forwarded timely to the Presiding Judge by the Defense Office.
[2] England and Wales Reported and Unreported Cases, 158 JP 941.

- As a matter of common sense a request for a reward by a witness might have a bearing on his motives for coming forward to give evidence.
- It must, therefore, always be disclosed by the police to the Crown Prosecution Service, and the prosecution must disclose it to the defense.
- The duty was a continuing one and a failure to disclose it was, therefore, an irregularity in the trial within the meaning of section 2(1)(c) of the Criminal Appeal Act 1968. It was a positive duty and was not contingent upon a request for disclosure.

6. Attached to this Motion go the transcripts of the particular Court of Appeal proceedings of 17 May 1994 and the disposition of the judges.

7. The Defense lends support from this authority to allow the request formulated in this Defense Motion.

8. A second legal authority arises to grant this Defense Motion. This authority lies in a decision of the European Court of Human Rights of January 27, 2004 in the cases of *Verhoek v. the Netherlands*, pertaining to the disclosure of agreements between the Prosecution on the one hand and material witnesses on the hand concerning incriminating statements given by two witnesses, in exchange for immunity from criminal prosecution and other financial advantages/rewards.[3]

9. In this case, the European Court of Human Rights, confronted with the applicant's argument that Article 6 of the European Convention was violated, declared the application of the applicant inadmissible. During the hearings, and in their pleadings before the national courts, the defense extensively challenged the lawfulness of agreements between the prosecution and two material witnesses who, in exchange for their incriminating statements, obtained various financial profits from the public prosecution service. The defense in that case contended

[3] Application number 54445.00, main abstract published in Nieuwsbrief Strafrecht, vol. 8 (issue 9) of 5 August 2004, p. 718 – 726.

that such agreements, underlying the particular incriminating statements, cast doubt on the credibility of the two witnesses and complained about the withholding of information relating to the financial aspects of the particular agreements.

10. The European Court, in dismissing these challenges, held *inter alia* that:

- First of all, the Defense was aware of the agreements between the public prosecution office and the said witnesses;
- The proceedings were conducted in such a way as to enable the trial judges as well as the defense to examine the said agreements and the credibility of the witnesses;
- The public prosecutors were questioned about the agreements and about their contacts with the said witnesses;
- The contents of the financial negotiations, among which a considerable part of the correspondence between the witnesses (their lawyers) and the public prosecution service was added to the case file, so that the defense was provided with an adequate and proper opportunity to examine those negotiations.

11. Accordingly, the Court concluded that the applicant was provided with a fair and effective opportunity to challenge the agreements. Moreover, the Court observed that the national trial judges did show that they were well-aware of the dangers, difficulties, and pitfalls surrounding any agreements with (criminal) witnesses.

12. The Defense in the instant case deems that this decision of the European Court of Human Rights may provide, at least by way of analogy, additional legal support for the disclosure of any agreement or materials with respect to potential rewards provided by the Prosecution to its trial witnesses. As such, the decision of the European Court of Human Rights does not make a substantive distinction between witnesses having at the same time the capacity of co-accused or being

potentially accused on the one hand, and witnesses without having such capacity on the other hand.

III Relief Sought

13. Based on the foregoing arguments, the Defense respectfully requests the honourable Trial Chamber to order the Prosecution to disclose all information and materials pertaining to rewards provided by the Prosecution to its trial witnesses prior to the examination-in-chief of the particular witness, and/or any other order the Trial Chamber deems appropriate.

Respectfully submitted,
Done at this 4th day of March 2005

Geert-Jan Alexander Knoops
Lead Counsel

1 of 1 DOCUMENT

R v Rasheed

COURT OF APPEAL (CRIMINAL DIVISION)

158 JP 941

HEARING-DATES: 17 May 1994

17 May 1994

CATCHWORDS:

Criminal law -- disclosure -- request by witness for reward -- duty of police and prosecution to disclose.

HEADNOTE:

The appellant was convicted of manslaughter, assault with intent to rob and wounding with intent to do grievous bodily harm and was sentenced to 16 years' imprisonment. The case against him was entirely circumstantial and largely depended on the evidence of his former girlfriend. The argument of the appellant's counsel on appeal was based on the fact that before the trial that witness had asked to be considered for a reward, but at the time of the trial neither prosecuting nor defence counsel was aware of that. After the trial she received a reward of £ 2,000 and subsequently the Crown Prosecution Service disclosed a message received by investigating officers from her solicitor before the trial asking whether she would be entitled to a reward. Counsel for the appellant relied on the common law duty of disclosure.

Held: The duty to disclose extended to any material casting doubt upon the reliability of a witness in the proceedings. As a matter of common sense a request for a reward by a witness might have a bearing on his motives for coming forward to give evidence. It must, therefore, always be disclosed by the police to the Crown Prosecution Service, and the prosecution must disclose it to the defence. The duty was a continuing one and a failure to disclose it was, therefore, an irregularity in the trial. It was a positive duty and was not contingent upon a request for disclosure.

INTRODUCTION:

Appeal: by Abdul Rasheed against his convictions at Birmingham Crown Court.

COUNSEL:

M Mansfield QC and A Shamash for the appellants; S Coward QC for the Crown.

PANEL: Steyn LJ, Ian Kennedy, Mance JJ

JUDGMENTBY-1: STEYN LJ

JUDGMENT-1:

STEYN LJ: On Wednesday August 10, 1988 two men attempted to rob a Securicor guard, John Worwood, who was in the process of delivering cash to a branch of Barclays Bank in High Street, Birmingham. One man was Rafeeq Dickson. He stabbed Mr Worwood. Mr Worwood subsequently died. A window cleaner, Mr Gerald Hall, tried to go to Mr Worwood's assistance. Rafeeq Dickson stabbed Mr Hall in the chest. He survived. Rafeeq Dickson and his accomplice fled empty handed.

Between May 15 and 24, 1989 in Birmingham the appellant Abdul Rasheed, and Rafeeq Dickson were tried before Mr Justice Tucker on an indictment containing six counts. Rafeeq Dickson admitted assault with intent to rob, and stabbing Mr Worwood and Mr Hall. His defence was restricted to the question of intent. The appellant pleaded not guilty to all counts.

On May 25 the jury returned their verdicts. The details of those verdicts are as follows. On count 1 the two men were jointly charged with murder. The jury returned verdicts of not guilty of murder but guilty of manslaughter in respect of both men. On count 2 Rafeeq Dickson and the appellant were jointly charged with an allegation of assault with intent to rob John Worwood. To this count Rafeeq Dickson pleaded guilty. The appellant pleaded not guilty but was found guilty by the jury. Both men were charged with the attempted murder of Gerald Hall (count 3) and in the alternative with wounding Mr Hall with intent to do him grievous bodily harm (count 4). Both men entered not guilty pleas in respect of both counts. They were acquitted on count 3 but convicted on count 4. The appellant was charged alone on counts 5 and 6 with doing acts tending to pervert the course of justice. These two counts alleged that he had asked two friends to give false accounts to the police about how he had sustained a knife wound which the prosecution alleged was caused during the robbery. He was convicted on count 5 and acquitted on count 6.

On May 26 Tucker J sentenced Rafeeq Dickson to 16 years' imprisonment concurrent on each of the counts on which he was convicted. Not distinguishing between the two men, the Judge sentenced the appellant to 16 years' imprisonment concurrent for manslaughter (count 1), assault with intent to rob (count 2) and wounding with intent (count 4). For doing an act to pervert the course of justice (count 5), the Judge sentenced the appellant to three years' imprisonment concurrent.

The appellant now appeals against these convictions with the leave of the Full Court. Counsel for the appellant has, in oral argument, largely restricted his challenge to the appellant's conviction on three main counts. That will be the focus of this judgment, but at the end of the judgment we will have to return to count 5.

It will be convenient first to sketch in some more detail the circumstances of the robbery as established by unchallenged evidence. On August 10, 1989 at 9.45 am a Securicor van manned by the two victims arrived at Barclays Bank in order to make a delivery of money. Mr John Worwood and Mr Derek Dickson were the guards in the van. Mr Worwood left the van and entered the bank whilst Mr Dickson stayed inside the van. The bank is on the first floor of the building and is reached by escalators from street level.

As he entered the bank Mr Worwood was followed by two men who approached him at the bottom of the escalator. The taller of the two men, whom the Crown alleged was the appellant, positioned himself in front of Mr Worwood. The smaller man who was, on his own admission, Rafeeq Dickson, remained on the step below.

Rafeeq Dickson tried to grab the money bag which Mr Worwood was carrying. When it became apparent that Mr Worwood did not intend to let go of it, Rafeeq

Dickson stabbed Mr Worwood. A window cleaner, Mr Gerald Hall, saw the attack and tried to help Mr Worwood. He, too, was stabbed by Rafeeq Dickson.

The taller robber then ran out of the bank followed by Rafeeq Dickson who was covered in blood and brandishing a knife. The two men fled.

It is now necessary to explain how the case against the appellant stood at the end of the prosecution case. There was no eyewitness evidence to connect the appellant with the robbery. There was also no relevant forensic evidence. He made no relevant admissions. The case against him was entirely circumstantial, and it largely depended on the evidence of Altheia Hall, a former girlfriend of the appellant.

The evidence which the Crown relied on fell into seven categories:

(1) A parking ticket was issued to the appellant one week before the robbery at the same time of the day as the robbery took place, that is 9.45 am to 9.50 am, and in close proximity to the bank. Deliveries of cash were always made at about 9.45 am. The Crown said that this was evidence of a scouting expedition by the appellant by way of preparation for the robbery.

(2) The prosecution called Altheia Hall who said that about a week and a half before the robbery the appellant asked her to make alterations to his overalls, and to insert a velcro fastener. She said he pressed her to complete the work but she had failed to do so. Neither of the robbers wore overalls on August 10.

(3) Altheia Hall said that at about 10 am on the day of the attempted robbery the appellant visited her at a community centre called Summerfield Centre. In response to a leading question she said that when the appellant arrived he was with a man who turned out to be Rafeeq Dickson. Altheia Hall had a nursing qualification. The appellant asked her to dress a stab wound that he had sustained. Altheia Hall said she suggested that he should go to hospital. She said he was clean shaven. That was regarded as significant because eyewitnesses said both robbers were clean shaven. The appellant said he had a short beard.

(4) Shortly after the appellant's visit to Summerfield Centre, Altheia Hall went to the appellant's house. She dressed his wound. The appellant again refused to go to hospital. She said there was a news flash of the robbery on the television set. She said the appellant asked Rafeeq Dickson to change the channel. On the insecure basis of various estimates of time and distances, the defence contended that Altheia Hall's evidence was wrong, the reasoning being that she said she left the appellant's house at 11 o'clock and the first news flash of the robbery was timed at 11.25 am.

(5) On August 20, 1989 police officers visited the home of the appellant's wife. The appellant was there. He and his wife were found washing items of clothing and burning other items of clothing. There was, however, no link between the clothes the appellant wore on August 10 and the articles which he and his wife were washing and trying to destroy.

(6) The appellant told a number of lies to the police. He said that his wife had caused the injury. Later he suggested that Tina Mantock had caused the injury.

(7) Finally the Crown relied on evidence that the appellant asked Tina Mantock and Mohammed Majeed to give false evidence and support the account which he had given in interview.

That is how the Crown case against the appellant stood at the [end] of the prosecution case. To that description of the evidence we need only add that the

jury had heard police evidence of interviews in which the appellant had consistently denied any involvement in the robbery.

The experienced leading counsel, who appeared for the appellant at trial, did not submit that the Judge should withdraw the case from the jury. The circumstantial case against the appellant on the main counts was far from overwhelming, but we consider that the very fact that on Altheia Hall's evidence this appellant arrived at the Summerfield Centre in the company of an admitted participant in the robbery, and that the appellant had a stab wound about 15 to 20 minutes after a robbery in which a knife was used, meant that there was a case for the jury to consider. We believe that counsel acted properly and responsibly in not making a submission there was no case to answer.

Returning to the description of the course of the trial, Rafeeq Dickson was the first to testify. His evidence was very short. He admitted his role in the attempted robbery, and that he had stabbed both Mr Worwood and Mr Hall. He denied that he had the necessary intent on the charges of murder of Mr Worwood and wounding of Mr Hall. Significantly, he said that the appellant was the second robber. That was the first direct evidence of the involvement of the appellant in the robbery. Counsel cross-examined Rafeeq Dickson to the effect that while in custody Rafeeq Dickson had said he would make sure that the appellant received 25 years' imprisonment.

When the appellant gave evidence he came out with an entirely new explanation of his injury to the evident surprise of his counsel. He said that during the morning of August 10 he was at his home when Rafeeq Dickson rushed in. What then happened he described as follows: Rafeeq Dickson was in a frantic state and was carrying a bundle under his arm. The appellant was cut in his side by something that Rafeeq Dickson was carrying. Rafeeq Dickson said that he had been involved in a robbery with others in town and that he needed to stay off the street for a while. The appellant said that he went to the Summerfield Centre alone in his car. The blood on the car seat must have been from his wound. At the Centre he reported work required on his kitchen. He then noticed that the blood was coming from his wound. He spoke to Altheia Hall. He asked her for a plaster. Later that morning Rafeeq Dickson and Miss Hall came to visit him at his home. Altheia Hall dressed his wound. He denied that the television was on or that he had asked for it to be turned off.

The appellant said that he had gone to the house of Tina Mantock on August 10 and had shown her his wound. He had told her that he had fallen over a fence. That was not true. He had gone to stay with his wife on August 11. On August 20, the day that he was arrested, he had started a fire in the garden at his wife's request, to burn rubbish including dirty items of clothing left behind by the previous occupier. These did not include anything he had been wearing on August 10. He had not previously revealed what he knew about Rafeeq Dickson's guilt, and would not have done so except when put on oath.

When he later saw Miss Mantock he told her that the police might ask her how he had come about his wound. He said she suggested that she should tell the police that she had stabbed him. He had not asked Mr Majeed to tell a false story, and lie said that he was bearded on August 10.

The appellant said that whilst in custody during the course of the trial, Rafeeq Dickson had inferred to him that Miss Hall and the appellant were responsible for his arrest. Rafeeq Dickson also mentioned a possible sentence of 25 years, and he also said that he would make sure that the appellant received such a sentence as well.

The Judge summed up the case carefully and fairly. He gave an appropriate accomplice warning about the danger of relying on the evidence of Rafeeq Dickson. He said that the appellant's lies were capable of amounting to corroboration. Pertinent to the present appeal he identified another category of evidence which was capable of corroboration, namely the evidence of Altheia Hall. He said:

". . . That is provided you are sure that she has no axe to grind against Rasheed, no malice against him and that you can rely on her. She agreed with Dickson's evidence that he and Rasheed arrived simultaneously at the community centre. She agreed with him that after she returned from the chemist Dickson went back with her to 3 Halifax Grove.

"She agreed with his evidence that the television set was on when they got there, that there was a news flash about the robbery and that Rasheed asked for the television to be turned over to another channel."

The Judge left to the jury, as live issues, divergences between the evidence of Altheia Hall and the appellant. The Judge highlighted for the jury a number of divergences between the evidence of Altheia Hall and the appellant. In the context of the issues as they have become refined, and in the light of the appellant's final explanation of his injury to the jury, it is only necessary to mention three disputes which were placed before the jury by the Judge. The first was the dispute about the appellant's overalls. The appellant made the request ten days before the robbery and, according to Altheia Hall, the appellant pressed her to complete the job. The dispute largely centres on what the appellant asked Altheia Hall to do, and whether the alterations would facilitate a robber in the course of a robbery.

The second and more important issue was whether, as Altheia Hall said, the appellant asked Rafeeq Dickson to change the TV channel when a TV news flash of the robbery came on. The appellant disputed this evidence.

Thirdly, although realistically in the light of a photograph taken after the appellant's arrest, Altheia Hall was wrong in saying that this appellant was clean shaven on August 10. The Judge still left this matter as an, issue for the jury to decide. The Crown never made a formal concession on the point. The Judge dealt with Altheia Hall's credibility in the following terms:

"I come to the evidence of Altheia Hall. How did she strike you? When first seen by the police she had not told them the truth about her relationship with Rasheed because she said they might think she was involved. She had, in fact, had a sexual relationship with him when he was separated from his wife. She said that on August 10 he was clean shaven. The suggestion put to her is that she was slighted by the fact that Rasheed was going back to his wife and that she has told lies about him. That is one possibility you will have to consider. On the other hand, you will ask whether you are sure that she is basically a wholesome and honest woman who took no pleasure telling the truth about her former lover. Those are matters for you to assess."

That was a perfectly fair comment, but it is also right to add that the jury would have gathered that Altheia Hall remained an important witness and that the Judge thought that she was an impressive witness.

After the summing-up the jury retired. They returned verdicts by a majority of 10 to 2 against the appellant on the main counts. On count 5 they returned a unanimous verdict of guilty against the appellant. The jury returned those verdicts after six hours and 42 minutes.

That brings us to the grounds of appeal. With characteristic realism Mr Mansfield QC, who did not appear at the trial but did appear for the appellant on this appeal, confined his argument to one ground of appeal. That ground is based on the fact that Altheia Hall had asked to be considered for a reward about five weeks after the robbery and ten months before the trial. After the trial she received an award of £ 2,000. Subsequently the Crown Prosecution Service disclosed a message received by investigating officers from Altheia Hall's solicitors before the trial. The document which was disclosed reads as follows:

"Further to our previous conversation Altheia Hall has been to see me with Miss Courtney. Neither has received a direct or indirect threat towards them. But Hall heard from a neighbour of hers called Jenny that a woman called Janet Bailey has been making the threats. Courtney believes that a man called Rivers knows what is going on. Hall has further instructed me that she has been told by a friend that she might be entitled to all or part of the reward that was offered. Can you tell me whether she would be so entitled?"

Reply: "We have already seen Mr Rivers who is unable to give us any information. However, we will make further inquiries. With regard to the reward, I am not in a position to disclose whether Hall might be entitled to make a claim. That will be a matter between the senior investigating officer and the informant, whoever they may be. I am sure you appreciate the need for strict confidentiality."

Humphries reply: "I will write directly to Securicor requesting information and forward you a copy. You may also wish to know that Altheia Hall has enlisted the help of Clare Short, MP who will be writing to you expressing concern about the threats made to Altheia Hall."

(Our emphasis).

At the time of the trial neither prosecuting counsel nor defence counsel were aware of the fact that Altheia Hall had asked for a reward. The appellant did, however, know that a reward had been offered.

Mr Mansfield relied on the common duty of fair disclosure by the Crown as enunciated in Ward [1993] 96 Cr App R 1. He submitted that the message was material and therefore disclosable. A passage in the judgment of the Court in Ward explains how the concept of materiality is used in two different senses. The passage reads as follows:

"The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. If the evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity. The proviso makes it plain that 'material' means something less than 'crucial', because it contemplates that although there may have been a material irregularity, yet a verdict of 'guilty' can be upheld on the ground that it involves no miscarriage of justice."

Mr Mansfield submitted that the obligation to disclose arose because the document was relevant to the credibility of Miss Hall. He drew our attention to the fact that in Taylor, June 11, 1993, unreported except in The Times of June 15 1993, in a judgment given by McCowan, LJ, this Court regarded a request for a reward by a witness as relevant to his credibility and therefore dicloseable.

In our judgment the duty to disclose extends to "any material casting doubt upon the reliability of a witness in the proceedings": see the Guiness advice given by the Director of Public Prosecutions to chief constables in August 1992

para 8(i). The classic examples of material tending to undermine the credibility of a witness, which must be disclosed, are other statements and significant convictions of a witness. What about a request for a reward by the witness? There is, of course, nothing objectionable about the police or a company such as Securicor offering a reward for information which might lead to the arrest and conviction of a criminal. That is, however, not the point. As a matter of common sense a request for a reward by a witness may have a bearing on his motives for coming forward to give evidence. It must, therefore, always be disclosed by the police to the Crown Prosecution Service, and the prosecution must disclose it to the defence. That duty is a continuing one, and a failure to disclose such a document is, therefore, an irregularity in the trial within the meaning s 2(1)(c) of the Criminal Appeal Act 1968.

Mr Mansfield submitted that the irregularity was a material one in the second sense explained in Ward. He submitted that under s 2(1) of the Criminal Appeal Act 1968 we ought to allow the appeal on the main counts. Mr Coward QC submitted that the irregularity was not material. Alternatively, if it was material, he invited the Court to apply the proviso of s 2(1) of the Criminal Appeal Act 1968.

Turning first to the issue of materiality of the irregularity, Mr Coward pointed out that defence counsel knew during the trial that a reward had been offered. He suggested that defence counsel could have explored with Altheia Hall whether she applied for a reward. Using our collective experience, we say at once that generally speaking experienced counsel (and leading counsel for the defence was very experienced) would not embark on such a speculative cross-examination. In any event, there is a positive duty to give fair disclosure. That duty is not contingent upon a request for disclosure, and the activation of that duty is not affected by the question whether, by due enquiries, the defence could have obtained the document in other ways. We hold these propositions to be self-evident. In this case it does not neutralize the irregularity to say that the information could have been obtained in other ways. We reject this argument.

That brings us to Mr Coward's main submission on materiality. He accepted that if the relevant document had been available to defence counsel at the trial and had been put to Altheia Hall, it could have undermined her credibility in the eyes of the jury, but he said it is important to know whether a disclosure of a document would, in fact, have had an impact on the trial. Would counsel for the appellant have used it? Mr Coward submitted that counsel for the defence would probably not have used the document because it contained references to threats by unidentified persons. Leaving aside the possibility of cross-examining in a way which would not let in the whole document, we are satisfied that the Judge, a most experienced trial Judge, would not have allowed questions from Crown counsel about threats to a witness from a wholly unidentified source. We reject this submission.

Mr Coward submitted that we ought to call leading counsel who appeared on behalf of the appellant at the trial to testify how he would have reacted to the relevant hypothetical question: If the document had been available, would he have cross-examined Altheia Hall on the basis of the information in the document? What impact would the disclosure of the relevant document have had on the trial? Presumably it follows that not only leading counsel but junior counsel, the solicitor and the appellant would also be relevant witnesses on this hypothetical issue. This argument is misconceived. There is no application before us to admit any evidence of this kind. If there had been, we would have refused it. This is not a case where new evidence can be led because of the alleged inept way in which counsel presented the case. Taking the record

of the proceedings as it is, we must consider the case objectively in the light of s 2 of the Criminal Appeal Act 1968, and on the basis of the materials before us. Given these conclusions, we understood Mr Coward to accept that he cannot challenge the materiality of the irregularity on any other basis. That must be the case for, as the Court observed in Ward, in the passage which we quoted, if the document is material in the first sense, its non-disclosure is likely to constitute a material irregularity. In this case the non-disclosure did constitute a material irregularity.

That brings us to Mr Coward's submission that we ought to apply the proviso. Mr Coward submitted, in effect, that Altheia Hall merely helped the Crown to survive the half-time hurdle, and thereafter her evidence could largely be discounted. We reject this submission. That is not how the Crown presented the case. And the trial Judge summed up to the jury on the basis that Altheia Hall was an important witness and that her evidence tended to establish the appellant's guilt. He summed up on the basis that there were material divergences between the evidence of Altheia Hall and the appellant. We accept Mr Mansfield's submissions that there were some not insignificant divergences, but most importantly we cannot ignore how the Judge left the matter to the jury. We must emphasize, however, that the Judge was merely reflecting in his summing-up the way in which the evidence and arguments were deployed before him.

We take into account the implausibility of the injury being caused in the way in which the appellant put forward in his final explanation. Nevertheless, in the eyes of the jury Altheia Hall was an important witness. It is at the very least possible, or even likely, that counsel for the appellant would have cross-examined her about her request for a reward. He had nothing to lose since he had already challenged Altheia Hall's credibility. How would such a cross-examination have affected the course of the trial? It may have been a damp squib. On the other hand, it may have seriously damaged Altheia Hall's credibility. We simply cannot be sure what the outcome would have been. It is also possible that the jury would have reasoned that the appellant's final explanation as to how he sustained the injury was most improbable. There is much to be said for this point of view. The appellant was probably the second man, but we cannot be confident that the jury, properly directed, would inevitably have convicted if the document had been disclosed and put to Altheia Hall. After all, the verdicts in question were by a majority of 10 to two. Given the fact that Rafeeq Dickson was a tainted witness who lied about the number of his accomplices and refused to divulge their names, this conclusion is unavoidable. It is not an appropriate case for the application of the proviso.

For these reasons we would allow the appeal of the appellant on counts 1, 2 and 4. As far as count 5 is concerned, we have had inadequate argument about the effect in law of our judgment. We adjourn the appeal on count 5. The burden will be on the appellant to apply to restore that part of the appeal if he is so advised. We do not reserve a restored hearing to ourselves. However, on such a restored hearing, if any, there must be skeleton arguments from both sides on the legal position. To the extent that we have indicated, the appeal is allowed.

Lord Justice Steyn: What is the position in respect of a retrial bearing in mind the date? Is it beyond our power?

Mr Coward: My Lord, there is no power to order a retrial. The grounds of appeal were lodged a fortnight before July 31, 1989. Accordingly, there is no power for this Court to order a retrial.

Lord Justice Steyn: From the point of view of justice that seems a pity.

Mr Coward: My Lord, I express no view of that. In the light of your Lordship's judgment, the sentence which the appellant is presently serving for count 5 would have expired in any event and accordingly, it would appear that his immediate release could be ordered.

Lord Justice Steyn: We so order.

DISPOSITION:

Judgment accordingly.

SOLICITORS:

Barnett and Co, Birmingham; Crown Prosecution Service.

THE FACTS

The applicant, Mr Johan Verhoek, is a Netherlands national, who was born in 1954 and has no known fixed abode in the Netherlands. He is represented before the Court by Mr M. Moszkowicz Sr., a lawyer practising in Maastricht.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Events prior to the criminal proceedings against the applicant

In 1991 a combined fiscal and criminal investigation under the code name *Kolibrie* (hummingbird) was opened into a criminal organisation allegedly engaged in large-scale shipment of drugs from Pakistan to the Netherlands, the Azores and Canada. For this purpose an investigation team was created composed of police officers, fiscal investigation officers and public prosecutors (the *Kolibrie*-team). Over the years numerous witnesses and suspects were questioned, requests for mutual legal assistance were made to, *inter alia*, Paraguay, Sweden, the Bahamas, Spain and Switzerland, rafts packed with drugs were seized in Canada, a search operation was carried out in co-operation with the navy and barrels filled with drugs were salvaged by divers off the coast of the Azores.

The investigation concentrated, *inter alia*, on the following shipments: – the shipment of about 20,000 kilograms of marihuana to the Netherlands aboard the Aquarius/Moana B; – the shipment of about 60,000 kilograms of marihuana to the Netherlands and Canada aboard the Lukas; – the shipment of about 120,000 kilograms of marihuana to Canada and the Azores aboard the Pacific Tide/Giant 4.

In June 1993 a certain K., who was under investigation for his alleged participation in the Pacific Tide/Giant 4 shipment, gave a statement to a Netherlands public prosecutor about one of these shipments. At the time he was being detained in France, where he had been convicted of involvement in another shipment of drugs. He indicated that he was willing to make further statements in exchange for an early extradition to the Netherlands. After he had served his prison sentence in France, K. spent several months in detention pending extradition and in July 1995 he arrived in the Netherlands. He was detained on remand on suspicion of participation in the above-mentioned shipments of drugs. He made further statements to the police. Seven of these statements consisted of falsehoods. According to K., his statements contained falsehoods because he did not trust his lawyer. In August 1995 a written agreement was concluded between K. and the public prosecutors T. and W. According to the agreement, K. undertook to make truthful statements about the criminal offences of which he had knowledge without relying on his right to remain silent and to testify before a judge if requested to do so. In exchange for his statements he was released from detention on remand and was given an undertaking that if the prison sentence imposed on him exceeded the time he had already spent in detention pending extradition and detention on remand, the sentence would not be executed. Furthermore, the public prosecution service (*openbaar ministerie*) undertook to take appropriate measures to safeguard his safety as far as possible. If K. reneged on his obligations, the prosecution service reserved the right to use his statements and would no longer be bound to comply with its part of the agreement.

Thereupon, K. continued to make detailed statements about the preparation for and the carrying out of the shipments of drugs as well as about the people involved, including himself and the applicant.

In 1995 the lawyers of a certain A., a suspect in the *Kolibrie* investigation, contacted the

public prosecution service. A. was aware of the fact that he was under investigation in the Netherlands and indicated that he was interested in talking to the prosecution service. An agreement between A. and the public prosecutors T. and W. was concluded and was consigned to writing. A. undertook to make truthful statements about the criminal offences of which he had knowledge without relying on his right to remain silent and to testify before a judge if requested to do so. In exchange, he was enabled to trade off any criminal prosecution in the Netherlands in respect of the criminal offences to which he had confessed by making a payment of 1,800,000 Netherlands guilders (NLG) (820,000 euros (EUR)). The public prosecution office undertook to inform the authorities of several other countries about A.'s co-operation. The prosecution service reserved the right to use A.'s statements and not to comply with its part of the agreement if A. reneged on his obligations. A. made 23 statements about the organisation of the drugs shipments and the people involved, including himself and the applicant. The first seven statements contained demonstrable falsehoods.

K. and A. were also questioned by the United States Drugs Enforcement Administration ("DEA") about several shipments of drugs.

In January 1996 the applicant, who was by then suspected of being one of the ringleaders of the criminal organisation responsible for the shipments, was arrested and detained on remand.

2. The criminal proceedings against the applicant

The applicant was charged with membership of a criminal organisation and participation in the shipment of drugs aboard the Aquarius/Moana B, the Lukas and the Pacific Tide/Giant 4. Between 22 April 1996 and 24 January 1997, 29 hearings were held before the Regional Court (*arrondissementsrechtbank*) of Amsterdam. On 7 February 1997 the Regional Court convicted the applicant of all charges and sentenced him to six years' imprisonment. The applicant lodged an appeal and between 20 June 1997 and 16 January 1998, 20 hearings were held before the Court of Appeal (*gerechtshof*) of Amsterdam.

In the course of the proceedings before the Regional Court and the Court of Appeal the following relevant events occurred:

K. and A. were questioned extensively before the investigating judge, before the Regional Court and before the Court of Appeal about their motives for testifying, about the falsehoods in their initial statements, about the agreements reached with the public prosecution service and about the contents of their statements. K. was also questioned about the course of events during his imprisonment in France in 1993.

Both K. and A. claimed the right to remain silent in respect of certain questions put by the defence. After having heard the arguments of K. and A. as well as the submissions of the defence and of the prosecution, the domestic courts ordered that K. and A. answer most of these questions. They were excused from answering some questions relating to their contacts with the DEA and their financial situation, since replying to these questions was considered likely to incriminate or endanger them.

Numerous other witnesses were questioned, *inter alia*, business and personal contacts of K. and A., about the latter witnesses' reliability and credibility. A French investigating judge was questioned about K.'s situation in 1993. Furthermore, two law professors and an expert who had made a comparative law study on agreements with witnesses were extensively questioned by the Regional Court about all manner of legal issues relating to this kind of agreement. The public prosecutors T. and W. were questioned before the Court of Appeal about the course of the investigation, the agreements with K. and A. and their contacts with several other witnesses.

The Court of Appeal rejected the defence's request to question Maître Chégin, K.'s lawyer in France in 1993, being of the opinion that his testimony could not have any bearing on any decision to be taken in the case against the applicant. The Court of Appeal reasoned in this connection that the questions which the defence wanted to put to him concerned the agreement concluded between K. and the public prosecution service in August 1995, whereas Maître Chégin had been K.'s lawyer in 1993.

In the course of the proceedings before the Regional Court it became clear that the public prosecution service and K.'s lawyer, Van G., had been in contact and had exchanged correspondence relating to various financial aspects of the agreement concluded between the public prosecution service and K. Part of this correspondence was added to the case file and K., the public prosecutors T. and W. as well as Van G. were questioned before the Court of Appeal about their correspondence.

During the hearings and in their pleadings before the Regional Court and the Court of Appeal, the defence extensively challenged the lawfulness of the agreements and their contents, sought to cast doubt on the credibility of the witnesses K. and A. and complained about the withholding of information relating to the financial aspects of the agreement with K. and the fact that the witnesses had been excused from answering certain questions in spite of the condition in the agreements that they would not invoke their right to remain silent. The defence further alleged that the prosecution had acted in bad faith and had tried to mislead both the defence and the judges on several occasions.

In a judgment of 30 January 1998 the Court of Appeal quashed the Regional Court's decision, convicted the applicant on all charges and sentenced him to five years and six months' imprisonment and a fine of NLG 1,000,000 (EUR 453,000).

The judgment contained a lengthy legal analysis of the compatibility of the agreements concluded between the public prosecution service and the witnesses K. and A. with Netherlands law, the political developments on this issue, the principles of proper conduct of proceedings and the requirements of Article 6 of the Convention. The Court of Appeal concluded that the agreements were permissible and lawful except for the undertaking made to K. to the effect that he would not have to serve a possible prison sentence. The Court considered:

> The public prosecution service is free to make decisions about the investigation and prosecution of criminal offences, including the giving of an undertaking to demand that a certain penalty be imposed. The public prosecution service is not free to assume the authority that any penalty which might be imposed on K. by a judge would not have to be executed... The decision to include this undertaking in the agreement with K. is thus ... not lawful. This unlawfulness ... however, is not of such a nature that the prosecution case against the applicant should be declared inadmissible. The present criminal proceedings are characterised by the fact that, for the first time, the conclusion of agreements with co-suspects has been submitted for the full consideration of a judge. No plausible grounds have been made out for concluding that the public prosecution service acted in bad faith, and thus intentionally breached the law, merely in order to frustrate the interests of the integrity of criminal proceedings. Nor have plausible grounds been made for concluding that the public prosecution service entered into the impugned undertaking with the purpose of acting in contempt of the decision of the judge in the present case.

Although it decided that the prosecution of the applicant was not barred, the Court of Appeal considered that the unlawful undertaking made to K. was one of the factors which should lead to a reduction of his sentence from the seven years' imprisonment it would have

imposed, to five years and six months. The Court of Appeal considered that the remainder of the agreements was permissible under Netherlands law and that the conclusion of the agreements had neither violated the principles of the proper conduct of proceedings nor the applicant's right to a fair trial. It proceeded to examine whether the statements of K. and A. could be used in evidence:

> The extent to which the statements of K. and A. may be used in evidence nevertheless requires further examination. It has to be examined whether K. and A. made their statements in the absence of pressure or constraint. Partly in view of the agreements underlying the statements, consideration should also be given to the question whether the defence had the opportunity adequately to scrutinise the statements of K. and A. Such further examination is also necessary because the reliability and credibility of the statements of K. and A. may have been adversely affected by what they felt obliged to do or by what they deemed was in their own best interests, given the contents of the agreements with the public prosecution service. In addition, it should be borne in mind that these witnesses stand accused of offences relating to more or less the same set of facts as the defendant.

Accordingly, the Court of Appeal went on to examine closely the reliability of K. and A. and the credibility of their statements. In this context, it had regard to the position and personality of both K. and A., the possibilities which the defence had had to examine their statements, the contents of these statements, the other evidence, the impression both witnesses had given the court as well as the applicant's response to K.'s and A.'s statements. The Court of Appeal considered that their statements were detailed and disclosed concrete reasons for their knowledge. Although K. and A. did not know each other, their statements corresponded and were corroborated by the statements of four other witnesses as well as by other evidence. The Court of Appeal also considered that the applicant had not submitted any facts to challenge the statements of K. and A. Taking these considerations into account, and stating explicitly that this matter had to be treated with particular caution (*bijzondere behoedzaamheid*), the Court of Appeal found that the statements made by K. and A. were reliable and credible.
The Court of Appeal further considered:

> [The] principles of the proper conduct of proceedings imply above all that the defence, confronted with an agreement concluded by the public prosecution service with a witness, be given complete disclosure – with a view to the exercise of the rights of the defence – about the existence of the agreements, the manner of their conclusion as well as their contents, and also that the defence be given every opportunity to challenge the manner of conclusion and the contents of the agreements.
> These requirements have been completely met. The existence of the agreements and the identity of K. and A. were disclosed from the outset. The agreements were put down in writing and were included in the case file together with all relevant documents. In the presence of the defence, K. and A. have been questioned as witnesses on this issue at every stage of the proceedings, and [the prosecutors] T. and W. have been questioned about it at the trial on appeal. It has appeared that no relevant difference of opinion exists between the prosecutors and K. and A. about the meaning of the agreements and the way in which they were concluded. Even apart from that, the defence has been enabled to obtain all necessary information concerning the agreements.

With regard to the complaint that information about the negotiations between the public prosecution service and K.'s lawyer concerning the financial aspects of the agreement had initially been withheld, the Court of Appeal considered that the applicant had been able to raise this issue both before the Region-

al Court and the Court of Appeal and to have it examined fully: part of the correspondence between the public prosecution service and Van G. had been added to the case file and counsel for the defence had been able to question K., Van G. and the public prosecutors W. and T. on this issue. The allegation that the prosecution had intentionally misrepresented the amount of the financial reward promised to K. as well as the contents of the negotiations was dismissed as being implausible.

The Court of Appeal further dismissed as unfounded a number of other accusations made by the defence to the effect that the public prosecution service had intentionally violated the rights of the applicant. It convicted and sentenced the applicant as set out above. Apart from the statements made by K. and A., the Court of Appeal also relied on the statements of nine other witnesses, financial documents, several official reports of police officers and the results of the examination of samples of drugs.

The applicant lodged an appeal on points of law with the Supreme Court (*Hoge Raad*), submitting an extensive statement of grounds of appeal.

The Supreme Court gave judgment on 6 April 1999. It dismissed the appeal in its entirety.

In response to seven complaints concerning the contents and conclusion of the agreements with K. and A., and with reference to its own case-law (decision of 30 June 1998, *Nederlandse Jurisprudentie* – Netherlands Law Reports – 1998, no. 799) and to a number of Commission decisions (*X. v. the United Kingdom*, no. 7306/75, Commission decision of 6 October 1976, Decisions and Reports 7, p. 115; *Salmon Meneses v. Italy*, no. 18666/91, Commission decision of 30 November 1994, unreported; and *Flanders v. the Netherlands*, no. 25982/94, Commission decision of 15 January 1996, unreported), the Supreme Court reiterated that, as long as the conclusion of agreements was not regulated by law, the question to be examined was whether the actual circumstances of every case were compatible with the fundamental rights of an accused as guaranteed by Article 6 of the Convention and with the principles of the proper conduct of proceedings derived from, *inter alia*, Article 6 of the Convention. Noting that the reliability of statements of a suspect in exchange for promises by the prosecution may be adversely affected by what a witness feels obliged to do or by what he or she deems to be in their own best interest, it considered that this kind of witness should be questioned by a judge, preferably in open court, and, where the credibility of a witness was challenged, it should appear clearly from the trial courts' judgments that this issue had been examined.

The Supreme Court upheld the decisions of the Court of Appeal regarding the agreements and dismissed ten other complaints, adopting mainly summary reasoning.

B. Relevant domestic law and practice

In the early 1990s serious concerns arose over the methods of criminal investigation used in cases concerning organised crime. A parliamentary commission of inquiry (*parlementaire enquêtecommissie*) was instituted, which presented its final report on 1 February 1996. In this report agreements concluded with suspects testifying against co-accused were criticised. The commission was of the opinion that these kinds of agreements should be explicitly regulated by law and should in no event be allowed to lead to complete immunity from prosecution. The Minister of Justice subscribed to this opinion and legislation is now under preparation to regulate agreements with criminal witnesses.

Article 29 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), insofar as relevant, provides that a suspect is not obliged to reply to questions put to him or her by a judge or investigating officer.

Article 219 of the Code of Criminal Proce-

dure provides that a witness is allowed to refrain from answering questions if replying to those questions would expose him or her to the risk of a criminal conviction.

COMPLAINTS

The applicant complained under Article 6 of the Convention that the conclusion and contents of the agreements between the public prosecution service and the witnesses K. and A., as well as the subsequent use in evidence of the statements obtained in this manner, violated his right to a fair trial, in particular the principle of equality of arms, in that: – the agreements lacked a legal basis and were incompatible with the recently expressed opinion of the legislator concerning agreements with criminal witnesses; – the undertaking given by the public prosecution service to K. relating to non-execution of a prison sentence was found to be unlawful; – the prosecution had withheld information regarding various financial promises made to K.; – the agreement contained the condition that K. and A. would not rely on their right to remain silent – these witnesses were thus not free from pressures and constraints when making their statements; moreover, as they were subsequently nevertheless excused from replying to a number of questions put by the defence, the applicant was not sufficiently able to challenge the agreements and the defence was put at a disadvantage *vis-à-vis* the prosecution; – the statements of K. and A. should have been considered unreliable, since the (manner of) conclusion of the agreements left K. and A. at the mercy of the prosecution and since they admitted to having lied in their initial statements.

The applicant also complained that the public prosecution service acted in bad faith in all of the aforementioned matters, bearing in mind, moreover, that his conviction rested almost entirely on the statements of K. and A.

He finally complained, also under Article 6 of the Convention, about the refusal of the national courts to hear Maître Chégin as a witness.

THE LAW

The applicant complained that his right to a fair trial as guaranteed by Article 6 of the Convention was violated by the conclusion and contents of the agreements made by the prosecution authorities with the witnesses K. and A. and by the use in evidence of the statements subsequently obtained from these witnesses. Article 6 of the Convention, in so far as relevant to the present case, provides as follows:

> 1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing by [a] ... tribunal ...
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
> (b) to have adequate time and facilities for the preparation of his defence; ...
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...

According to the Court's established case-law, the guarantees of paragraph 3 of Article 6 of the Convention are specific aspects of the right to a fair trial set forth in Article 6 § 1 of the Convention (see, among other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, § 25, and more recently *S.N. v. Sweden*, no. 34209/96, § 43, ECHR 2002-V). The Court will therefore examine the applicant's complaints with regard to the overriding principle of fairness set out in that provision.

The Court reiterates at the outset that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting

Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Garcìa Ruiz v. Spain* [GC], judgment of 21 January 1999, no. 30544/96, § 28, ECHR 1999-I). It is not the task of the Court to determine, as a matter of principle, whether particular types of evidence – for example unlawfully obtained evidence – may nevertheless be admitted in evidence. The question which must be answered is whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V).

The Court's case-law further establishes that it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and the defence. This does not mean that the parties must be put in exactly the same position as each other. This principle does, however, require that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see, among other authorities, *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II).

Finally, the Court has previously held that the use of statements made by witnesses in exchange for immunity or other advantages may put in question the fairness of the hearing granted to an accused and is capable of raising delicate issues since, by their very nature, such statements are open to manipulation and may be made purely in order to obtain advantages or for personal revenge. However, the use of this kind of statement does not in itself suffice to render the proceedings unfair (see *Erdem v. Germany* (dec.), no. 38321/99, 9 December 1999; *X. v. the United Kingdom*, cited above; *Flanders v. the Netherlands*, cited above; and, *mutatis mutandis, Mambro and Fioravanti v. Italy*, no. 33995/96, Commission decision 9 September 1998, unreported).

Turning to the circumstances of the present case, the Court observes that the public prosecution service concluded agreements with the applicant's co-accused K. and A. and that statements obtained from them were used in evidence against the applicant. The applicant has raised a number of complaints relating specifically to the conclusion and contents of these agreements and to the use in evidence of K.'s and A.'s statements. The central question for the Court, however, is, as stated above, whether the proceedings as a whole were fair which, in a case like the present one, requires the existence of fair procedures to examine the admissibility and test the reliability of the disputed evidence including an adequate and proper opportunity for the applicant to challenge the evidence adduced and the observations filed by the prosecution.

In this context the Court notes in the first place that the defence was aware of the agreements and of the identity of both K. and A., and that the proceedings were conducted in such a way as to enable the trial courts as well as the defence ample opportunity to examine the agreements and the credibility of K. and A. Both men were questioned extensively by both the trial judges and the defence at every stage of the proceedings. In addition, the public prosecutors T. and W. were questioned about the agreements and about their contacts with K. and A. Three experts were also heard about the legal aspects of the agreements, and several relations of K. and A. were questioned about their reliability and the credibility of their statements. The applicant was thus provided with a considerable amount

of relevant information giving him ample opportunity to challenge not only the conclusion of the agreements, but also the reliability of K. and A. and the credibility of their statements. This finding is not affected either by the fact that some questions put to K. and A. remained unanswered or by the fact that information concerning the financial negotiations with K.'s lawyer was not disclosed from the outset. The few unanswered questions, if relevant at all, were not linked to the charges and the finding of the national courts that there existed pertinent interests for excusing the witnesses from replying to those questions has not been challenged. With regard to the financial negotiations, the Court notes that part of the correspondence between K.'s lawyer and the public prosecution service was added to the case file, and that the applicant was given the possibility to question K., Van G. and the public prosecutors W. and T. Therefore, the Court considers, as did the Court of Appeal, that the defence was provided with an adequate and proper opportunity to examine those negotiations.

In sum, the Court concludes that the applicant was provided with a fair and effective opportunity to challenge the agreements concluded with K. and A. and the statements made by them. The fact that the national courts rejected the arguments of the defence makes no difference.

Secondly, and with respect to the way in which the national courts dealt with the issue, the Court observes that during the hearings as well as in their judgments these courts showed that they were well aware of the dangers, difficulties and pitfalls surrounding agreements with criminal witnesses. In the judgments all aspects of the agreements were extensively and carefully scrutinised, with due attention being paid to the numerous objections raised by the defence. It was thus found that the prosecution service had sufficiently informed the defence and the courts about the agreements and that the allegations of the defence relating to intentional deception by the prosecution service were unfounded. Although it was found that the agreements themselves did not violate Netherlands law, the Court of Appeal agreed with the defence that the public prosecution service had exceeded its authority in respect of the undertaking given to K. relating to the non-execution of any prison sentence that might be imposed on him. The courts further displayed extreme caution in their assessment of the admissibility of the statements of K. and A. and they provided extensive reasoning as to why they considered these statements credible and reliable in spite of the doubts raised by the defence and in spite of part of the agreement concluded with K. having been found unlawful.

With regard to the complaint about the refusal of the national courts to hear Maître Chegrin as a witness, the Court recalls that Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary to hear a witness (see the *S.N.* judgment, cited above, § 44). The Court notes that, after having heard the arguments of both the prosecution and the defence, the Court of Appeal explained why it deemed the hearing of Maître Chégin unnecessary. Having regard to the reasoning adopted by the Court of Appeal in this context, the refusal to question this witness did not deprive the applicant of a fair trial.

The Court concludes that it does not appear that the applicant's conviction was based on evidence in respect of which he was not, or not sufficiently, able to exercise his defence rights under Article 6 §§ 1 and 3 of the Convention. Furthermore, noting that the applicant was convicted following adversarial proceedings in the course of which he was given ample opportunity to state his case, to challenge the evidence before the trial courts and to submit whatever he found relevant for the outcome of the proceedings, the Court finds no indication that the criminal proceedings

against the applicant fell short of the requirements of Article 6 of the Convention as regards fairness of proceedings.

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously
Declares the application inadmissible.

273

Europees Hof voor de Rechten van de Mens
27 januari 2004, nr. 44484.98
(Mrs. Costa, Baka, Loucaides, Jungwiert, Butkevych, Thomassen, Ugrekhelidze)

Lorsé versus Nederland. De rechter heeft gebruik gemaakt van verklaringen voor het bewijs van medeverdachten met wie het Openbaar Ministerie een overeenkomst is aangegaan waarin aan dezen tegenprestaties zijn toegezegd in ruil voor het afleggen van hun verklaringen. Het had de voorkeur verdiend dat de betrokkenen konden hebben getuigd in aanwezigheid van de verdediging. Dat zulks niet mogelijk is geweest is niet Nederland aan te rekenen en er is een serieuze poging gedaan een van de betrokkenen te ondervragen op een wijze die recht deed aan de belangen van de verdediging. Voorts is de verdediging geïnformeerd over het aangaan van en de inhoud van de overeenkomsten en omtrent de personen van de betrokkenen. Aldus waren zowel de verdediging als de rechter ruimschoots in de gelegenheid de overeenkomsten en de geloofwaardigheid van de betrokkenen en hun verklaringen te toetsen. Daaraan doet niet af de weigering van de rechter de officier van justitie te (doen) ondervragen en vragen omtrent de informantstatus van een van de betrokkenen toe te staan. De rechter is zich voorts bewust geweest van de gevaren die zijn verbonden aan het aangaan van overeenkomsten als hier aan de orde en heeft de verklaringen van de betrokkenen met uiterste behoedzaamheid gebezigd. Bovendien waren de veroordelingen niet in beslissende mate gebaseerd op deze verklaringen. De omissie in eerste aanleg inzake het informeren omtrent het gebruik van infiltranten, is in hoger beroep hersteld. De weigering de stukken inzake de infiltratie – die geen relevante informatie had opgeleverd – bij het dossier te voegen ontnam klager niet het recht op een fair trial. Het (meerderheids)oordeel is dat het recht op een fair trial niet is geschonden en dat de klacht kennelijk ongegrond is.

[EVRM art. 6, 35; Sv art. 29, 219]

THE FACTS

The applicant, Mr Jacobus Lorsé, is a Netherlands national, who was born in 1945 and is, as far as the Court is aware, serving a prison sentence in Dordrecht. He is represented before the Court by Mr A.A. Franken, a lawyer practising in Amsterdam.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Events prior to the criminal proceedings against the applicant

In 1991 a criminal investigation under the code name 'Laundry' was opened into a criminal organisation engaged in drug trafficking. The investigation was prompted by discovery in the harbour of Rotterdam on 15 May 1991 of 357 kilograms of cocaine in a shipment of wood on board a ship from Surinam.

A team of police officers (the Laundry team) was composed and in September 1991, upon application of the public prosecutor (*officier van justitie*), the investigating judge (*rechter-commissaris*) of the Regional Court (*ar-*