168

SCSL-04-16-PT
(6791 - 6809)

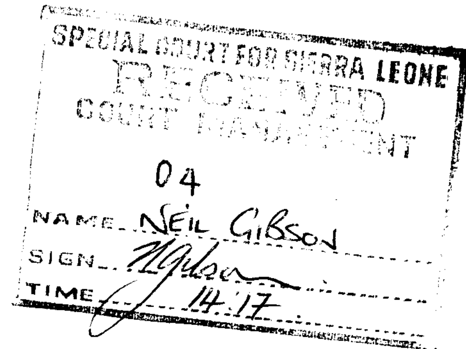
6791

BEFORE:

Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lissack

Registrar: Mr Robin Vincent

Date Filed: 4th March 2005



The Prosecutor

-v-

ALEX TAMBA BRIMA also known as TAMBA ALEX BRIMA also known as GULLIT

BRIMA BAZZY KAMARA also known as IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

And

SANTIGIE BORBOR KANU ALSO KNOWN AS 55 also known as FIVE - FIVE also known as SANTIGIE KHANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL-2004-16-PT

BRIMA - MOTION IN SUPPORT OF KANU –MOTION TO DISCLOSE PROSECUTION MATERIALS AND/OR OTHER INFORMATION PERTAINING TO REWARDS PROVIDED TO PROSECUTION TRIAL WITNESSES

Office of the Prosecutor	Defence Counsel
Luc Coté	Kevin Metzger
Lesley Taylor	Glenna Thompson
Boi-Tia Stevens	Kojo Graham
Millicent Stronge	

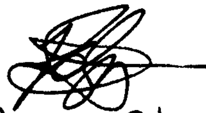
1. The Defence for Brima having had sight of the motion filed by the Defence for Kanu, wishes to register its support for the said motion. We agree with the contents of the motion, adopt and echo the arguments presented by the Defence for Kanu.

2. Additionally, we urge upon the Honourable Trial Chamber the Decision of the English Court of Appeal in the case of R v Mathew Smith and Five Others[1]. It is respectfully submitted that the said case supports the motion for disclosure, and indeed highlights the problems which non–disclosure of material obtained by Prosecution can create.[2] This is particularly germane to this case, especially where the Prosecution intends to rely on witnesses (insider witnesses) who are said to have been associated with the Accused and are reputed to have been given or offered, emoluments, benefits and/or promises of relocation.

3. We would respectfully urge the Honourable Trial Chamber to hear oral arguments on this or any other matter that may arise from this motion.

Respectfully submitted

This 4th day of March 2005

Kevin Metzger 

Glenna Thompson

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[1] [2004] EWCA, Crim 2212, 29th July 2004, unreported

[2] Judgement of Latham LJ, paragraph 1

Annex

R v Matthew Smith and Five Others

Supplied by Smith Bernal Reporting Ltd for Lawtel 6794

No: 2002/0453/D5, 2002/2000/D3, 2002/6294/D5, 2002/7180/D5, 2003/6221/D5 & 2004/3903/D5

Neutral Citation Number: [2004] EWCA Crim 2212
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Thursday, 29 July 2004

B E F O R E:

LORD JUSTICE LATHAM

MR JUSTICE ASTILL

SIR CHARLES MANTELL

R E G I N A

-v-

MATTHEW SMITH
VINCENT HEMENS
CHARLES DIXON
DANIEL LITTLE
STEPHEN MEE
FRANCIS LITTLE

Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR C BENSON appeared on behalf of Smith
MR P HACKETT QC and MR N MERCER appeared on behalf of Hemens
MR J STURMAN QC and MR C VAN HAGAN appeared on behalf of Dixon
MR B TETLOW appeared on behalf of D.Little
MR P CALDWELL appeared on behalf of Mee
MR B RICHMOND appeared on behalf of F.Little
MR D DAY QC, MR S COLLERY AND MR N MEDCROFT appeared on behalf of the CROWN

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE LATHAM: These appeals raise, once again, the problems which non-disclosure of material obtained by the prosecution can create. And, once again, the problem has been created by a failure by Customs and Excise Investigators to make adequate disclosure of material which was relevant to issues which the court was entitled to consider to its own prosecution team of lawyers.

2. On 16th August 2001 the appellants Smith, Hemens and Dixon were convicted of conspiracy to import cannabis. Hemens and Dixon were convicted of five counts and were sentenced to 12 years' imprisonment. Smith was convicted on one count and was sentenced to four years' imprisonment. The applicants Daniel Little, his cousin Francis Little, and Mee, pleaded guilty on 4th April 2001 to one count of conspiring to import cannabis. Daniel Little was sentenced to five years' imprisonment. Mee and Francis Little were sentenced to eight years'

imprisonment. The appellants Hemens, Dixon and Smith appeal with leave of the single judge.

3. The applicants Daniel Little, Mee and Francis Little apply for leave to appeal against their convictions, despite their pleas of guilty, on referral by the Registrar. Mee and Francis Little require extensions of time in which to make their applications, which we grant.

4. The prosecution case was that between August 1998 and March 2000 the appellants, the applicants and others had been involved in a conspiracy to import cannabis on a massive scale. The prosecution believed that it could identify 67 occasions on which cannabis was imported into this country, their value running into millions of pounds. The conspiracies fell into two categories. The appellants Hemens and Dixon, together with a co-defendant Moore who gave evidence for the prosecution, arranged for the importation and delivery of the drugs. Smith took the place of Dixon after Dixon had been arrested for an unrelated matter on 11th February 2000. It was accepted that he had been involved for that limited period. The Little cousins, Daniel and Francis, together with Mee were customers.

5. The prosecution evidence in part consisted of evidence relating to front companies which were put in place by Hemens, Dixon and Moore for the purposes of arranging the importation into this country of the drugs, in part the evidence of surveillance by Customs and Excise showing the connection between the various appellants and applicants, but most important for the purpose of these proceedings the evidence of Moore which, if credible, implicated the appellants as his partners in organising the importations and the applicants as their customers. For the purposes of this appeal, it is unnecessary to set out the prosecution case in any greater detail.

6. The essence of these appeals is that material has now come to light which the defendants at the original trial would have been entitled to use to discredit the evidence of Moore. It is submitted that the evidence is such as could have materially affected the way the judge dealt with an application by all the defendants at trial that the trial be stayed for an abuse of process. It was certainly material which would have enabled the appellants' counsel to have cross-examined Moore as to his credibility in a way which could have affected the verdicts of the jury. It is material which, it is submitted, established that Moore expected a substantial reward and other benefits in return for giving evidence, contrary to the impression given by the disclosed documents and contrary to Moore's assertions in cross-examination that he expected no reward. It is further said that the circumstances suggest that the non-disclosure was deliberate and that it was done to conceal the fact that Moore had indeed been led to expect a reward.

7. The application to stay the proceedings, which was heard and dismissed by the trial judge in March 2001, was based on the fact that by then it was known that there had been considerable concern about the activities of a Customs and Excise Investigation Officer, Bernard Small, in enquiries relating to the substantial evasion of duty on alcohol, conspiracies centred on London City Bond. By then one of the major figures in those conspiracies, Mr Allington, had made statements in which he disclosed that he had been a participating informer, contrary to the case which had been presented by Customs and Excise in a number of trials which had by then taken place arising out of those conspiracies. By March 2001 one judge had held that Allington was a participating informer and had ordered disclosure of documents which resulted in Customs and Excise abandoning the prosecution. There were a number of appeals pending in which allegations of non-disclosure and dishonesty on the part of Customs and Excise Officers, including Bernard Small, were being made. The unhappy story is set out in the judgment of this court in R v Villiers and others [2001] EWCA Crim 2505, judgment given on 9th November 2001. The consequences of the findings in that case echoed thereafter

through a number of later decisions, in particular R v Early and others [2003] 1 Cr.App.R 288.

8. The relevance of those decisions is that Bernard Small was one of the two officers instructed to debrief Moore. The defendants' applications to stay the indictment as an abuse of process were based on the allegations which were then being made about Bernard Small's behaviour in relation to LCB as they demonstrated, it was said, that he was capable of dishonest manipulation of evidence. It was therefore submitted that the evidence of Moore must accordingly be tainted. It was also submitted that there was reason to believe that there had not been full disclosure of all the documentation as to the relationship between Moore and Customs and Excise. The judge acknowledged the strength of the allegations which were being made, but did not consider that he could treat them as any more than allegations at that time and dismissed the defendants' applications. No one criticises the decision he made on the material that he had available to him at that time.

9. So far as disclosure is concerned, there had, as we understand it, been only one relevant PII application which was heard by the judge on 28th February 2001. On that occasion prosecuting counsel disclosed to the judge the fact that Moore had, as a consequence of his intention to give evidence, been given witness protection by Customs and Excise under their Witness Protection Scheme. The consequence was that daily contact sheets were kept by Witness Protection Officers, who were quite separate from the investigating officers. Four specific documents were drawn to the judge's attention. Unfortunately there is no note of which they were, save that one of them was known as a Memorandum of Understanding which Moore had been asked to sign, but had not signed, in January 2001. This document set out the basis upon which he was being provided with protection and the benefits that he would thereby obtain. There was no mention in it of any reward. As to the other documents, the judge accepted the prosecution's submission that their disclosure could affect the confidence a witness such as Moore had in the effectiveness of the Witness Protection Scheme.

10. It was on the basis of the judge's ruling in relation to the abuse of process application and the disclosure which had by then been made that Daniel and Francis Little and Mee pleaded guilty. The trial of the appellants then proceeded during the course of which Moore gave evidence in accordance with the witness statements which he had previously given implicating the appellants and the applicants in the way that we have described. He was cross-examined and, as we have said, denied any expectation of any reward. He said that he had decided to give evidence against his co-conspirators because he had been threatened.

11. The appellants themselves gave evidence giving innocent explanations of the contacts they undoubtedly had with Moore and denying any involvement in the importation of drugs.

12. In the documents which were disclosed, in particular the documents relating to the debriefing of Moore and the taking of his statements, the officers dealing with him, in particular Mr Walsh who was the officer in charge of the debriefing, made repeated reference to the fact that no inducement or reward had been offered to Moore and Moore agreed on each occasion. The same theme can be seen in notes of meetings between Customs and Excise officials and Mr Bunn, Moore's solicitor, who had first approached Customs and Excise in April 2000 indicating that Moore might be prepared to give evidence for the prosecution. There was, however, no doubt from documents which had been disclosed that Mr Bunn was seeking to obtain benefits for Moore in return for his evidence, including benefits for his family and protection for him and his family, and had also raised the issue of whether any lump sum payment would be offered. In the disclosed documents Customs and Excise Officials consistently said that there could be no question of any inducement or reward.

13. The documents which were not disclosed and which the prosecution concede should have been disclosed show, according to the appellants, a different picture. The documents to which particular reference has been made and their relevance are as follows:

i) On 20th July 2000 there was a meeting between Mr Fitzpatrick of the Customs and Excise and Moore and Mr Bunn. In his Minute of this meeting Mr Fitzpatrick notes that after Moore left the meeting there was a discussion between him and the solicitor about Moore's expectations. The Minute states:

> "His solicitor has already indicated that Moore is likely to want a one-off payment to move abroad. Again, he has been told that we are unable to make any commitments at this point [emphasis added], nor could we, even if we wished to as the circumstances in the years to come when Moore is released from prison may be very different."

ii) This meeting was followed by a telephone call on 28th July 2000 between Moore and one of his Witness Protection Officers. It is clear that Moore was trying to find out more about what was being offered to him. He was in particular concerned about the fact that if he remained in the United Kingdom he was in effect being offered a council house. He was looking for relocation abroad. He was concerned that he had not been told what had happened between his solicitor and Customs and Excise. This was in the context clearly of his having talked to other prisoners about their expectations of rewards from the police. He mentioned that there were contracts between such prisoners and the police on the basis of which they would be paid out of what he described as a "reward fund." The Witness Protection Officer made it plain that that was a different matter from witness protection which was what he was concerned with, but he said:

> "It's not, that's nothing to do with Witness Protection, that is something entirely different. It may be that you know that's a road which is taken or view that is taken at the end of the day."

Moore then said:

> "Well I mean ... that is between them and I don't actually want to know until after the trial."

He went on:

> "But at the same time I just want confirmation of the fact that I will be looked after at the end of the day."

Witness Protection Officer:

> "Yeah, yeah."

iii) On 29th November 2000 a Mr Millington, who was a Customs and Excise solicitor dealing with Moore's assets in the context of the confiscation proceedings, expressed concern that some benefits that were apparently being provided to Moore and his girlfriend Miss Netts might compromise the position. He said:

> "There is in my view (again shared by counsel) a very real risk that some of this documentation regarding the manner in which the witness and Miss Netts have been treated by the NIS may become discloseable to the solicitors acting for the persons against whom the witness is to give evidence. Clearly if this was to

happen it could have a damaging effect on the credibility of the witness and a prejudicial effect on the cases concerned."

iv) On 4th December 2000, one of the investigating officers, Mr Pettit, in a note he made of a meeting with senior management, said:

"We could not discuss rewards or payments to the source until he had given evidence. Once that had happened and he proved to be a witness of truth, everything was negotiable."

v) In a note made by Mr Millington of a meeting on 16th February 2001, he said:

"Steve Dunn, the very experienced FIB officer assigned to this case and I have for some considerable time been concerned about the relationship which appears to have developed between the investigating officers, Moore and his solicitors."

vi) In a contact note for 23rd March 2001, the Witness Protection Officer stated in relation to a visit he had made to Moore in prison on 18th March 2001:

"During the journeys and while waiting for Steve's visitor, we discussed his state of mind, and his health. We talked some more about speaking to a chaplain and I said that I would try to arrange this for Wednesday. Steve spoke at length about his expectations of Witness Protection and Customs generally. He felt that he wanted a financial disbursement at the end of the two trials, at which time he would relocate himself. He did not name a sum, but mentioned an acquaintance who had received £700,000 from the police, and he indicated that this was not a large sum. He also indicated that if he received adequate payment at the end of the trials, that he would not plan to continue with the judicial review. He said that he felt that Customs would be happy with this arrangement. I explained that I had no involvement in the arrangements for Steve's future at this point, and that even if I did, I would not be in a position to talk about what will happen as this could be considered an inducement. He said he was happy with that and that he didn't want to discuss it until the trials were over, but he continued to make reference to it throughout both journeys. At one point Steve said 'If I am not properly looked after by Customs at the end of this, I'll make sure that no one ever goes to Witness Protection again. I'll sell my story to the press. I have already had a number of offers'."

vii) In a note of a meeting on 12th June 2001, between Mr Bunn and Mr Pettit, Mr Pettit stated:

"...

(5) Any payment to be withheld until after second trial.

...

(7) Steve wants to leave the country and live outside the Witness Protection System. One-off payment - no publicity - money for Mel and his mother."

viii) In a contact note of 22nd January 2002, the Witness Protection Officer noted that Moore had said that "Ray Pettit had said he would get a one-off payment."

ix) In a telephone call in May 2002, Moore said to a Witness Protection Officer that "Ray

Pettit and Paul Aldred and Gary Lisle have told me that I wouldn't have to go into Witness Protection. I will be able to go abroad, they said they would give me a one-off payment, it isn't ... the money side of things I am worried about."

We should add at this point that the intention had originally been that Moore would give evidence in a further trial relating to other customers, hence the reference to the second trial in some of the documents to which we have referred. In the event he refused to give evidence. The second trial never took place.

14. Leaving aside the last two documents to which we have referred, which post-dated the trial, it is submitted on behalf of the appellants that the documents establish at the least that Moore expected to obtain a reward and that the relationship between the Customs and Excise officers Mr Bunn and Mr Moore was choreographed in order to give the impression that no reward would be provided, whereas all parties knew that there would be a reward and that the only question was its amount which would await the end of the proceedings. The telephone conversation on 28th July 2000 was revealing, it is said, because it indicated that Moore was himself well aware of the charade that was being played and was anxious not to be told anything expressly which could compromise his position as a witness. It is submitted, however, that this material is sufficient to entitle a court or a jury to conclude that a deal had in reality been struck.

15. We should record that this was not the full extent of the submissions which have been made on behalf of the appellants in their written submissions. In those they asserted that Customs and Excise had also failed to disclose the documentation which was ultimately disclosed in relation to Bernard Small and which resulted in the conclusions which were reached by the courts in the cases to which we have referred. It was submitted that if this material had also been available that would have strengthened the argument that not only had there been non-disclosure but that there had been deliberate non-disclosure and that some form of manipulative deal had been struck between the Investigating Officers and Moore. The appellants also pointed to benefits which had been obtained, it was said, by Miss Netts and Moore during the period between his arrest and the end of the trial, which indicated that Moore was being given preferential treatment in relation to the confiscation proceedings, and further submitted that the confiscation proceedings were themselves pursued with an uncharacteristic lack of vigour which suggested that Moore was being allowed to retain a significant proportion of his illicit gains.

16. Customs and Excise strongly resisted the inferences that the appellants sought to draw from the documents set out in (i) to (vii) above. They submitted in particular that it was important to bear in mind the timescale within which Moore was debriefed and made his statements. After the contacts between Mr Bunn and the Customs and Excise Investigators, arrangements were made for Moore to be taken to a place where he would be held in conditions whereby the Police and Criminal Evidence Act provisions were to apply to his custody requiring a full record to be made of all contact with him. He was first seen by Mr Small and Mr Walsh in the custody suite on 3rd May 2000. There was a further interview on 5th May 2000, at the end of which he had named all the appellants and the applicants together with others. Although a statement taken on 19th May 2000 did not name Hemens or Smith, that was because they had not been arrested. He made a statement on 2nd June 2000 in which he named those two appellants. In those circumstances it is submitted that none of the material which has now been disclosed suggests that any deal could have been struck as the appellants and applicants would seek to allege by the time that Moore had committed himself to giving evidence in terms which implicated the appellants and applicants. It is also submitted that there is nothing which points to any form of underhand dealing on the part of Customs and

Excise Officers which could justify the conclusion that there had been even arguably an abuse of process or deliberate non-disclosure.

17. As far as the appellants are concerned, it seems to us that they are entitled to succeed in their appeals whether or not there was any material which could have supported an argument that there had been an abuse of process. Moore in his evidence during their trial asserted that he had not expected any reward. The documents which have now been disclosed would have provided significant cross-examination material which could have undermined that assertion. Whether or not it would have done so is not a matter about which we can speculate. The appellants were entitled to disclosure of that material which could have had an effect on the verdicts of the jury. Customs and Excise have not sought to suggest that the other material in the case was in itself sufficient to justify our holding that the verdicts were safe in the absence of the evidence of Moore.

18. The applicants, however, are in a different position. All three of them pleaded guilty. Further, Mee and Francis Little gave evidence in a Newton hearing in January 2002 prior to sentence in which they admitted their part in the conspiracy. In R v Early, Rose LJ giving the judgment of the court said this as to the court's approach in cases such as the present:

> "Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided. The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. This is particularly crucial in relation to disclosure and Pll hearings. Accordingly, Mr Gompertz QC, rightly, accepted that when defence counsel advised Rahul, Nilam and Pearcy as to plea, they were entitled to assume that full and proper disclosure had already been made. He also rightly accepted that a defendant who pleaded guilty at an early stage should not, if adequate disclosure had not by then been made, be in a worse position than a defendant who, as the consequence of an argument to stay proceedings as an abuse, benefited from further orders for disclosure culminating in the abandonment of proceedings against him. Furthermore, in our judgment, if, in the course of a PII hearing or an abuse argument, whether on the voir dire or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows of this, or this court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution case will be regarded as tainted beyond redemption, however strong the evidence against the defendant may otherwise be. Such an approach is consistent with the view expressed by this court, in Edwards 2 CAR 345 @ 350F where, in a different context, Beldam LJ referred to the suspicion of perjury starting to infect the evidence and permeate other similar cases in which the witnesses are involved. We approach the question of safety of these convictions, following pleas of guilty, in accordance with Mullen 2 Cr App R 143 as approved in Togher & others 1 Cr App R 457, namely a conviction is generally unsafe if a defendant has been denied a fair trial. We bear in mind, in particular, three observations by Lord Woolf CJ in Togher. First, at paragraph 30, 'if it would be right to stop a prosecution on the basis that it was an abuse of process, this court would be most unlikely to conclude that, if there was a conviction despite this fact, the conviction should not be set aside'. Secondly, at paragraph 33, 'The circumstances where it can be said that the proceedings constitute an abuse of process are closely confined. It has to be a situation where it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand'.

> Thirdly, at paragraph 59, freely entered pleas of guilty will not be interfered with by this court unless the prosecution's misconduct is of a category which justifies this. A plea of guilty is binding unless the defendant was ignorant of evidence going to innocence or guilt. Ignorance of material which goes merely to credibility of a prosecution witness does not justify reopening a plea of guilty."

19. Whilst it could be said that in one sense the material which had not been disclosed went essentially to the credibility of Moore, that does not seem to us to provide the real answer. The issue is not just the credibility of Moore. The relevance of the material to these applicants is that it would have provided support for their application for a stay on the basis that there had been an abuse of process, in that the material is capable of supporting the argument that Moore's evidence was tainted by a deal which had been struck either with him or his solicitor. If the material is indeed capable of supporting such an argument then the applicants have been deprived of the opportunity to deploy it and therefore of having the indictment stayed. The failure to disclose the material therefore denied them a fair trial. As this court said in R v Austin [2004] EWCA Crim. 1983:

> "In other cases such as *Gell* convictions have been quashed because of non-disclosure, or wrongful disclosure but, in those cases, if there had been disclosure, it might have had a causative impact on a tenable abuse argument."

20. It seems to us that the question therefore is whether or not the material could indeed have had a causative impact on a tenable abuse argument. The applicants submit that even if the material which pre-dated the abuse hearing in March 2001 did not include all the material to which we have been referred, nonetheless there was sufficient in the documents we have referred to in (i) to (vii) to justify the submission that it could have had an effect and we are not in a position to conclude that that effect would have been insignificant in the absence of hearing the sort of evidence which would have to be called during the course of an abuse hearing in order to deal with the issues raised by that material.

21. We see no escape from the conclusion that this submission is correct. The applicants were therefore denied the opportunity to deploy that material in support of the abuse of process application and were accordingly denied a fair trial. Despite their pleas of guilty their convictions were unsafe; and neither the fact that they pleaded guilty nor, as far as two of them were concerned, that they admitted the offences in the Newton hearings can affect that position. They were entitled to a proper determination of the issue as to whether or not they should be arraigned.

22. It is unnecessary for us therefore to decide whether the non-disclosure was deliberate or not. That issue may be relevant if there were to be a retrial and a renewed application to stay for abuse of process. It would accordingly be inappropriate for us to make any comment about it.

23. Accordingly, we give leave to the applicants to appeal and, for the reasons that we have given, the appeals of all the appellants are allowed and their convictions are quashed.

24. MR DAY: My Lord, can I invite the court to consider the question of retrial in this case?

25. LORD JUSTICE LATHAM: Certainly.

26. MR DAY: The Crown's position is that so far as Smith and Daniel Little are concerned, they have both served their sentences and have been released. The court may not feel that --

27. LORD JUSTICE LATHAM: Smith and.

28. MR DAY: Danny Little.

29. LORD JUSTICE LATHAM: Yes.

30. MR DAY: Of course so far as Smith is concerned the only evidence against him came from Moore. So the court may feel that it is not in the interests of justice that there should be a retrial so far as they are concerned. (Pause) I am told, I did not know this, that Francis Little and Mee have also been released.

31. LORD JUSTICE LATHAM: I would have thought that is likely ...

32. MR DAY: There we are.

33. MR RICHMOND: I had a conference with my client in chambers, so I hope that is the case!

34. MR DAY: Perhaps the same considerations apply to them.

35. LORD JUSTICE LATHAM: Certainly.

36. MR DAY: So far as Hemens and Dixon are concerned, I had a meeting last night with the senior personnel of Customs and Excise. There are other matters and other persons interested that we have to consult with before we can finally take a decision ourselves as to what to do in relation to Hemens and Dixon.

37. So far as Mrs Hemens is concerned, of course, the case against him entirely depended on Moore, so it will depend on whether or not if there is any possibility of Moore being called. Can I say that he was spoken to some time ago and tentatively expressed his willingness, but there are other matters that have come to light so far as we are concerned that will have to be considered.

38. So far as Mr Dixon is concerned, it has always been the Crown's position that there is a case against him, although it is weaker without Moore, and the stance we took for the purpose of this appeal is that we were not going to argue that because the judge said to the jury that there was no case without Moore against him.

39. LORD JUSTICE LATHAM: I trod rather gently in relation to that aspect of the matter.

40. MR DAY: So in relation to Moore and Dixon we would invite the court to consider the issue of retrial and to give the Crown the usual 28 days for preferring the indictment, during which time we will be in a position to finally come to a decision as to what course to take.

41. LORD JUSTICE LATHAM: So it is only in relation to Dixon and Hemens then.

42. MR DAY: Yes. On the assumption that everyone else has served their sentence, which I am sure can be confirmed by their counsel.

43. LORD JUSTICE LATHAM: Yes. Mr Hackett?

44. MR HACKETT: My Lord the principles that this court has applied when considering whether under section 7 of the Criminal Appeal Act 1968 to order a retrial are summarised in two or three lines in Archbold. The section starts at the bottom of page 1005, paragraph 7-112.

45. LORD JUSTICE LATHAM: Yes.

46. MR HACKETT: And the principles are over the page. My Lord if I may read them, they are very short and there is nothing else in the actual reports of the cases. It says:

> "The decision whether to order a retrial requires an exercise of judgment, involving consideration of the public interest and the legitimate interests of the defendant. The former was generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution could be conducted without fairness to, or oppression of, the defendant."

47. My Lords the factors that we invite the court to take into account and that we argue in support of our submission there should be no order for a retrial is firstly the chronology, the prosecution starting in the year 2000, the trial starting in March 2001, concluding with Mr Hemens conviction in August of 2001, so he has served almost three years in prison. My Lords, we say that there is oppression and unfairness in any order for a retrial not only because of that chronology but because of the reason for the quashing of his conviction. My Lords have just read the judgment of this court so I do not need to go through it, but there is an element of culpability in the prosecution for this non-disclosure. There is great unfairness and oppression to Mr Hemens through the non-disclosure. My Lord it is worth mentioning as well, when considering the chronology, that it is now 18 months since Mr Hemens received leave to appeal. Although some significant disclosure in the appeal has come very late in the day, the contact sheets and other material came early in the day and what has held him up, and it has been a very frustrating 18 months for him, is that others have come in on his coat tails, one by one and bit by bit, and that and the complications in the case have led to the appeal being delayed.

48. My Lords, the principal matter that I want to say something about is Mr Day's statement that Moore was approached and tentatively expressed his willingness. We say that does not really fully reflect the present situation and the other matters generally referred to are matters that entirely exclude the possibility that Moore will ever step into the witness box in any retrial and there can be no tenable argument that Moore will give evidence in this case and I will support that in a moment. My Lord, if it is right that means that the wheels start to grind again, the prosecution say they want 28 days and that is regrettable. The non-disclosure was admitted, the issues were clear, the problems with Moore that I will illustrate to my Lords in a moment have been known about for some time, the prosecution should have been in a position to know where they stood today.

49. If I could take my Lords to the material I rely upon it is at the back of File 13, starting at page 4764. It is the documents that I handed to my Lords late in the day yesterday. Disclosure documents, Steven Moore's finances. The first three paragraphs are not so relevant. They merely disclose that Moore, contrary to his evidence and disclosure at trial, was using his sister for money laundering of drugs proceeds. My Lords from paragraph 4 what this document reveals is that from at the very latest August 2003, and Moore must have started earlier than that to be able to effect this foreign fraud, he was engaged in very significant fraudulent activity. My Lords, that came last week, that disclosure, but we had a few weeks ago a disclosure request from the Swiss authorities from the Investigating Magistrates to interview Moore in connection with their end of this fraud. My Lords can see the scale of what Moore has been involved in. The paragraphs that follow I can summarise for my Lords, not only has he been engaged in that activity, which was unsuccessful, that is worth noting, on the face of it he did not succeed but it is pretty serious stuff. But he has been successful at some point because he has paid £1 million into bank accounts, his own bank accounts, which suggests a certain amount of confidence on Mr Moore's part, given his recently concluded almost negligible confiscation proceedings, that he feels comfortable enough to be paying these huge sums into accounts in his name or controlled by him. If the prosecution were to

call Moore to make the case against Mr Hemens, Moore would have to make a statement making a full and frank confession of his conduct and the prospects of Moore making a statement now to the prosecution of a full and frank confession and his being relied upon as a witness of truth, to go with the material we now have about the negotiations before and during the trial, and together with material we now have about how his confiscation proceedings we say were manipulated, render the prospect of his being called absolutely nil. So although he may once have expressed a tentative willingness to give evidence, that no doubt was before he understood that the authorities had this information on him and it would be unfair and oppressive, in our submission, if a retrial was ordered by this court in circumstances where the only witness who can result in Mr Hemens' conviction has engaged in this sort of conduct which means that the prosecution cannot in reality rely upon him. We do say that this is a decision the prosecution could and should have taken before today. Unless I can assist my Lords any further, those are our submissions.

50. LORD JUSTICE LATHAM: Thank you.

51. MR STURMAN: My Lord, in July 2003 in my first draft of my skeleton I conceded that there should be a retrial, but that was before this most recent disclosure --

52. LORD JUSTICE LATHAM: We are not going to hold you to that.

53. MR STURMAN: I support everything Mr Hackett has said. Mr Dixon has been custody for four years and seven months.

54. LORD JUSTICE LATHAM: Was he in custody from the moment he was arrested?

55. MR STURMAN: Yes.

56. LORD JUSTICE LATHAM: He was arrested in February 2000, was he not?

57. MR STURMAN: Four years and five months, yes, there were two months in relation to the other matter which was discontinued. Although the Crown say that there is a distinction between Dixon and Hemens, interestingly the note of the first discussions with the officers as to whether or not Moore should give evidence, it is page 3268, I do not ask you to look it up, I will read you the extract: "Moore is important to bolster the case against Dixon which is not as strong as that against the others", right at the beginning when there is the first debrief with Moore and Mr Bunn's offer for Mr Moore to give evidence, and bearing in mind what we now know about Moore frankly it is inconceivable that he is going to tread the boards a second time, if I can use the vernacular, bearing in mind the difficulties. If there is another trial it would not start probably until 2005. Mr Dixon's earliest date of release is 2005. The trial took five months last time, there is no reason to think it would take less than three months this time. Is it worth the public money in going through this and lancing this boil against in public?

58. LORD JUSTICE LATHAM: Yes. I assume so far as Hemens is concerned, his earliest date of release will be some time in 2006 or maybe even 2007. He has served three so he has at least three more years. Mr Day, is there anything further you wish to say?

59. MR DAY: No, thank you.

60. LORD JUSTICE LATHAM: We will retire and consider the matter.

(The court adjourned for a short time)

61. LORD JUSTICE LATHAM: We consider that the seriousness of the offences which the two appellants who remain in custody are alleged to have committed, mean that in the public interest there should be a retrial. However, bearing in mind all the matters that have been submitted to us on behalf of both these appellants, we consider that there would be the possibility of injustice if they were not granted bail and the question therefore is what conditions, if any, would the prosecution seek to impose on the grant of bail to these two appellants?

62. MR HACKETT: Mr Day has already considered the matter and has kindly indicated to me that the prosecution would not oppose bail. I do not know whether --

63. LORD JUSTICE LATHAM: Is that correct?

64. MR DAY: So far as Hemens is concerned I did intimate that.

65. LORD JUSTICE LATHAM: That would in fact accord with the position pretrial and during the trial.

66. MR DAY: Yes.

67. LORD JUSTICE LATHAM: Were there any conditions during that period, Mr Hackett?

68. MR HACKETT: My Lord none of those who instructed me at the trial instruct me now.

69. MR DAY: There was certainly a surety. I am not sure whether there were any reporting restrictions before the trial started. Normally when the trial starts and the defendants were turning up at court.

70. LORD JUSTICE LATHAM: There is no problem about reporting. No.

71. MR HACKETT: My Lord, looking at the documents submitted to this court in support of an earlier application for bail, the conditions that were imposed were that he resided at 1 03 Cray Road.

72. LORD JUSTICE LATHAM: That was all?

73. MR HACKETT: My Lord, there was also a curfew between midnight and 6 am. My Lords I do not know if that is of any relevance in the present situation.

74. LORD JUSTICE LATHAM: I am not quite sure how that helps anybody.

75. MR HACKETT: He had to report daily to Orpington Police Station before the trial. My Lords again my submission is that his position today is significantly better than it was before the original trial because of the disclosure that has been made and what we now know about Moore and that daily reporting is simply unnecessary. He met all his obligations during the trial, even after Moore had given his evidence against him he continued to attend. He had to present himself at the door of his residence when required by a uniformed police officer and was not to apply for travel documents.

76. MR JUSTICE ASTILL: To hand in his passport. Presumably he now does not have a passport?

77. MR HACKETT: I do not know whether he has a passport.

78. MR JUSTICE ASTILL: Not to apply means he has not got one.

79. MR HACKETT: Certainly. I do not know if he had these at trial but certainly his parents offered to stand as sureties for him in the previous application before this court in the sum of £250,000 each. I know they have attended every hearing and supported him throughout. My Lords in my submission they are pressing sureties, he is not going to let them down.

80. LORD JUSTICE LATHAM: Yes. What you are offering essentially is a condition of residents. There is a surety or sureties available if we consider that that is appropriate.

81. MR HACKETT: My Lords, yes. Reporting might be appropriate simply in order to make sure that people know where he can be contacted once or twice a week.

82. MR HACKETT: My Lord, yes.

83. LORD JUSTICE LATHAM: That would be the sort of thing I imagine would be satisfactory. Yes, thank you very much. Yes, Mr Sturman?

84. MR STURMAN: I did speak to Mr Day and the Crown do not agree to bail in his case.

85. LORD JUSTICE LATHAM: I am not surprised. Your client has been in custody throughout.

86. MR STURMAN: Of course he has nearly finished his sentence. He has an address to go to, 34 Marland Avenue, Orpington in Kent. His mother is willing to stand surety in the sum of £100,000 but bearing in mind how close he is to the end of the prison sentence anyway, I would submit it is highly unlikely that he is not going to actually stay in the country and await his trial. I do not say this facetiously but of course the Crown to do have a £253,000 security on behalf of Mr Dixon because the £168,000 lottery win for Mr Dixon and the £85,000 payment by the Metropolitan Police was held by Mr Moore in a bank account in Jersey and Customs allowed him to spend it on legal fees. At the end of this case there may well be an argument as to whether or not that £250,000 comes back from the Customs and Excise or comes back from Mr Moore. So there is absolutely no incentive for Mr Dixon to flee when that £250000-odd is out there and he is going to want it back at the end of these proceedings. I do not make that point facetiously, but to illustrate to the court that there is in effect a de facto security that keeps him here to await these proceedings. And the case, in our submission, is fatally flawed against him and it would be an injustice to keep him in custody when your Lordship has in fact said that an injustice can be cured by giving him bail. Otherwise there is an injustice and there should not be a retrial.

87. LORD JUSTICE LATHAM: Yes, Mr Day?

88. MR DAY: My Lord, if you are minded to give Mr Dixon bail, could I also ask that there be a condition that he does not approach directly or indirectly any prosecution witness?

89. LORD JUSTICE LATHAM: We would have to make that a condition I think of Mr Hemens' bail as well.

90. MR DAY: Yes.

91. LORD JUSTICE LATHAM: We will rise and consider the matter.

(The court adjourned for a short time)

92. LORD JUSTICE LATHAM: We have already allowed the appeals and quashed the convictions. We direct that a fresh indictment be preferred, if the prosecution so determines, against Hemens and Dixon only within 28 days. They should be re-arraigned on that fresh indictment within two months. They are in the meantime granted bail. The conditions are

firstly that each should reside at the addresses that have been given to the court by their counsel and if those could be recorded in writing and handed in to the associate and to the prosecution we will be grateful. They should report to Orpington Police Station once a week commencing next week. What day would be appropriate?

93. MR STURMAN: Wednesday, my Lord.

94. LORD JUSTICE LATHAM: Yes, between 8 am and 8 pm?

95. MR STURMAN: My Lord.

96. LORD JUSTICE LATHAM: They must surrender any travel documents that they may have and undertake not to apply for any travel documents. They should not contact any prosecution witnesses, directly or indirectly. We do not consider that it is necessary for there to be any sureties in this case.

97. So far as representation orders for any retrial are concerned, what applications are made? Leading and junior counsel and solicitors?

98. MR STURMAN: Yes, please.

99. MR HACKETT: Yes, please, my Lord.

100. LORD JUSTICE LATHAM: Leading and junior counsel and solicitors. The venue should be determined by the relevant presiding judge. Are there any other matters, Mr Day?

101. MR DAY: Not so far as the Crown are concerned, my Lord.

102. MR HACKETT: My Lord, I apply for a defendants costs order.

103. LORD JUSTICE LATHAM: There has been a period, has there, when Mr Hemens was supported privately?

104. MR HACKETT: My Lord I understand there may be a short period before he was granted legal aid. I do not think it is anything substantial or significant.

105. MR JUSTICE ASTILL: Do we not have to make an order in a certain sum?

106. MR HACKETT: It is to be taxed.

107. LORD JUSTICE LATHAM: Then we will make a defence costs order in respect of Hemens. There is not such an application in respect of Dixon?

108. MR STURMAN: No, he has been legally aided throughout.

109. MR RICHMOND: My Lord, Mr Little does not have the benefit of a representation order at this stage. May I please --

110. LORD JUSTICE LATHAM: Do any of the applicants have them?

111. MR RICHMOND: It is just me.

112. LORD JUSTICE LATHAM: It is just you, Mr Richmond. Of course you arrived latest on the bandwagon, did you not?

113. MR RICHMOND: I did, but I have been here a long time now.

114. LORD JUSTICE LATHAM: Mr Richmond, you can certainly have a representation order for counsel. Is that all you are asking for?

115. MR RICHMOND: My Lord, thank you.

116. LORD JUSTICE LATHAM: Thank you all very much.