Annex D.17

R. v Preston (Stephen)

House of Lords | November 4, 1993 | [1994] 2 A.C. 130

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House of Lords

4 November 1993

[1993] 3 W.L.R. 891

[1994] 2 A.C. 130

Lord Keith of Kinkel , Lord Templeman , Lord Jauncey of Tullichettle , Lord Browne-Wilkinson and Lord Mustill

1993 June 21, 22, 23, 24, 28, 29; Nov. 4

Analysis

[Conjoined Appeals]

Crime—Evidence—Telephone intercept—Unused materials obtained by telephone intercept—Prohibition on evidence tending to suggest existence of surveillance warrant—Conflict between duty of prosecution to disclose unused materials and statutory policy protecting secrecy of surveillance—Whether destruction of surveillance material and consequent non—disclosure material irregularity—Whether defendants to be excluded from legal argument on question of disclosure— Criminal Appeal Act 1968 (c. 19), s. 2(1) — Police and Criminal Evidence Act 1984 (c. 60), s. 78(1) — Interception of Communications Act 1985 (c. 56) , ss. 2(2)(b), 6, 9(1)

Following a surveillance operation mounted by the police, during which a telephone interception warrant had been issued pursuant to section 2(2)(b) of the Interception of Communications Act 1985 , [1] the defendants were charged, inter alia, with conspiracy to evade the prohibition in force in respect of the importation of cannabis. In addition to evidence of personal contact between the defendants, the prosecution relied on the frequency of calls made on the defendants' telephones. During the course of the trial the ***131** question was raised whether there had been a telephone interception. In the absence of the defendants and their solicitors, prosecuting counsel disclosed that a warrant had been issued and indicated that, subject to the prohibition under section 9 of the Act against the giving of any evidence suggesting the existence of a warrant, he would seek advice from the Home Office with a view to disclosing any intercepted material that might assist the defence. He later reported to the court, again in the absence of the defendants and their solicitors, against whom the judge had made rulings restricting what they could be told of the nature of the deliberations in camera, that the Attorney-General had advised that it was not prosecuting counsel's duty to look at any such material as might exist, since it could not in any event be given in evidence without disclosing the existence of the warrant contrary to section 9. It was later disclosed that the material had been destroyed. Pursuant to section 78(1) of the Police and Criminal Evidence Act 1984 , defence counsel made an application for the exclusion of all evidence relating to the making of telephone calls upon which the jury was being invited to draw inferences. The judge refused the application and the defendants were convicted. They appealed against conviction on the grounds, inter alia, that the prosecution's failure to disclose details of the interceptions, and also the judge's rulings excluding the defendants from attending, or receiving information on, the hearings in camera, amounted to material irregularities. The Court of Appeal dismissed the appeals.

On appeal by the defendants: -

(1) that the prohibition in section 9 of the Act of 1985 against adducing evidence tending to suggest that a warrant for interception had been issued was insufficient reason for an investigating authority to refuse to disclose information which might assist a defendant, since the fact that such information could not be put in evidence did not mean that it was worthless, and prosecuting counsel, in his role as arbiter between the adversarial interests of the prosecution and the broader dictates of justice, could only play his part in the decision as to whether the overall evidence warranted the carrying on with a prosecution if he was fully aware of all information material to the case (post, pp. 139F-G, 144G-H, 163F - 164C).
But (2), dismissing the appeals, that the power of the Secretary of State to issue a warrant under section 2(2)(b) of the Act "for the purpose of preventing or detecting serious crime" did not extend to the amassing of evidence with a view to the prosecution of offenders; that the investigating authority were therefore under a duty under section 6 of the Act to destroy all material obtained by means of an interception as soon as its retention was no longer necessary for the prevention or detection of serious crime, and they did not have to retain the material until trial for disclosure to the defence; that although the policy underlying sections 2 and 6 was in contradiction to the duty to give complete disclosure of unused materials, the intent of the Act to keep surveillance secret, and to give the maximum privacy to those whose conversations

had been overheard, prevailed; and that, therefore, the destruction of the documents obtained from the interception and their consequent unavailability for disclosure could not be relied upon by the defendants as a material irregularity in the course of their trial; that, further, the fact that the intercept material had been destroyed and the contents irretrievably lost did not prevent the ***132** adducing in evidence of telephone companies' records as to the defendants' use of telephone equipment; and that, accordingly, the trial judge had correctly exercised his discretion under section 78(1) of the Police and Criminal Evidence Act 1984 to allow the jury to draw inferences from the fact that telephone calls had been made by the defendants (post, pp. 139F-G, 142A-B, 144A-B, G-H, 165D-E, 166C-E, 168G - 169B, E-G, 170E-G).
Reg. v. Effik (1992) 95 Cr.App.R. 427 , C.A. overruled.
(3) That it had not been necessary to exclude the defendants and their solicitors from the legal argument concerning the disclosure of the intercepted material, since such argument could not have contained anything detrimental to the public interest or to the safety of an informant; that it had been equally unnecessary for counsel to be prevented from informing their clients as to the nature of those discussions; and that the judge's rulings on those matters amounted to material irregularities in the course of the trial; but that, on an application of the proviso to section 2(1) of the Criminal Appeal Act 1968 , the irregularities did not cast doubt on the reliability of the jury's verdict and the defendants' convictions would stand (post, pp. 139F-G, 141G-142A, 144G-H, 171D-F, H-172B).
Decision of the Court of Appeal (Criminal Division) (1992) 95 Cr.App.R. 355 affirmed on different grounds.

The following cases are referred to in their Lordships' opinions:

- Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892; [1984] 2 All E.R. 408, C.A..
- Malone v. Metropolitan Police Commissioner [1979] Ch. 344; [1979] 2 W.L.R. 700; [1979] 2 All E.R. 620
- Malone v. United Kingdom (1982) 5 E.H.R.R. 385 ; (1984) 7 E.H.R.R. 14
- Marks v. Beyfus (1890) 25 Q.B.D. 494, C.A..
- National Assistance Board v. Wilkinson [1952] 2 Q.B. 648; [1952] 2 All E.R. 255, D.C..
- Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734
- Reg. v. Agar [1990] 2 All E.R. 442; (1989) 90 Cr.App.R. 318, C.A..
- Reg. v. Aramah (1982) 76 Cr.App.R. 190, C.A..
- Reg. v. Davis [1993] 1 W.L.R. 613; [1993] 2 All E.R. 643; 97 Cr.App.R. 110, C.A..
- Reg. v. Effik (1992) 95 Cr.App.R. 427, C.A..
- Reg. v. Harper-Taylor and Bakker (1988) 138 N.L.J. 80, C.A..
- Reg. v. Hennessey (Timothy) (1978) 68 Cr.App.R. 419, C.A..
- Reg. v. King (unreported), 25 November 1992, C.A.

- Reg. v. Pitman [1991] 1 All E.R. 468; The Times, 31 October 1990, C.A..
- Reg. v. Slowcombe [1991] Crim.L.R. 198 , C.A..
- Reg. v. Smith (Terrence) [1990] 1 W.L.R. 1311; [1990] 1 All E.R. 634; 90 Cr.App.R. 413, C.A..
- Reg. v. Ward [1993] 1 W.L.R. 619; [1993] 2 All E.R. 577, C.A..

The following additional cases were cited in argument:

- Conway v. Rimmer [1968] A.C. 910; [1968] 2 W.L.R. 998; [1968] 1 All E.R. 874, H.L.(E.).
- Edwards v. United Kingdom (1992) 15 E.H.R.R. 417
- Huvig v. France (1990) 12 E.H.R.R. 528
- Inquiry under the Company Securities (Insider Dealing) Act 1985, In re An [1988] A.C. 660; [1988] 2 W.L.R. 33; [1988] 1 All E.R. 203, C.A. and H.L.(E.).
- Lüdi v. Switzerland (1992) 15 E.H.R.R. 173
- Pepper v. Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] I.C.R. 291; [1993] 1 All E.R. 42, H.L.(E.).
- Reg. v. Bolton Justices, Ex parte Scally [1991] 1 Q.B. 537; [1991] 2 W.L.R. 239; [1991] 2 All E.R. 619, D.C..
- Reg. v. Director of Serious Fraud Office, Ex parte Smith [1993] A.C. 1; [1992] 3 W.L.R. 66; [1992] 3 All E.R. 456; 95 Cr.App.R. 191, H.L.(E.).
- Reg. v. Guildhall Justices, Ex parte Director of Public Prosecutions (1983) 78 Cr.App.R. 269, D.C..
- Reg. v. Howson (1981) 74 Cr.App.R. 172, C.A..
- Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.).
- Reg. v. Maguire [1992] Q.B. 936; [1992] 2 W.L.R. 767; [1992] 2 All E.R. 433; 94 Cr.App.R. 133, C.A..
- Reg. v. Sansom [1991] 2 Q.B. 130; [1991] 2 W.L.R. 366; [1991] 2 All E.R. 145; 92 Cr.App.R. 115, C.A..
- Reg. v. Secretary of State for the Home Department, Ex parte Ruddock [1987] 1 W.L.R. 1482; [1987] 2 All E.R. 518
- Reg. v. Taylor (1993) 98 Cr.App.R. 361, C.A..
- Reid (Junior) v. The Queen [1990] 1 A.C. 363; [1989] 3 W.L.R. 771, P.C..
- Rex v. Lee Kun (1915) 11 Cr.App.R. 293, C.C.A..
- Schenk v. Switzerland (1988) 13 E.H.R.R. 242

CONJOINED APPEALS from the Court of Appeal (Criminal Division).

These were appeals, by leave of the House of Lords (Lord Templeman, Lord Griffiths and Lord Browne-Wilkinson) granted on 17 November 1992, by the defendants, Stephen Preston, Zena Preston, Nicholas Clarke, Anthony Austen and Jeremy Salter, from the judgment of the Court of Appeal (Criminal Division) (Woolf L.J. and Scott Baker and Hidden JJ.) (1992) 95 C r.App.R. 355, dismissing their appeals against conviction at the Crown Court at Portsmouth (Judge Griffiths and a jury) for conspiracy to evade the prohibition on the importation of cannabis in contravention of section 3(1) of the Misuse of Drugs Act 1971 and section 170(2)(b) of the Customs and Excise Management Act 1979 , contrary to section 1(1) of the Criminal Law Act 1977 .

Pursuant to section 33 of the Criminal Appeal Act 1968 the court certified the following question of law as being of general public importance:

> "(i) Whether the Interception of Communications Act 1985 makes it unnecessary for the Crown to disclose to the defence material intercepted under the . . . Act relevant to the issues in a criminal trial? (ii) Whether the . . . Act . . . prohibits the putting of questions to a witness in a criminal trial designed to elicit the fact that an interception of specified premises did or did not take place? (iii) Whether the . . . Act . . . renders inadmissible evidence of the contents of any material intercepted pursuant to the . . . Act notwithstanding the relevance of such evidence to the issues in a criminal trial? (iv) Whether the . . . Act . . . creates an exception to the general rule of law as set down in Reg. v. Ward [1993] 1 W.L.R. 619 to the effect that it is incompatible with a defendant's absolute right to a fair trial to allow the prosecution, who occupy an adversarial position in criminal proceedings, to be judge in their own ***134** cause on an asserted claim to immunity to disclosure? (v) Whether, where a plea of guilty is founded or is consequent upon a material irregularity during the course of the trial, the Court of Appeal can apply the proviso to section 2 of the Criminal Appeal Act 1968 ?"

The facts are set out in the opinion of Lord Mustill.

Sydney Kentridge Q.C. (who did not appear below) and *Simon Stafford-Michael* for Stephen Preston. It is the prosecution's general duty to disclose, at least to the judge, relevant material intercepted under the Interception of Communications Act 1985 to the defence, irrespective of any request by the defence. That duty extends to anything which arguably may assist the defence. Although public interest immunity may provide an exception to the general duty, it would be wrong for the prosecution to act as judge in their own cause on the issue of public interest immunity by withholding the material without giving any notice of its existence to the defence: see Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734 ; Reg. v. Ward [1993] 1 W.L.R. 619 ; Reg. v. Davis [1993] 1 W.L.R. 613 and Reg. v. King (unreported), 25 November 1992. The obligation to disclose arises principally at common law with the overriding purpose of achieving a fair trial and a just verdict.

Where a telephone interception has taken place, the question is whether public interest immunity covers the content of the intercepted conversation: Reg. v. Agar [1990] 2 All E.R. 442 . If the interception has produced material which helps the defence that material should be disclosed: see Reg. v. Guildhall Justices, Ex parte Director of Public Prosecutions (1983) 78 Cr.App.R. 269 , 273, 275 and Reg. v Hennessey (Timothy) (1978) 68 Cr.App.R. 419 .

Sections 2, 6 and 9 of the Act of 1985 do not oust the jurisdiction of the court to determine whether the intercepted material is capable of being admitted as evidence in the interests of justice: Reg. v. Effik (1982) 95 Cr.App.R. 427 . If there are circumstances in which such evidence can be led, then there is a correlative obligation to disclose the intercepted material. In section 9 "evidence" means evidence which tends to suggest that one or other of the circumstances set out under section 9(1)(a) or (b) is satisfied. Section 6 provides safeguards for dissemination of the material by protecting the position of the person whose communication has been intercepted, but it does not prevent disclosure to prosecuting authorities or, where appropriate, to the defence. [Reference was made to Malone v. Metropolitan Police Commissioner [1979] Ch. 344 and Reg. v. Secretary of State for the Home Department, Ex parte Ruddock [1987] 1 W.L.R. 1482 .]

The words "preventing or detecting serious crime" in section 2(2)(b) contemplate criminal prosecutions and include specific crimes. Before the Secretary of State can be satisfied that there is a need for a warrant for interception there must be a prima facie case that particular crimes have been or are about to be committed. An interception may achieve the prevention of crime through the prosecution and conviction of offenders: In re An Inquiry under the Company Securities (Inside Dealing) Act 1985 [1988] A.C. 660 , 705-706.

The proviso to section 2(1) of the Criminal Appeal Act 1968 can only be applied where the Court of Appeal is satisfied that there has been no ***135** miscarriage of justice. Where the court has found that there was a material irregularity during the course of the trial, and following such irregularity a plea of guilty was entered and a verdict directed by the trial judge, the court cannot take into account the plea of guilty in determining whether the proviso should be applied. As a matter of principle the proviso should not be applied at all.

Stafford-Michael followed.

Geoffrey Robertson Q.C. (who did not appear below) and *Roderick Price* for Zena Preston. The intercepted material was of particular importance to Zena Preston's case, as the Court of Appeal recognised: (1992) 95 Cr.App.R. 355 , 372. In its absence she did not have a fair trial.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) , even if it is not part of English law, merits consideration as a treaty: see Malone v. Metropolitan Police Commissioner [1979] Ch. 344 , 366, 379. Fairness, within the meaning of article 6 of the Convention, requires that prosecution authorities should disclose to the defence all material evidence for and against the defendant. That requirement is recognised under English law: Edwards v. United Kingdom (1992) 15 E.H.R.R. 417 . [Reference was also made to Malone v. United Kingdom (1982) 5 E.H.R.R. 385 .]

The European Court of Human Rights ruled, in Malone v. United Kingdom (1984) 7 E.H.R.R. 14 , that the telephone-tapping arrangements in the United Kingdom were a violation of the Convention. Legislation was accordingly introduced to ensure that those arrangements complied with the Convention: see The Interception of Communications in Great Britain (1980) (Cmnd. 7873) and The Interception of Communications in the United Kingdom (1985) (Cmnd. 9438). The history and stated aim of the Interception of Communications Act 1985 gives special force to the presumption that Parliament intends to legislate in accordance with its treaty obligations. The purpose of the legislation was to produce compliance with the Convention. Section 9 should therefore be interpreted so as to enable the guarantees of articles 6, 8 and 13, in relation to fair trial, protection for privacy and effective remedy for violation of the Convention, to be complied with. [Reference was made to Huvig v. France (1990) 12 E.H.R.R. 528.] Alternatively, as the Court of Appeal indicated 95 Cr.App.R. 355 , 367, the judge may provide protection to the defendant by excluding evidence of the interpreted material under section 78 of the Police and Criminal Evidence Act 1984 . [Reference was also made to Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734 .]

Where disclosure of material is or may be prejudicial to the public interest, the disclosure may be refused: see Conway v. Rimmer [1968] A.C. 910 and Reg. v. Guildhall Justices, Ex parte Director of Public Prosecutions, 78 Cr.App.R. 269 . The Act of 1985 must be construed consistently with the Attorney-General's public interest duties in respect of prosecutions. Hence the undertaking given to Parliament by Viscount Whitelaw that where exculpatory material appears on an intercept it will be drawn to the Director of Public Prosecutions' attention for him to consider whether the prosecution should be dropped: Hansard (H.L. Debates), 6 June 1985, col. 919). If the respondents are correct, this undertaking can never be ***136** honoured: police must destroy evidence of innocence instead of passing it to those whose constitutional duty is to avoid miscarriages of justice. It is the duty of the police, as part of the apparatus of prosecution, to preserve and to pass on to prosecutors all material evidence: Reg. v. Bolton Justices, Ex parte Scally [1991] 1 Q.B. 537 ; Reg. v. Maguire [1992] Q.B. 936 and Reg. v. Taylor (1993) 98 Cr.App.R. 361 . The policy of the Act of 1985 may be to enjoin secrecy rather than to use intercept material in evidence for the prosecution of serious crime, but in the absence of clear words secrecy cannot be allowed to conduce to the conviction of the innocent. Section 9 does not debar the out-of-court use of telephone intercepts, either by the prosecutors (in deciding whether to drop a case) or by defence lawyers (in making representations to the Director of Public Prosecutions that the trial should not proceed; in ensuring that no false inference is raised against the defendant at trial; for memory-jogging and cross-examination).

The right of a defendant to be present at all stages of a serious criminal trial has always been regarded as elemental to the fairness of the trial, and the defendant's right to be present entails his right to attend with his solicitor. The right is only lost by waiver, express (e.g. illness) or implied (e.g. absconding or creating disorder). Otherwise, a judge has no power to order that a defendant or his solicitor be excluded from hearing argument or rulings. The reason for the defendant's presence is that he should hear the case against him and have the opportunity to answer it: Rex v. Lee Kun (1915) 11 Cr.App.R. 293 ; Reg. v. Howson (1981) 74 Cr.App.R. 172 ; Reg. v. Davis [1993] 1 W.L.R. 613 ; Lüdi v. Switzerland (1992) 15 E.H.R.R. 173 and Schenk v. Switzerland (1988) 13 E.H.R.R. 242 .

Sir Ivan Lawrence Q.C. (who did not appear below) and *Lionel Lassman* for Nicholas Clarke, adopting the submissions of Kentridge Q.C. Where an interception of telecommunications has resulted in criminal proceedings, the prosecution counsel should be informed of the interception. The location of the intercepted telephone equipment should be identified. Such identification may be relevant in the interests of justice and of a fair trial. The prosecution counsel can only properly conduct the case if he is informed of the inferences that may be drawn from evidence of telephone calls made by or to particular defendants. Counsel should be informed of the evidence which has been obtained as a result of an interception of telephone calls, so as to be in a position to consider the question of disclosure and the making of applications to the trial judge. Where nothing adverse to any defendant has been gained from the interception, counsel should be so informed. Such information will ensure that in his opening or closing speech counsel does not invite the jury to draw inferences adverse to a particular defendant when it will not be safe or in the interests of justice and of a fair trial to do so. The prosecution counsel must be in a position to anticipate and prevent questioning by the defence counsel or the making of submissions which may lead to a breach of section 9 of the Act of 1985.

John Perry Q.C. (who did not appear below) and *Brendan Keany* for Anthony Austen, adopting the submissions of Kentridge Q.C. and Robertson Q.C. Under the disclosure rules, the obligation which rests on the prosecution to disclose relevant evidence does not depend on any ***137** request by the defence. The obligation is a continuing one. It rests not only on the actual prosecutor but on the whole prosecution apparatus. In this context, relevant evidence means evidence which has some bearing on the offences charged and the surrounding circumstances of the case: Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734 . It is not limited to evidence which will obviously advance the defendant's case. It is a help to the defendant to have the opportunity of considering all the material evidence which the prosecution have gathered and from which the prosecution have made their own selection of the evidence to be led. The fact that at the end of the day the evidence is of no real significance is irrelevant to the duty of disclosure. Subject to public interest immunity, all statements and documents recording relevant interviews with a defendant must be disclosed: Reg. v. Ward [1993] 1 W.L.R. 619 and Reg. v. Maguire [1992] Q.B. 936 .

Where the disclosable material is subject to public interest immunity, a proper procedure exists for resolving the conflict between the duty of disclosure, the obligation to comply with the principles underlying public interest immunity and to protect sensitive material, and the public interest in the proper administration of justice in the curial process: see Conway v. Rimmer [1968] A.C. 910 and Reg. v. Davis [1993] 1 W.L.R. 613 . Prima facie, the intercepted material is subject to public interest immunity: see Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department [1973] A.C. 388 , 407-408 and Reg. v. Guildhall Justices, Ex parte Director of Public Prosecutions, 78 Cr.App.R. 269 . There is nothing in section 2 of the Act of 1985 which by necessary implication excludes the operation of the disclosure rules. Nor is there anything in section 9 which precludes the intercepted material being put in evidence by way of an admission of the relevant facts. [Reference was made to Reg. v. Effik, 95 Cr.App.R. 427 .] Section 6 also does not by necessary implication exclude the disclosure rule. That section is intended to protect the person whose communication has been intercepted and the intercepted material itself. The arrangements to be made under the section do not limit access to the material to investigating officers. Public interest immunity and relevance provide the necessary protection for the intercepted material if use is to be made of it in a criminal trial. [Reference was made to Conway v. Rimmer [1968] A.C. 910 and Reid (Junior) v. The Queen [1990] 1 A.C. 363 .]

Andrew Collins Q.C. (who did not appear below) and *Michel Massih* for Jeremy Salter, adopting the submissions of Kentridge Q.C. Pursuant to section 2(2)(b) of the Act of 1985 a warrant may be issued "for the purpose of preventing or detecting serious crime." An effective way of preventing serious crime is to secure the conviction of those responsible for it. The means of achieving the purpose of the section include the use of intercepted material in criminal proceedings. [Reference was made to section 45 of the Telecommunications Act 1984 and section 11 of, and Schedule 2 to, the Act of 1985.] Section 6 of the Act of 1985 does not prevent disclosure to a Crown prosecutor. The section only applies where a warrant exists. If there is an unlawful intercept the material obtained can, subject to ***138** section 78 of the Police and CriminalEvidence Act 1984 , be used and must, if of use to the defence, be disclosed.

Alan Moses Q.C. (who did not appear below), *John Aspinall* and Philip Havers for the Crown. The Interception of Communications Act 1985 maintains the secrecy of the statutory interception of communications in the course of transmission by post or by a public telecommunication system, by prohibiting the introduction of any evidence about the existence or absence of a warrant and thereby preventing the disclosure of the existence or absence of an interception. In addition, the Secretary of State is required to make arrangements for the handling of intercept material by confining its circulation and use to certain statutory purposes: see sections 2(2), 6(3) and 9(1) of the Act. Thus the Act falls outside the disclosure rules.

The material intercepted may be used only for the purposes set out in the Act. It cannot be used for any other purpose by either the prosecution or the defence. Disclosure of such material to prosecution counsel or to the court for the purposes of determining whether it should be disclosed to the defence is contrary to the arrangements the Secretary of State is bound to make under the Act. The all-important public interest in a fair trial and in avoiding injustice to defendants can only be secured, consistently with the provisions of the Act, by imposing responsibility on the discrete bodies of officials responsible for the operation of statutory interception. That responsibility must be exercised under guidance of prosecuting counsel, who must ensure that, so far as the statute permits, the prosecution does not proceed in a manner inconsistent with the content of any intercepted material.

No warrant may be issued unless it is necessary for preventing or detecting serious crime: section 2(2)(b). That subsection refers to gathering intelligence for the purposes of preventing or detecting serious crimes as defined in section 10(3) . It does not refer to marshalling material or evidence in the process of prosecuting a criminal trial: see sections 2(3) and 6 of the Act of 1985 and section 45 of the Telecommunications Act 1984 (as substituted by section 11 of, and Schedule 2 to, the Act of 1985). The context of the words "preventing or detecting serious crime" precludes a construction wide enough to include the use of evidence for the purposes of prosecution. No assistance can be derived from In re An Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660 .

Section 4 of the Act of 1985 limits the duration of a warrant and requires a warrant to be cancelled where it is no longer necessary for the purposes of section 2(2) . Thus, once a serious crime is detected, a warrant may not continue even though it might reveal useful evidence to support the prosecution of those involved in the crime.

No communication intercepted in the course of its transmission by means of a public telecommunication system can be disclosed for the purposes of or in relation to a criminal trial save where one of the parties has consented to that interception and, thus, the interception is outside section 9: see section 1(2)(b) . The prohibitions in section 9 prevent disclosure of the existence or absence of an interception apart from cases of consent or the exceptions set out in section 9(3) . Such secrecy is vital to the operation of the interception system. To adduce evidence of the ***139** contents of intercepted material undermines the preservation of secrecy under section 9. Such evidence suggests that an interception has taken place either pursuant to a warrant (section 9(1)(b)) or in breach of the Act (section 9(1)(a)). Whether the evidence is oral, written or by way of admission, its source and context will have to be considered. A judge may have to bear in mind the circumstances in which the evidence was obtained for the purposes of admissibility under section 78 of the Police and Criminal Evidence Act 1984 . Similar considerations apply to disclosure of intercepted material to the defence. Thus such material cannot be used by the defence.

The prosecution has the responsibility for ensuring a fair trial but it has to do so within the confines of the statute. The disclosure rules set out in Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734 and developed by the courts in relation to public interest immunity in Reg. v. Ward [1993] 1 W.L.R. 619 ; Reg. v. King , 25 November 1992 and Reg. v. Davis [1993] 1 W.L.R. 613 are subject to the code relating to the interception of public communications in the Act of 1985.

The Parliamentary history of the Act of 1985 shows that it was not the intention of Parliament that the operation of the Act should be subject to the common law rules of disclosure developed by the courts and contained in Practice Note (Criminal Evidence: Unused Material). Compliance with the provisions of the Act was placed outside the jurisdiction of the courts: see section 7(8). The rules laid down in Pepper v. Hart [1993] A.C. 593 are satisfied. At the committee stages in the House of Commons (see Hansard (H.C. Debates) 3 April 1985, cols. 1302-1303, 1305-1306) and in the House of Lords (Hansard (H.L. Debates) 6 June 1985, cols. 917-920) amendments were proposed designed to give the court power to make directions for disclosure of matters now contained in section 9(1) but the amendments were later withdrawn.

Kentridge Q.C. in reply referred to Reg. v. Director of Serious Fraud Office, Ex parte Smith [1993] A.C. 1 .

Price replied.

Lawrence Q.C. replied.

Perry Q.C. replied.

Collins Q.C. in reply referred to Reg. v. Sansom [1991] 2 Q.B. 130 .

Their Lordships took time for consideration

LORD KEITH OF KINKEL

. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Mustill, which I have read in draft and with which I agree, I would dismiss these appeals.

LORD TEMPLEMAN

. My Lords, by section 2(1) of the Interception of Communications Act 1985 :

> "the Secretary of State may issue a warrant requiring the person to whom it is addressed to intercept, in the course of their transmission by post or by means of a public telecommunication system, such communications as are described in the warrant; and such a warrant may also require the person to whom it is addressed to disclose the ***140** intercepted material to such persons and in such manner as are described in the warrant."

By section 10(1) "intercepted material" in relation to a warrant means the communications intercepted in obedience to that warrant.

By section 2(2) the Secretary of State shall not issue a warrant unless he considers that the warrant is necessary, inter alia, "for the purpose of preventing or detecting serious crime." By section 6 , where the Secretary of State issues a warrant he must make arrangements to secure that disclosure of intercepted material is limited to the minimum necessary for the purpose of preventing or detecting serious crime and must secure that each copy of any intercepted material is destroyed as soon as its retention is no longer necessary for the purpose of preventing or detecting serious crime.

The arrangements made by the Secretary of State to comply with section 6 when he issues a warrant for a telephone to be tapped have been outlined and approved by the commissioner appointed under section 8 of the Act to keep under review the carrying out by the Secretary of State of his functions and duties. When a warrant is issued to an official of the telecommunications service for a telephone to be tapped in order to prevent or detect serious crime, the official prepares a tape and transcript, the police officer in charge of the relevant investigation takes note of any information which he deems to be helpful and the tape and transcript are then destroyed, usually within 24 hours. Thus if a suspected drug smuggler arranges by telephone to meet a friend at London Airport the police are in a position to make use of that information but no records of the telephone conversation are allowed to be kept.

By section 9 of the Act in any court proceedings no evidence shall be adduced and no questions asked in cross-examination which tend to suggest that a warrant has been issued.

Thus the Act makes it impossible for a record of a telephone conversation to be given in evidence and makes it impossible for evidence to be given that a warrant was issued for a telephone conversation to be intercepted.

On 30 July 1989 the defendant Stephen Preston travelled from Amsterdam to his house in Waterfall Road in London. He came, on his own admission, to find out what had happened to part of a consignment of drugs illegally imported from Holland to England and then hijacked, and to see that the suppliers in Amsterdam received the price which they had stipulated for the whole consignment. On 3 August 1989 Stephen Preston emerged from his Waterfall Road house carrying two holdalls and entered a car which held the defendants Clarke and Salter. The occupants of the car were arrested and the holdalls were found to contain £225,680 in cash. A third holdall at the Waterfall Road house held 10 kg. of cannabis. The papers found in the car and at the house implicated the defendants, all of whom were charged with conspiracy to import drugs. The defendants Clarke and Austen made damaging admissions. Stephen Preston admitted that he was taking part in a conspiracy to distribute drugs but alleged that he was acting under duress exercised in Amsterdam by the aggrieved suppliers who held his girlfriend and his son as hostages. ***141** Each of the other defendants pleaded ignorance of anything to do with drugs. The trial of the defendants began on 1 November 1990. The defendants believed, correctly, that the success of the police in arresting the defendants and catching them red-handed was due partly to information received from an informer and partly from information received as a result of telephone tapping which had been authorised by the Secretary of State. The police were unwilling to disclose information about the informer and were debarred by the Act of 1985 from giving any information about the content of the telephone intercepts. The defence concentrated on complaining to the judge that their clients could not have a fair trial unless they could identify the informer and be supplied with details of all the telephone conversations which had taken place.

On Tuesday, 27 November 1990 counsel for Stephen Preston saying that he had "never been a shrinking violet so far as disclosing my defence is concerned" condescended to outline the instructions which Preston had given to his solicitors to explain why the suppliers of the drugs had fixed upon him, innocent though he claimed to be, as the right person to go to England and complete the distribution of the drugs and recovery of the moneys. On the same day, namely 27 November 1990, when Stephen Preston's instructions to his solicitors were revealed to the judge and the prosecuting authorities for the first time, the prosecuting counsel confirmed that pursuant to the statutory provisions regarding telephone tapping and following the procedure which had been approved by the commissioner, all the tapes and transcripts of telephone conversations had been destroyed immediately after the police had gathered the information which enabled them to arrest the defendants. Prosecuting counsel also informed the judge and defending counsel that representatives of the police who had used the information derived from telephone tapping knew of nothing which would support a defence of duress or a defence of innocence. Stephen Preston changed his plea to guilty on 6 December 1990.

The defendants having been caught red-handed in the circumstances I have outlined, and there being ample evidence to make the defence of ignorance unbelievable, all the other defendants were duly convicted. Counsel for the defendants pursued their complaints that there could not be a fair trial of their clients because they had not been given the name of the informer and had not been supplied with details of the telephone conversations which had been intercepted. These complaints were rejected by the trial judge and by the Court of Appeal (1992) 95 Cr.App.R. 355 and the defendants now appeal to this House against conviction. The defendants also put forward a further complaint. The arguments about the informer and the telephone tapping had taken place in the judge's room in the absence of the defendants. Counsel were forbidden to tell their clients about the arguments exchanged and the information confided in the course of discussions in the judge's room. The trial did not conclude until 15 February 1991.

Defence counsel now complain that argument should not have taken place in the absence of the defendants and certainly should not have been concealed from the defendants. My noble and learned friend, Lord Mustill, will deal with the principles which apply to the undesirable ***142** practice of secret exchanges between judge and counsel. In the present case the procedure had no effect on the outcome.

For my part I consider that the arguments put forward on behalf of the defendants are quite untenable. The Act of 1985 requires the destruction of material which might otherwise be probative of the guilt or innocence of the defendant. Parliament cannot have intended that a defendant should be able to rely on the absence of that material in order to secure an acquittal. The trial must proceed as if the intercepted telephone conversations had never been recorded. I would dismiss these appeals.

LORD JAUNCEY OF TULLICHETTLE

. My Lords, section 2(2)(b) of the Interception of Communications Act 1985 empowers the Secretary of State to issue a warrant authorising telephone-tapping "for the purpose of preventing or detecting serious crime." The principal issue in these appeals is whether these words also cover the prosecuting of such crime. The defendants contend that they do with the consequence that the defence is entitled to have access to intercepted material. This contention is opposed by the Crown.

It is common ground that the Act of 1985 was passed as a result of the decision of the European Court of Human Rights in Malone v. United Kingdom (1984) 7 E.H.R.R. 14 . That case decided that there had been a violation of article 8 of the European Convention on Human Rights inasmuch as the law of England and Wales did "not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities." The mischief which the Act was intended to deal with was accordingly the lack of a clear statutory framework within which telephone tapping could take place and the lack of any form of redress for someone claiming that his telephone had been wrongly tapped.

Prior to the passing of the Act the invariable practice was that material intercepted as a result of telephone-tapping was not used in evidence. This is made clear in the Report of the Committee on the Interception of Communications (The Birkett Report) (1957) (Cmnd. 283), the White Paper on the Interception of Communications in Great Britain (1980) (Cmnd. 7873), the Report of the Committee on the Interception of Communications in Great Britain (The Diplock Report) (1981) (Cmnd. 8191) and the White Paper on the The Interception of Communications in the United Kingdom (1985) (Cmnd. 9438). Did the Act alter this practice even although the decision in Malone did not require such alteration?

If section 2(2)(b) stood alone it could be argued that "prevention" broadly construed could comprehend prosecution. After all, it might be said, what better way of preventing crime than by successfully prosecuting those who are found out? However, section 2(2)(b) does not stand alone but must be construed in the context of the Act as a whole and in particular sections 6 and 9 thereof. Section 6(1) provides that where the Secretary of State issues a warrant, he shall, unless such arrangements have already been made, make such arrangements as he considers necessary for the purpose of securing:

> "(a) that the requirements of subsections (2) and (3) below are satisfied in relation to the intercepted material; and (b) where a ***143** certificate is issued in relation to the warrant, that so much of the intercepted material as is not certified by the certificate is not read, looked at or listened to by any person."

Section 6(2) is in the following terms:

> "(2) The requirements of this subsection are satisfied in relation to any intercepted material if each of the following, namely - (a) the extent to which the material is disclosed; (b) the number of persons to whom any of the material is disclosed; (c) the extent to which the material is copied; and (d) the number of copies made of any of the material, is limited to the minimum that is necessary as mentioned in section 2(2) above."

Pausing there, it is obvious that this subsection envisages the minimum possible circulation of intercepted material and presupposes that at the time the warrant is issued the Secretary of State will be in a position to determine not only to whom the intercepted material is to be disclosed but how much of that material is to be copied and also the number of copies to be made. This is something which it would be impossible for him to do if, before or after the interception was made, it was decided that some or all of the material was to be used in evidence. At the time when the warrant was issued the Secretary of State might very well have no idea of the number of persons who might be prosecuted as a result of the intercepted material nor of the extent of their representation by solicitors and counsel. Section 6(2) therefore points strongly away from any contemplated evidential use of intercepted material. This pointer is further reinforced by the terms of section 6(3) :

> "The requirements of this subsection are satisfied in relation to any intercepted material if each copy made of any of that material is destroyed as soon as its retention is no longer necessary as mentioned in section 2(2) above."

Once again, while the Secretary of State could no doubt provide for destruction of copies which remained in the hands of those persons over whom he had a degree of control, he could not so provide in relation to copies in the hands of third parties such as counsel and solicitors acting for defendants or in relation to those which had become court exhibits.

Section 9(1) is in the following terms:

> "In any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest - (a) that an offence under section 1 above has been or is to be committed by any of the persons mentioned in subsection (2) below; or (b) that a warrant has been or is to be issued to any of those persons."

It was argued by the defendants that this subsection merely prevented the asking of questions as to whether or not an interception had taken place but did not prevent the material derived from such intercept being introduced in evidence in some other way, such as by admission. However, the clear purpose of the subsection is to prevent evidence being elicited which suggests that an intercept has been made and this would be a ***144** pointless exercise if, nevertheless, the content of that intercept was to be disclosed. Indeed it is very difficult to see how such content could be used in evidence without disclosure of the circumstances in which it became available.

My Lords, I have no doubt that Parliament intended that the existing practice of not using intercepted material as evidence should continue. Thus section 6 provides that there should be the minimum disclosure and retention of intercepted material and section 9 prevents the asking of questions suggesting that a warrant to intercept material has been or is to be issued. The combined effect of the two sections is that neither the existence of a telephone intercept under warrant nor the result thereof are to be disclosed in evidence. Against this background it becomes clear that "prevention" in section 2(2) does not include prosecution. In this connection it is of significance that Schedule 2 to the Act, which enacts a substitution for section 45 of the Telecommunications Act 1984 , provides in the substituted subsection (2) thereof:

> "Subsection (1) above does not apply to - (a) any disclosure which is made for the prevention or detection of crime or for the purposes of any criminal proceedings; . . ."

These words replace the words "do not apply to any disclosure in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings." The latter words related only to an offence which had taken place and were inapplicable to ab ante prevention, such as forestalling possible terrorist activities. The two Acts are closely connected and having introduced "prevention" into the new section 45 it would have been logical to include the reference to criminal proceedings in section 2(2)(b) had it been intended to cover such purposes. The fact that no mention of criminal proceedings occurs in section 2(2)(b) further points to the fact that Parliament had no intention to alter the existing practice.

The defendants argued strenuously that failure to disclose intercepted material could result in prejudice to defendants. In my view, any prejudice which might result to the defence must be far outweighed by the inability of the prosecution to make use of incriminating material gleaned from an interception. It is likely that in the great majority of cases in which a prosecution follows telephone-tapping the material of the intercept will incriminate rather than exculpate one or other of the parties to the intercepted conversation and would be of assistance to the prosecution if it were available in evidence.

My Lords, I am in entire agreement with the far more detailed reasons given by my noble and learned friend, Lord Mustill, in his speech for dismissing these appeals. I, too, would dismiss them.

LORD BROWNE-WILKINSON

. My Lords, for the reasons given by my noble and learned friend, Lord Mustill, I, too, would dismiss these appeals.

LORD MUSTILL

. My Lords, for many years the interests of national security have required the interception by public authorities of messages ***145** passing through public systems of communication. Thus, although the principle that the mail is inviolable has always been accorded great importance the executive has habitually encroached upon it, in the special interest of protecting the revenues drawn from Customs and Excise duties, and more generally of preserving national security and forestalling serious crime. Latterly, rapid improvements in technology have enlarged both the volume and the methods of communication, and have at the same time prompted the development of new means of exercising surveillance over messages passed by these new means. Thus, the harm done by the telephonic transmission of subversive or criminal messages by telephone is countered by new methods of interception: telephone-tapping as it is often called. This is the subject of the present appeal, which stems from a long and difficult trial in the Crown Court at Portsmouth.

At the conclusion of this trial Stephen Preston, Zena Preston, Nicholas Clarke, Anthony Austen, Jeremy Salter and Marie Denton were convicted on the first count of an indictment alleging a conspiracy unlawfully to evade the prohibition in force in respect of the importation of a class B controlled drug. They were thereupon sentenced to terms of imprisonment. There were also convictions on other counts not presently material. Except for Marie Denton, whose sentence of imprisonment was suspended, all the defendants appealed against both conviction and sentence. The appeals against sentence achieved some limited success in the Court of Appeal (Woolf L.J., Scott Baker and Hidden JJ.), 95 Cr.App.R. 355 , but all the appeals against conviction were dismissed. These defendants now appeal to the House on five certified questions of law. In the event, the debate has without objection extended well beyond the scope of the questions, so I will not set them out. Nor at this stage will I attempt to explain the issues in any detail. In the end they are all quite short, but they must be set in the context, both of the events which led to the prosecution of the defendants, and of the unusual course of the trial. It is sufficient for the moment to say that the ground to be traversed concerns (a) the purposes for which telephone intercepts may properly be made; (b) the permissible retention, use and disposal of materials and information derived from such intercepts; (c) the extent to which the fact of an intercept and the results thereof may be disclosed and put in evidence at a criminal trial; (d) the duty of the prosecutor to disclose materials derived from an intercept which are or may be favourable to the defendant; (e) the fairness of putting in evidence the fact that telephone calls were made without disclosing to the jury either the fact that some were intercepted or were the fruits of the interceptions; (f) the relationship of these questions to the general principle that a criminal trial should take place in the presence of the defendants.

THE LAW AND THE PRACTICE

Tensions

Before stating in any detail the laws and practices which form the background to the appeal it may be useful to point out some of the tensions which make up its foreground. In the first place there is the tension within the organs of state, between those which look for the ***146** maximum use of intercepts for the common good, to forestall treason, spying and crime, and those whose functions and culture incline towards protection of the individual, and specifically to the protection of the individual's right of privacy.

Secondly there are the tensions, again within the organs of state, conspicuous where an intercept has yielded information which, directly or indirectly, has led to a prosecution. Those who perform the interceptions wish to minimise the dissemination of the fact that they have been performed, since it is believed that this would diminish the value of activities which are by their nature clandestine. We need not consider to what extent this preoccupation with secrecy at all costs is soundly based for it has been treated as axiomatic for decades, if not longer. Recognition that it exists is however essential to an understanding of what happened during and after the trial. At the opposite pole stand the prosecuting authorities and in particular prosecuting counsel. The latter has two functions which are inhibited by the secrecy of the interception process. The first is obvious. If the intercept yields material tending to show that the arrested person is guilty, the prosecutor will naturally want to make use of it. The second function is less obvious, but just as important, namely that he must conduct the prosecution of offenders in an open manner, disclosing all material which may assist the defendant. The conflict between these orthodox functions of prosecuting counsel and the special duties of secrecy imposed by the law and practice on covert surveillance was revealed by the difficulties suffered by counsel then appearing for the Crown (Mr. Aspinall) in his conduct of the prosecution at the trial and by Mr. Moses on the argument for the prosecution in this House. Mr. Aspinall was forced to hasten between those from whom he would naturally draw his instructions, namely the Crown Prosecution Service and the senior police officer in the case, and the Home Office and the Attorney-General, whose right to intervene in a pending trial was by no means obvious, and whose intervention caused prosecuting counsel to adopt a stance which, in at least one respect, was demonstrably unsound. Mr. Aspinall plainly did his best, and if at times he became confused in his function, and thereby confused the judge and other counsel, with a consequent waste of time and effort, I can only suggest to your Lordships that he is entitled to every sympathy. So also on the argument of the appeal. It was evident that prosecuting counsel, whose function was to represent the Crown as prosecuting authority by advancing all proper reasons why the convictions should be upheld, was distracted by the need to obtain and present the views of other organs of state, whose interests are antithetical to those of a prosecutor. This antithesis was strikingly illustrated by the muddle which led to the Crown successfully advancing before the Court of Appeal in Reg. v. Effik (1992) 95 Cr.App.R. 427 a proposition precisely the opposite of the one which it pressed upon your Lordships' House in the present case.

Recent developments on the law and practice regarding disclosure by the prosecution of "unused materials" have also created tensions within the criminal process. Traditionally this process has been adversarial, with the prosecutor on one side, the defendant on the other, and the judge and jury in the middle. The heavy responsibilities now placed on prosecuting ***147** counsel have blurred the edges, not only because he is required to perform tasks which may benefit his opponent (although of course they are designed to benefit the administration of justice) but also because when he decides what ought to be disclosed his acts are administrative and also in a sense judicial in character. This diffusion of function is multiplied in cases such as the present where counsel is required to hold the ring, not only between the state as prosecutor and the defendant, but also between the state as prosecutor and the state as the operator of a secret process to which disclosure is inimical.

Finally, the understandable desire of those who practise surveillance to maintain secrecy at all costs collides with the first principle of criminal practice that proceedings should take place in public and in the presence of the defendant.

Taken together these factors account, at least in part, for the complexity and, it must be said, the degree of confusion into which the proceedings have fallen. Before describing how this happened I must establish a background of law and practice. The starting point must clearly be the specialist area of telecommunications intercepts.

The former practice

The history and rationalisation of the power assumed by the executive to intercept private communications in the mail, and later by telegraph and telephone, are discussed in a series of published reports, notably those of a committee of Privy Councillors, the Birkett Report 1957 (Cmnd. 283), a Home Office White Paper of 1980, The Interception of Communications in Great Britain (Cmnd. 7873) and the Diplock Report 1981 (Cmnd. 8191). Each of these documents treats as established beyond doubt both the practical justification and the legality of interception. Equally, they all recognise the conflict between the need for the state to pry into the private dealings of the individual and the right of the individual to keep them private, and acknowledge the importance that this intrusion should be kept to an absolute minimum, and that the fruits of the interception should be retained only for so long as is necessary to achieve the purpose for which the interception was authorised. The reports, and others, also make clear that although there has been some disagreement about whether the intercept material is in principle capable of being used in court (contrast the majority and minority opinions in the Report of the Privy Councillors) all were agreed that in practice such material is never so employed.

This consensus was for a time put in doubt by the attempt of the plaintiff in Malone v. Metropolitan Police Commissioner [1979] Ch. 344 to establish that interception was unlawful. In an elaborate judgment Sir Robert Megarry V.-C. dismissed the claim. The decision has been overtaken by events and it is sufficient for present purposes to record that the Vice-Chancellor described telephone-tapping as a subject which cried out for legislation. At first this proposal fell on stony ground. Reinforcement was however provided by the recommendations of the Royal Commission on Criminal Procedure (1981) (Cmnd. 8092), especially at paragraphs 3.56 to 3.60, and by the decision of the European Court of Human Rights in Malone v. United Kingdom, 7 E.H.R.R. 14 . The court ***148** found against the United Kingdom in the latter case not because interception in proper circumstances and under proper safeguards was in itself objectionable, but because the law of England did not indicate with reasonable clarity the scope and manner of exercise conferred upon the public authorities, so that the minimum degree of legal protection to which citizens were entitled under the rule of law in a democratic society was lacking: see paragraph 79.

These developments led the Government to conclude that legislation was necessary.

By way of preliminary there were published what the Home Secretary described in a Parliamentary written answer (No. 169) on 19 December 1984 as "revised and tightened guidelines" on the use of equipment in police surveillance operations. In general these were to the same effect as what had gone before, but it is surprising to find (in paragraph 10) the assertion that:

> "It is accepted that there may be circumstances in which material obtained through the use of equipment by the police for surveillance as a necessary part of a criminal investigation could appropriately be used in evidence at subsequent court proceedings."

This departure from previous practice was itself contradicted a few weeks later by a Home Office White Paper, The Interception of Communications in the United Kingdom (Cmnd. 9438) designed to lay the ground for the forthcoming Bill. Only two passages are directly material:

> "7. The Government's aim in introducing legislation is to provide a clear statutory framework within which the interception of communications on public systems will be authorised and controlled in a manner commanding public confidence. It is not seeking through the introduction of this legislation to broaden the scope existing practices. . . . 12. The legislation which the Government will bring forward

> will provide a comprehensive framework for interception. It will place interception on a clear statutory basis and will reinforce existing arrangements for control over authorised interception which have been operated by successive Governments. Its main features will be as follows: . . . (f) The Bill will provide for controls over the use of intercepted material. By making such material generally inadmissible in legal proceedings it will ensure that interception can be used only as an aspect of investigation, not of prosecution."

We thus see the mischief against which the Act of 1985 was aimed: to clarify and place on a sound statutory footing a system of interception whose existing tight constraints were not to be weakened.

The Act of 1985

This short but difficult statute fulfils several different functions. First, subject to certain specified exceptions, it prohibits the intentional interception of messages sent by post or through a public telecommunications system. There are two sanctions. The first is a fine or sentence of imprisonment imposed in proceedings brought by or with the consent of ***149** the Director of Public Prosecutions. The second sanction is invoked by an aggrieved individual, not by the state. Any person who believes that communications sent to or by him have been intercepted may apply under section 7 to a tribunal constituted in the manner set out in Schedule 1 . The tribunal investigates whether there has been a contravention of sections 2 to 5 , which relate to warrants and certificates. If a contravention is found the tribunal reports accordingly to the Prime Minister and to the complainant, and may order the quashing of the warrant or certificate, the destruction of copies of the intercepted material, and the payment of compensation.

To these general prohibitions section 1(2) creates exceptions in the case of (a) an interception made in obedience to a warrant issued by the Secretary of State, and (b) an interception made by someone who has reasonable grounds for believing that the person to or by whom, the communication is sent has consented to the interception. Subsection (3) creates further exceptions, not here material.

Sections 2 to 5 of the Act set up the system of warrants and certificates. The following provisions are most directly relevant:

> "2(1) Subject to the provisions of this section and section 3 below, the Secretary of State may issue a warrant requiring the person to whom it is addressed to intercept, in the course of their transmission by post or by means of a public telecommunication system, such communications as are described in the warrant; and such a warrant as may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the warrant. (2) The Secretary of State shall not issue a warrant under this section unless he considers that the warrant is necessary - (a) in the interest of national security; (b) for the purpose of preventing or detecting serious crime; or (c) for the purpose of safeguarding the economic well-being of the United Kingdom. . . .

> "3(1) Subject to subsection (2) below, the interception required by a warrant shall be the interception of - (a) such communications as are sent to or from one or more addresses specified in the warrant, being an address or addresses likely to be used for the transmission of communications to or from - (i) one particular person specified or described in the warrant; or (ii) one particular set of premises so specified or described; and (b) such other communications (if any) as it is necessary to intercept in order to intercept communications falling within paragraph (a) above. . . .

> "4(1) A warrant shall not be issued except - (a) under the hand of the Secretary of State; or (b) in an urgent case where the Secretary of State has expressly authorised its issue and a statement of that fact is endorsed thereon, under the hand of an official of his department of or above the rank of Assistant Under Secretary of State. (2) A warrant shall, unless renewed under subsection (3) below, cease to have effect at the end of the relevant period. . . . (6) In this section 'the relevant period' - (a) in relation to a warrant which has not been renewed, means - (i) if the warrant was issued under subsection (1)(a) ***150** above, the period of two months beginning with the day on which it was issued; and (ii) if the warrant was issued under subsection (1)(b) above, the period ending with the second working day following that day; . . ."

A definition of serious crime is found in section 10(3) .

Sections 4(3) (4) and (5) and section 5 provide for the renewal, modification and cancellation of warrants and certificates. The Act then turns in section 6 to the retention, circulation and destruction of the products of a lawful interception:

> "(1) Where the Secretary of State issues a warrant he shall, unless such arrangements have already been made, make such arrangements as he considers necessary for the purpose of securing - . . . (b) where a certificate is issued in relation to the warrant, that so much of the intercepted material as is not certified by the certificate is not read, looked at or listened to by any person. (2) The requirements of this subsection are satisfied in relation to any intercepted material if each of the following, namely - (a) the extent to which the material is disclosed; (b) the number of persons to whom any of the material is disclosed; (c) the extent to which the material is copied; and (d) the number of copies made of any of the material, is limited to the minimum that is necessary as mentioned in section 2(2) above. (3) The requirements of this subsection are satisfied in relation to any intercepted material if each copy made of any of that material is destroyed as soon as its retention is no longer necessary as mentioned in section 2(2) above."

It will be noted that section 6 creates no criminal or other sanction if the "arrangements" made by the Secretary of State are inadequate, or are deliberately or accidentally contravened. Nor apparently is there any extrajudicial redress since the jurisdiction of the tribunal extends only to breaches of sections 2 to 5. (I speak here only of the products of authorised tapping, since this is the subject of the present appeal. Quite different considerations may well apply to unauthorised tapping: see Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892 .) The criminal law is not however silent on the matter since a series of statutes, beginning with the Telegraph Act 1868 (31 & 32 Vict. c. 110) , have made it an offence for a person having official duties connected with the post office to disclose contrary to his duty the contents of telegraphic (later also telephonic) messages. The successive separation of public telecommunications from the postal service and the transfer of the former to the public domain, which the consequent change in status of telecommunication workers, called for a new provision, and this was embodied in section 45 of the Telecommunications Act 1984 . The effect was to render criminal three types of conduct on the part of a person "engaged in the running of a public telecommunication system." (1) The interception of a message sent by that system, unless done in obedience to a warrant of the Secretary of State. (2) The disclosure to any person of the contents of that message, unless either done in obedience to a warrant or "in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings." (3) The disclosure of the contents of any statement of account specifying the telecommunications services ***151** provided for a person, otherwise than "in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings."

When section 2 of the Act of 1985 came into effect there was no need to retain the first of these prohibitions. The second and third were replaced (through section 11(1) and Schedule 2 to the Act of 1985) by the following materially different provisions:

> "45(1) A person engaged in the running of a public telecommunication system who otherwise than in the course of his duty intentionally discloses to any person - (a) the contents of any message which has been intercepted in the course of its transmission by means of that system; or (b) any information concerning the use made of telecommunications services provided for any other person by means of that system, shall be guilty of an offence. (2) Subsection (1) above does not apply to - (a) any disclosure which is made for the prevention or detection of crime or for the purposes of any criminal proceedings; (b) any disclosure of matter falling within paragraph (a) of that subsection which is made in obedience to a warrant issued by the Secretary of State under section 2 of the Interception of Communications Act 1985 or in pursuance of a requirement imposed by the Commissioner under section 8(3) of that Act; or (c) any disclosure of matter falling within paragraph (b) of that subsection which is made in the interests of national security or in pursuance of the order of a court."

This new section 45 is not directly in issue, and I quote it only because of the light which it sheds on the crucial words of section 2. I should add that evidence of the use made of certain telephone apparatus played an important part in the trial. Whether this was pursuant to an order of the court under section 45(2)(b) , I do not know, but no point is made about it.

Returning to the body of the Act of 1985, we find in section 8 an additional safeguard, in the shape of a Commissioner, in whom is vested a general power of review linked to the performance, not only of sections 2 to 5, but also of section 6. The annual reports of the Commissioner show that he has paid close regard to the retention, disclosure and disposal of intercept materials, as well as to the initiation of intercept proceedings.

There remains one important provision, namely section 9, the cause of much perplexity at all stages of these proceedings. For the moment I will simply quote from it:

> "(1) In any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest - (a) that an offence under section 1 above has been or is to be committed by any of the persons mentioned in subsection (2) below; or (b) that a warrant has been or is to be issued to any of those persons. (2) The persons referred to in subsection (1) above are - (a) any person holding office under the Crown; (b) the Post Office and any person engaged in the business of the Post Office; and (c) any public telecommunications operator and any person engaged in the running of a public telecommunication system. (3) Subsection (1) above does not apply - (a) in relation to ***152** proceedings for a relevant offence or proceedings before the tribunal; or (b) where the evidence is adduced or the question in cross-examination is asked for the purpose of establishing the fairness or unfairness of a dismissal on grounds of an offence under section 1 above or of conduct from which such an offence might be inferred; and paragraph (a) of that subsection does not apply where a person has been convicted of the offence under that section."

Other material principles

The tensions to which I have referred arise through the co-existence of four mutually inconsistent sets of rules. The first is created by the Act of 1985, and I must now describe the other three. I shall do so briefly. There has been no controversy about them on this appeal, though there was much debate about how they should be applied to its particular circumstances, and nothing would be gained by extensive reference to sources which are well known and are fully reported elsewhere. Furthermore the law and practice on each of them is still in the course of evolution, in some instances surrounded by controversy, and it is important not to pre-empt future development by unguarded comment made without benefit of argument. No more is needed than to set the scene for the problems arising at the trial and on the appeals. I begin with the duty of the prosecution to disclose "unused materials."

It has been recognised for many years that the prosecution is obliged to make available to the defence materials not led in evidence by them which may assist the accused. In the earlier cases the duty was narrowly put, but more recent authorities have greatly expanded its scope: a process which had some distance to go when the Act of 1985 was passed. The history of the matter, and of the conflicting lines of authority which developed, is given in Reg. v. Ward [1993] 1 W.L.R. 619 , 643 et seq. and need not be repeated here. The trial of the present defendants took place before the decision in Ward , and those concerned were directing themselves principally by reference to the Attorney-General's guidelines, Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734 . I do not stay to consider the formal status of these guidelines, or the question whether Ward has enlarged the duty of disclosure which they prescribe, or whether if so an appellate court should apply the standards prevailing at the date of the trial or those now current (on which see Ward [1993] 1 W.L.R. 619 , 643). The latter makes no difference here, for it is common ground that whatever test is applied if interception materials had still been in existence at the time of the trial they would have fallen within the scope of the duty, subject to the qualifications imposed by the Act of 1985 and the common law principle of public interest immunity. It is also common ground that the principal, although not the only, responsibility for ensuring that the duty is performed rests on prosecuting counsel; and indeed the trial transcripts clearly disclose that counsel for the Crown was fully alive to this responsibility and anxious in very perplexing circumstances to see that it was discharged.

Next, I must refer to the law on the public interest immunity which attaches to "sensitive materials." Here again, there have been important ***153** developments in recent years. In the main these do not bear on the appeal, since even if previously the disclosure of telephone intercepts was constrained by a special class of public interest immunity, the position is now governed by the Act of 1985. There is, however, one aspect of the current practice which will be relevant if the Act bears the meaning which the defendants suggest. It was held in Reg. v. Davis [1993] 1 W.L.R. 613 , in this respect following Reg. v. Ward [1993] 1 W.L.R. 619, that the task of deciding whether materials said to be sensitive should be disclosed is for the court, not prosecuting counsel. The Court of Appeal made it clear that argument on this question should in general take place inter partes, and that if for some reason the defendants were excluded from the court their counsel should be free to disclose to their clients what had gone on: [1993] 1 W.L.R. 613 , 617B. At the same time, however, it was laid down that where the material was of such a sensitive nature that disclosure of its character or even of the fact that an application was being made for a decision on disclosure of the material would defeat the public interest in its non-disclosure the application could be made "ex parte," in the absence of the defendant and his advisers, and without any notice to them. This new procedure had not of course been announced at the time of the defendants' trial.

Finally, there is the general question of hearings in private. These are objectionable in principle and in practice. There is no need to quote authority for the proposition that they are objectionable in principle, for it is of the essence of an adversarial process that the accused, as one of the opposing parties, should hear what his opponent has to say and how he says it, so that he can properly frame his response. As to the practical objections these have repeatedly been emphasised by appellate courts. If an advocate sees the judge in private, only later giving his client a summary of what has passed, there is always the risk of misunderstanding, muddle, resentment and injustice. As recently as the early days of the defendants' trial, two senior judges of unrivalled practical experience were compelled once again to give warning of the dangers. In Reg. v. Smith (Terrence) [1990] 1 W.L.R. 1311 , 1314, Russell L.J. found it "disturbing that despite frequent observations made in this court discouraging unnecessary visits to the judge's room, they appear to continue up and down the country," whilst in Reg. v. Pitman [1991] 1 All E.R. 468 , 470, (reported in summary form in The Times, 31 October 1990) Lord Lane C.J. exclaimed that "no amount of criticism and no amount of warnings and no amount of exhortation" seemed to prevent the "steady flow of appeals . . . arising from visits by counsel to the judge in his private room." These were cases on "plea-bargaining," but the risks can be as great in other contexts, as witness the quotation in each of these cases of a passage from the judgment in Reg. v. Harper-Taylor and Bakker (1988) 138 N.L.J. 80 which is of general application. The general principle does, it is true, admit of exceptions.

Precisely how far they go may be debatable, and Reg. v. Davis [1993] 1 W.L.R. 613 has evidently added another item to the list, but the existence and high importance of the general principle that the trial should be held in the presence of the defendant unless absolutely necessary is indisputable. Against this background I turn first to the events which ***154** founded the case for the prosecution of the defendants, and then to the trial itself.

THE PROSECUTION CASE, THE ISSUES AND THE TRIAL

The prosecution case

The following is a summary of the principal facts relied upon by the prosecution. Its purpose is to demonstrate the importance of the telephone communications, some of which are now acknowledged to have been intercepted, and not to give a balanced account of the whole of the evidence at the trial.

It is convenient to keep in mind that there were four crucial dates: (1) 22 April 1989; the arrest of Michael Denton at Waterloo Station; (2) 28 July 1989; the discovery at Greenwich of a hijacked Astramax van; (3) 30 July 1989; the journey by Stephen Preston from Amsterdam to London; and (4) 3 August 1989; the arrest of Stephen Preston, Clarke and Salter outside 18, Waterfall Road, London, S.W.19.

Stephen and Zena Preston were married in 1983. Michael Denton and Marie Denton are her children by a previous marriage. For some years they all lived in Spain, until 1988 when the couple separated. Stephen Preston moved first to Morocco, and then to Amsterdam, where he assumed the identity of a friend named Crabtree. He had two addresses, one of them in Brouwersgracht. At the material time he was living with a young woman called Elaine.

Meanwhile Zena Preston and the Dentons had returned to England, and set up house together at 18, Waterfall Road. In December 1988 Michael Denton ceased to live there and went with friends to live in Amsterdam. For a time a man named Peter Dodmore stayed at Waterfall Road with Marie Denton. Nicholas Clarke lived in Portsmouth. He was an old friend of the Prestons'. Jeremy Salter came to live at Clarke's home during June 1989. Anthony Austen, who lived in Gravesend, had no prior connection with the other defendants. Mention should also be made of Nicholas Hickmott, a friend or acquaintance of the Prestons. Although Hickmott was not charged with any offence he was briefly taken into police custody and interviewed some weeks after the events in question, and his name featured prominently at the trial. Although the Prestons had separated they remained in contact - how closely, and for what purpose, was in dispute. There were various monetary transactions between them involving bank accounts and credit cards. These were on comparatively small scale and were said by Zena Preston to involve the proceeds of sale of businesses which the couple had operated in Spain. During February 1989 Zena Preston helped Stephen Preston to procure a passport in the name of Crabtree, using a forged application form and a false address. There was evidence from Peter Dodmore that Stephen Preston telephoned the Waterfall Road house two or three times a week during December 1988 and January 1989. In addition, Zena Preston made at least two visits to Amsterdam to meet Stephen Preston.

These were not the only journeys between the two cities. Marie Denton went to Amsterdam twice, and Clarke and Salter each made at least one visit to Amsterdam. Significantly, although Michael Denton had gone to ***155** live in Amsterdam he made at least four visits to London between

December 1988 and April 1989. On two of these occasions his ticket was paid for through Zena Preston's credit card. The last visit resulted in the arrest of Denton outside Waterloo Station on 22 April 1989. He was in possession of a substantial quantity of cannabis resin, and a considerable sum of money. Before the present trial began he was convicted and sentenced to a term of imprisonment in respect of his dealings with cannabis.

In addition to evidence of personal contact between the defendants, the Crown relied on the frequency of telephone messages passing between apparatus to which the defendants had access. In addition to the telephones installed at Waterfall Road and Brouwersgracht, there were three mobile telephones together with certain other apparatus which I need not mention. The first mobile telephone, which was in the possession of Clarke, was the subject of a contract in the name of Nicholas Wild ("the Wild telephone"). The second, also in the possession of Clarke, was the subject of a contract in the name of David Lee ("the Lee telephone"). The third was a telephone in the possession of Hickmott.

The Crown relied particularly on the volume of calls made on the Wild telephone. To the telephone at the Brouwersgracht address there were calls on every day between 22 and 27 July, rising in frequency from one to 11 calls per day; and to Hickmott's mobile telephone a total of 92 calls between 19 and 27 July. On the Lee telephone there were seven calls to the Brouwersgracht address during June and July 1989.

In addition to the burst of telephonic activity in the days before 28 July, reliance was also placed on the hiring by Clarke and Salter of vehicles during the latter part of July, for short periods during which they incurred substantial mileage. In addition, an Astramax van was hired on 26 July by a person unknown in a false name with the aid of a stolen driver's licence.

On 28 July the police were called to this Astramax van, which was parked in Rotherhithe. Inside was a man named Andrew Morgan, bound and gagged. The van was otherwise empty. Morgan, who was shaken and slightly injured, was taken to Greenwich hospital. There is little doubt that the van had contained a large quantity of cannabis resin, part of a bulk importation from Holland, and that it had been forcibly taken without payment. There is also little doubt that the suppliers in Holland were acutely unhappy about the disappearance of the drugs and the money which they represented, and wanted steps taken to get them back.

This event was followed by a flurry of activity. On 30 July Stephen Preston travelled from Amsterdam to London under the name Crabtree. He met Marie Denton at Piccadilly, where she gave him credit cards in the name of Preston and Crabtree. She then took him to meet Clarke and Salter at Waterloo station. Later, he went to Waterfall Road. On 1 August Clarke's car was seen outside Waterfall Road. On that day a message was relayed to Zena Preston's place of work at Wakefield to the effect that her daughter was ill. Upon receipt she came down to Waterfall Road. In fact Marie Denton was not ill. That evening she went out in Clarke's car with Stephen Preston, Clarke, Marie Denton and Salter.

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The Wild telephone continued to be much used. On 28 July and the next few days there were totals of nine calls to the Brouwersgracht address; 27 calls to Waterfall Road; and 28 calls to Hickmott's mobile telephone. One of the latter calls (on 1 August) was made at a time when Clarke, Stephen Preston, Zena Preston and Salter were all in the car together. There were also 24 calls on the Wild telephone to the Lee telephone, and two calls to a pager lent to Austen by his brother.

On 3 August 1989 Clarke and Salter were observed to drive up to Waterfall Road in one of the cars hired by Salter. Stephen Preston left the house carrying two holdalls and got into the car which drove away. The police soon after intervened and arrested the three men. The behaviour of the men at the time of the arrest strongly suggested that they were in fear of being shot.

The two holdalls were found to contain a total of £225,680. Also in the car was the Wild mobile telephone. A subsequent search at Waterfall Road revealed another holdall containing about 10 kg. of cannabis resin. Various papers were also discovered in the car, on the person of Clarke at Waterfall Road and at Clarke's home. The details are immaterial. It is sufficient to say that according to the Crown they disclosed links between Simon Preston, Waterfall Road and the contents of the holdall, between Zena Preston, Michael Denton and Hickmott, and between the occupants of Waterfall Road and Austen; records of the telephone numbers of Waterfall Road, Hickmott, Austen's pager and the Brouwersgracht number; and a note that Andrew Morgan, the driver of the hijacked van, was at Greenwich hospital. There were also names, initials and figures which the prosecution alleged were lists of dealers and quantities of money and drugs.

At the time when police officers were in occupation of 18, Waterfall Road after the arrest a number of calls were made to the telephone. One of the police officers, pretending to be a participant in a drug dealing conspiracy, maintained one end of the conversations. The officers' recollection and record of these conversations was in issue, but the general nature of three of them seems to have been undisputed. The first was from a man in Amsterdam who showed a pressing interest in the whereabouts of Stephen Preston and of money which he was said to owe. Another was from Elaine who said that she and Preston's young son were being held hostage in Amsterdam for the return of the money and cannabis to Holland. The third was from Austen, who spoke of the hijacking of 100 kg. out of 200 kg. from Andrew Morgan.

Finally, whilst in police custody both Clarke and Austen made statements which, if accurate, contained damaging admissions.

The opposing contentions

From this and other evidence the prosecution asked the jury to infer that Stephen Preston had been exporting substantial quantities of cannabis from Holland to the United Kingdom for some time, and that at the end of July 1989 he had organised a 500 kg. load. The hiring of vehicles and the flurry of telephone calls were part of the preparations for this. The plan miscarried when part of the load was hijacked. He came over to London from Amsterdam to put matters right. Zena Preston knew what ***157** was going on and helped Stephen Preston, particularly in relation to his financial affairs.ing its distribution with the assistance of Salter. Austen was said to be a wholesale distributor, and Marie Denton assisted Simon Preston in peripheral ways.

The defendants did not deny that there had been a conspiracy to import cannabis, but disclaimed any part in it. In particular, Stephen Preston (on whose defence I will concentrate) asserted that his activities on and after 30 July were not part of a continuing conspiracy which had gone wrong, but were the result of duress imposed on him by the true conspirators. This defence appears to have been revealed in very general terms at a comparatively early stage, but it was not until nearly one month after the start of the trial that it was explained as follows. Preston had owned a bar in Spain which was raided by the police in consequence of activities in which Preston had played no part. He was forced to leave Spain and went to Holland. Various published materials, including in particular an article in an English newspaper, led many people to believe that he was a drug dealer in a large way, and that England was his particular sphere of influence. Thus, when the Dutch exporters of cannabis (including one of the people who spoke on the telephone to the police officer at Waterfall Road) ran into difficulties with their own distributors in the United Kingdom, they believed that Preston would be able to exercise influence there. Amongst the distributors were Austen, Clarke and Hickmott. To persuade Preston to exercise pressure on Austen and Clarke they made threats to his life and to the life of his son and Elaine. Thus, although it was undeniable that from 30 July he was having dealings with his co-defendants in relation to drugs and money he had done nothing before that date, either voluntary or involuntary, in pursuit of the conspiracy into which he was then recruited against his will.

The trial

My Lords, I have set out the principal facts on which the prosecution relied partly because they place in context the crucial significance attached by the prosecution to the cluster of telephone calls passing between apparatus to which the defendants had access both before the hijacking of the van, and afterwards in the interval between the hijacking and the arrest; and partly because they explain why the defence were at such pains to prise out of the investigating and prosecuting authorities as much information as possible about the nature and fruits of the interception, in the hope that this would show either that Stephen Preston first came on the scene as a result of duress on or about 30 July, or at least that nothing had been said during the telephone calls to suggest that he or any other defendant was party to whatever conspiracy there may have been. It would be possible now to go straight to the issues of law raised by the certified questions. I believe however that this would not be satisfactory. In the first place, the gradual unfolding of this topic as the trial progressed serves at the same time to illustrate the very real difficulties of applying the law in practice, and also to explain how the quite short issues for decision have come to appear so complex. Furthermore, even if your ***158** Lordships conclude against the defendants on the certified question of law there remains a need to look very carefully at the course of the trial to see whether, despite the best efforts of the judge and prosecuting counsel, it was so unfair or irregular that the convictions could not justly be allowed to stand. I will therefore set out the relevant events of the trial as shortly as I can - albeit not as shortly as I could wish.

The trial began on 1 November 1989 and concluded (apart from sentencing) on 15 February 1991. Although long it was not exceptionally so by modern standards. The chronology did however have two remarkable features.

The first was the extent to which proceedings took place in the absence of the jury. There were several days of submissions before the jury was empanelled, and a further week before prosecuting counsel began to open his case. Submissions continued to be made at such a rate that three weeks later when counsel for Clarke and Austen made an unsuccessful application for the jury to be discharged on the ground that its concentration had been broken by the repeated interruptions, the jury had been in court for the equivalent of only 6ä working days. Although full details are not available for the subsequent stages, it can be deduced that there was only two working days between 6 December and 1 February when the jury was present throughout, and during this period there were more than 40 occasions when the jury were sent out of court. At the time of the application to discharge the jury the trial judge exclaimed: "What am I supposed to do when defence counsel take point after point after point?" To this there was no answer, except that it was "one of the regrettable things." Regrettable it certainly was, but since no appeal is founded upon it I mention this only as background to the other remarkable feature of the trial, which was the extent to which the trial took place in the absence of not only the jury, but also of all the defendants and their solicitors. The House was informed that no fewer than 30 working hours were spent in this way. This must surely be without precedent - at least so it must be hoped. How did it come about? The transcripts disclose that the defendants and their solicitors were excluded so that three subjects could be discussed between counsel and the judge alone.

The first subject was an indication as to sentence. Before the case was opened to the jury, but after the judge had decided to admit evidence concerning the arrest and conviction of Michael Denton, counsel for Stephen Preston asked to see the judge privately. The judge agreed and there followed a discussion on how the offences alleged should be related to the sentencing bounds established by Reg. v. Aramah (1982) 76 Cr.App.R. 190 , and also about the "discount" which the judge would apply in the event of a change of plea at this stage. Counsel returned to the matter after the judge had given his adverse rulings on the two questions to which I will shortly come, and immediately before Stephen Preston changed his plea to guilty. Counsel and the judge must have overlooked the strong and recently reported observations by Lord Lane C.J. in Reg. v. Pitman [1991] 1 All E.R. 468 , 470, and by Russell L.J. in Reg. v. Smith [1990] 1 W.L.R. 1311 , 1314, which I have already quoted. This episode is a good example of the perils of informal plea bargaining, since subsequently the Court of Appeal granted to all the defendants reductions ***159** of sentence on the ground that the sentences imposed did not conform with the judge's private indication. This complaint is now spent, and I mention the topic only because (a) it accounts for a small part of the time spent in "in camera," and (b) the obvious cause of Stephen Preston's change of plea was not only the ruling of the judge on the issue now before the House, but also the confirmation by the judge that his previous indication on sentence still held good.

The second and third subjects discussed in private were connected and require some explanation. Stephen Preston's defence of duress depended crucially on the absence of any connection between himself and the importation of drugs before the crisis created by the hijacking. His defence was dealt a severe, if not necessarily fatal, body-blow when the judge ruled before the opening of the prosecution case that evidence of the arrest and conviction of Michael Denton could be admitted in evidence. In response, counsel for Preston began to foreshadow a case on the following lines. Nicholas Hickmott was playing a double role. In one capacity he was a police informer passing on information both true and false about his associates. But he was also a dealer in drugs on his own account, operating under cover of his activities as informer. The arrest of Denton was obviously the work of an informer and this informer would know the truth of the matter; namely that Denton had been supplied by Hickmott, and that Stephen Preston had no part in the importation which led up to the supply. To lend colour to this story counsel sought to extract from prosecuting counsel, either voluntarily or by order of the judge an admission that (a) Michael Denton was arrested on information given by an informer; (b) the informer was Hickmott; and (c) the immediate supplier to Denton was Hickmott. Ultimately admissions in terms of (a) and (c) were made, but (b) was never admitted. Nor did the judge make any orders relating to the identity of the informer, or as to the production of Hickmott as a witness. Since none of this is the subject of an appeal I need say only that I have seen nothing in the transcripts to suggest that the rulings of the trial judge on this question were wrong. Indeed, Marks v. Beyfus (1890) 25 Q.B.D. 494, Reg. v. Agar [1990] 2 All E.R. 442 and Reg. v. Slowcombe [1991] Crim.L.R. 198 strongly suggest that they were right. What I do find hard to see is why so much of the prolonged and repetitive argument on this point took place in private. It was plain, as the judge well recognised, that Stephen Preston believed from the start that Hickmott was the informer, and nothing in the arguments about whether the judge should order disclosure would have told Preston anything that he should not know, or have put Hickmott's safety in any further peril.

The question of the informer had another aspect. It could have been no accident that the police were observing 18, Waterfall Road, after Stephen Preston arrived from Amsterdam. So much was obvious from the start. What did however emerge, perhaps unexpectedly, during the cross-examination of a police officer, was that the police were not only expecting Preston to be there but were expecting him to be in fear of his life - as his behaviour on arrest bore out. Obvious candidates for the source of this intelligence were an informer and a telephone intercept. The possibility of ***160** an interception set in train the prolonged and difficult hearings in private which I will now summarise.

The first step was taken almost immediately. The jury, present during the cross-examination which revealed the possibility of an intercept, was sent out of court. The defendants and their solicitors remained. Counsel for Stephen Preston then called upon the prosecution to tender a senior police officer for cross-examination on the matter. We must assume that he did not then have in mind section 9 of the Act of 1985. On the following morning, 27 November 1989, counsel for the prosecution invited the court to sit in private, and the greater part of the relevant proceedings took place in the absence of the defendants and their solicitors. Counsel disclosed that a warrant had been issued under section 2 of the Act, and also that there was some material which he wanted the judge alone to see. We do not know what it was, but it cannot have been a record of the intercepted conversation(s) since Mr. Aspinall stated that all such records had been destroyed on the orders of the Home Office. There followed a discussion of the ways in which it might be possible without breaching section 9 to disclose intercepted material which might assist the defence. Both Mr. Aspinall and the judge were anxious that what could properly be disclosed should be disclosed, particularly if the intercept demonstrated that on a particular day Preston believed himself to be under threat. Mr. Aspinall agreed to consult the Home Office to see what could be done, whilst reiterating that there must be no infringement of section 9.

It is significant to note that in the course of this day's discussions Mr. Aspinall was able to convey two items of information, apart from whatever might have been in the document which he wanted to show the judge. First, he disclosed that a senior police officer in the case had spontaneously volunteered to him the existence of the intercept and also the existence of a warrant, which at that stage Mr. Aspinall seemed willing to produce for inspection. Secondly, Mr. Aspinall indicated that he knew at least something about what the intercepts did and did not contain. For example he was able to say that the forewarning of Michael Denton's journey did not come from an intercept, nor (if I correctly understand a very difficult passage in the transcript) did the anticipation of Stephen Preston's arrival from Holland come from this source. On the other hand it seems that something had emerged from the intercept about a journey made by Salter and Clarke, and also about the telephone message to Zena Preston at Wakefield. I will return to these disclosures by Mr. Aspinall at a later stage.

The matter came back before the court six days later, by which time Mr. Aspinall had spoken to a senior advisor of the Attorney-General. He was able to tell the court that (a) he (Mr. Aspinall) had known for some time "through another source" the premises concerned in the tapping; (b) he did not know the dates of the tapping; (c) the senior officer in the case had informed him that so far as that officer was aware there was no material derived from the intercept which would assist the case of Stephen Preston; (d) "a certificate has been issued." This latter point was not explained, and I can only assume that the reference was to a certificate under section 3(2)(b) of the Act. Mr. Aspinall did however make it clear that the further information which defending counsel had sought was not ***161** going to be revealed to him. Further discussion took place, in the course of which the judge's recognition that the intercept tape had been destroyed was made perfectly clear. In the upshot, the judge invited Mr. Aspinall, in the light of the recently-disclosed details of Stephen Preston's defence of duress, to go back to the Attorney-General to see whether there was anything in the material arising out of the intercept which could conceivably be of use to the defence.

This Mr. Aspinall did, but after discussions not only with the Attorney-General, but also with advisors to the Director of Public Prosecutions and the Home Office he reported to the court:

> "The Attorney-General is of the opinion that it is not my duty, as counsel for the Crown, to acquaint myself with such material as exists relating to the intercept for the purpose of considering whether any of that part of that material need

> be disclosed. Your Honour, the reason for his opinion is this. In the particular circumstances of this case, it is impossible to envisage any manner in which evidence relating to, or concerned with or arising out of the intercept might be adduced into this case whether orally, by admission of fact or otherwise, which will not tend to suggest the existence of the warrant. Thus, in any event, such evidence is inadmissible at any stage of this trial and any question concerning such evidence is impermissible at any stage in this trial. Accordingly the need for me to acquaint myself with such material as exists for the purpose of disclosure is unnecessary."

This seems to have been treated as the end of the matter so far as any question of disclosure was concerned. Counsel then raised the question of fairness, as regards the admission of evidence about the plethora of telephone calls around the crucial dates. It was contended that the prosecution could not fairly be allowed to invite inferences from this evidence whilst refusing to disclose information about the intercept which might show that the inferences were unfounded. The evidence should therefore be excluded and the discretion conferred by section 78(1) of the Police and Criminal Evidence Act 1984 should be exercised.

After further argument (still conducted in private) the judge ruled. (1) He rejected the application to exclude the evidence under section 78 . (2) He ordered that "no evidence may be given about the matter and no questions asked." (3) As regards an order which he had previously made that the individual defendants should not be informed about the nature of what was going on in private, counsel should now say no more, if asked whether there had been intercept, than that they were not at liberty to say.

The judge expressly stated that he was not ruling on the question of disclosure by prosecuting counsel, no doubt because once Mr. Aspinall had reported on the latest discussions the matter was treated as a fait accompli, given the non-existence of the transcript and tapes, coupled with the inhibitions created by section 9.

It was after the judge gave this ruling in private, on the same day as his ruling on the issue of the informer and on the application to discharge ***162** the jury, that Stephen Preston changed his plea to guilty. This was not however the end of the matter. The judgment of the Court of Appeal reveals the unease felt by the members of that court about the extent to which prosecuting counsel had been able to comply, and had complied, with the Attorney-General's guidelines in Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734, and pressed counsel for elaboration. In response, as the judgment records, 95 Cr.App.R. 355 , 373:

> "counsel for the Crown during the course of the hearing made a clear and unequivocal statement to this court that he had performed the heavy duty which we have identified and that in fact in this case there was no material available to the Crown which was inconsistent with the way the case had been presented on behalf of the prosecution or which might have furthered the defendants' defence."

The duty referred to included, as I understand it, the duty of counsel earlier pronounced upon by the court, to ensure that he had been put in a position where he could properly determine how the case for the Crown should be presented. Later, after the close of the argument counsel for the prosecution furnished a memorandum, drafted in consultation with the Attorney-General, which stated in part:

> "Consistently with the submissions already advanced as to the true construction and purpose of the Act of 1985 and the duties of prosecuting counsel, they have not considered it right to seek nor have they received any instructions as to the continuing existence or nature of any intercepted material within the meaning of the Act of 1985."

The court was not completely reassured and before giving judgment asked the following question, at p. 374:

> " 'Have you at some stage received information which enabled you to satisfy yourself (a) that in your judgment the Crown's case was not presented in relation

> to any defendant in a manner which was inconsistent with information known to the Crown?' To that part of the question counsel for the Crown answered 'Yes.' We then continued: '(b) that there was not information known to the Crown which was not disclosed which might have assisted the defence of any defendant?' Again the answer was 'Yes.' "

I should add that during the argument in the Court of Appeal it was disclosed that the only interception was on the telephone at Waterfall Road.

There are problems here. For example, "the Crown" is an ambiguous expression, often used to denote those who conduct prosecutions on behalf of the state, but on other occasions denoting the state as indivisible entity. What is known to the officers of the Crown in the latter sense would by no means always be known to those who prosecute on the Crown's behalf. I must assume that counsel for the prosecutor was using the expression in the narrower sense, for how else could he have assured the court that he had made the appropriate inquiries about the available information whilst at the same time asserting, in conjunction with the Attorney-General, that ***163** he had no right to ask for that information? For these and other reasons their Lordships pressed counsel for the prosecutor on the hearing of the appeal for further elucidation, and proposed that if all else failed at least the House should be acquainted with the proscribed material. It then emerged, not only that the physical products of the intercepts had long ago been destroyed, but also (if I correctly understood the information relayed by Mr. Moses from one of his groups of clients) that those concerned in the intercepts could probably no longer be identified, and if identified could probably not remember what had been said. My Lords, I believe that we have no choice but to accept this, although (as will have been seen) the senior officer in the case appears to have had at least some concrete information, which through Mr. Aspinall was relayed to the court during the private hearings.

THE ISSUES IN THE CASE

Section 9

After all this detail it is time to draw back and consider what the case is really about. For much of the trial and the appeals it seemed to about section 9. This is not surprising. So long as there persisted the belief that there was somewhere, in the hands of someone, a cache of material stemming from the interceptions it was natural to consider whether section 9 allowed the prosecuting authorities to put this material before the jury if they thought it right to do so, and whether in the absence of voluntary disclosure there was any means that the true state of affairs could be brought out into the open. The possibility that section 9 might permit affirmative answers opened up the complex of issues concerning the relationship between the positive duty of disclosure exemplified by the Attorney-General's guidelines Practice Note (Criminal Evidence: Unused Material) [1982] 1 All E.R. 734 and by Reg. v. Ward [1993] 1 W.L.R. 619 and the inhibitions created by other provisions of the Act of 1985 and the common law of public interest immunity.

There was another reason why section 9 loomed large. The conduct of prosecuting counsel was powerfully influenced by the advice, or perhaps more accurately the instructions, given by the Attorney-General. Their gist was that since nothing which might be disclosed to prosecuting counsel and through him to the defendants could in the light of section 9 be put in evidence before the jury there was no need to override the interests of secrecy by any further disclosure.

I will take the latter proposition first. Mr. Moses did his best with it, but he had other concerns to safeguard. I think it a great pity that the list of 13 counsel who appeared on this appeal was not augmented by one specifically charged to expound the wider interests of the state where they appeared to contradict the general duties of the prosecuting authorities as laid down by recent decided cases. Absent representations from such a source I can only say that the proposition appears quite unsustainable.

In the first place, the fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible, and this may apply, ***164** although less frequently, to the defence as well as to the prosecution. As the Court of Appeal pointed out in Reg. v. Ward [1993] 1 W.L.R. 619 , 645, it is of help to the defendant to have the opportunity of considering all the material evidence which the prosecution have gathered and from which the prosecution have made their own selection. In my opinion the test is materiality, not admissibility.

Secondly, the Attorney-General's proposition overlooks the essential function of the investigating and prosecuting authority which it must perform alongside its more obvious tasks of discovering, marshalling and presenting the evidence against the accused, namely to ensure that the prosecution of a suspected offender is conducted fairly. One aspect of this duty is to consider whether amongst the material to which the authority alone is privy there is material which suggests that the suspicions are unfounded, or that apparently damaging evidence should be viewed in a more favourable light. Upon such consideration the authority should decide whether the prosecution should proceed at all, and if so in what way it should be presented. Counsel for the prosecution plays an indispensable part in this function, and his role as arbiter between the adversarial interests of the prosecution and the broader dictates of justice cannot be effectively performed unless he knows everything material that there is to know. The Attorney-General's advice seems to ignore this entirely. Moreover the logic of the advice has disturbing implications in the present context. The question of admissibility arises, if at all, through section 9. Assuming that this has the meaning for which the prosecutor contends, the products of an intercept are made inadmissible because the interests of state demand that the whole business should be kept secret. If the Attorney-General is right it must follow that even if the contents of the intercept would clearly demonstrate to prosecuting counsel that the accused person is innocent he must be kept in ignorance of it, and in the interests of secrecy left to press unwittingly for an unjust conviction. My Lords, this is raison d'état indeed, and I would not hold it to be the law of England unless compelled to do so. I find no such compulsion in the Attorney-General's advice, for even if it gave a sound reason for refusing disclosure to the defence (which for the reason stated I believe it does not) the logic cannot be transferred to the supply of material, admissible or otherwise, to prosecuting counsel. If this, too, is to be withheld, a justification must be found elsewhere. I believe that the right place to search for it is in section 2, and that although the way in which the matter arose at the trial made it natural to concentrate on the questions which counsel for the defence might properly ask in cross-examination, the preoccupation with section 9 has tended to obscure the real point in the case.

Section 2

I therefore turn to section 2 , and in particular to the words "for the purpose of preventing or detecting serious crime" in subsection (2)(b) , the crucial importance of which had become clear by the conclusion of the argument before this House. If, as the defendants submit, these words go beyond the forestalling of future crimes and the discovery that crimes have been committed in the past, and by whom and in what manner, and ***165** if in particular they extend to the amassing of evidence with a view to the prosecution of offenders, then the "arrangements" made by the Secretary of State under section 6(1) must (by virtue of the references back to section 2(2) in subsections (2) and (3) of section 6) contemplate that the documents will not be destroyed whilst they are necessary for the purpose of a prosecution, using that term in its broadest sense. Now that the disclosure of unused materials compiled in relation to an actual or alleged offence has been recognised as one of the functions of the investigating and prosecuting authority the "arrangements" must be such that the documents would not immediately be destroyed but would be kept available for disclosure until an intended prosecution was either abandoned or completed. It might be that the documents, or some aspects of them, would be subject to some special form of public interest immunity, on which a ruling might have to be sought from the court, but subject to this they would be on the same footing as any other documents in the case. If this were the true position it would be but a short step from Reg. v. King (unreported), 25 November 1992, to hold that the destruction of the material soon after it had been compiled was a material irregularity in the course of the trial within the meaning of section 2(1)(c) of the Criminal Appeal Act 1968 and that the proviso could not in the circumstances apply. Furthermore it would plainly be unfair to allow the prosecution to rely so heavily on the fact that the telephone calls were made, and on inferences about their purpose, when the authorities had without lawful excuse prevented any inquiry from being made about what had actually been said.

If, on the other hand, the narrower reading were to prevail the case for the defendants would be far less compelling. If the purposes for which the grant of the warrant, and hence the retention of the physical material and the disclosure of the contents, were necessary did not extend to the prosecution of suspected offenders the destruction of the material was not only a permissible act but one which those responsible were bound by section 6 to perform. In such a case the defendants could hardly argue with any hope of success that it amounted to an irregularity, and they would have to fall back on other objections, notably that even if the destruction was legitimate it created a state of affairs where subsequent reliance on the bare fact of the telephone calls was unfair.

The paradox of these arguments is plain. In the ordinary way, if telephone intercepts are followed by a prosecution one could expect that if they revealed anything material it would favour a conviction, so that counsel for the Crown would argue for, and counsel for the defendant against, the retention of the material and its deployment at the trial, notwithstanding section 9. This is precisely what happened in Reg. v. Effik , 95 Cr.App.R. 427 where the Crown successfully argued before the Court of Appeal that intercept material which had apparently been allowed to survive could be given in evidence. Positions are now entirely reversed. In support of the appeals against conviction we have heard counsel for the convicted defendants arguing with eloquence that the statute should be given the wider meaning, so that in the majority of cases where the material will help the Crown its exclusion will not enable wicked people to escape justice. This rather unusual stance was matched by that ***166** of counsel for the prosecutor, who maintained that the judgment in Effik procured by arguments advanced on behalf of his client should be overruled.

The parties cannot be criticised for this reversal of roles which was forced on them by the shape of the issues, but it did entail that attention was concentrated on the anomalies, impracticalities and risks of injustice which the statute may create in the isolated case where the defence stands to gain from disclosure, and that the arguments relegated to the background the more usual situations with which it was designed to deal. I therefore suggest that the inquiry should begin by considering the words of section 2(2) in the light of the mischief at which the Act was aimed, and only then to consider whether the interpretation reached is so incompatible with the demands of justice as now understood that it must be forced to yield.

On the wording of the Act considered in isolation the arguments are very short. To my mind the expression "preventing and detecting" calls up only two stages of the fight against crime. First, the forestalling of potential crimes which have not yet been committed. Second, the seeking out of crimes, not so forestalled, which have already been committed. There, as it seems to me, the purpose comes to an end. I accept that the successful prosecution of one crime may in a sense prevent another, either because it puts the particular offender out of circulation for a while, or because the fact of a conviction in respect of one crime may deter the commission of others. But although prevention in this sense may be a by-product of a prosecution the word seems a very odd choice if the purpose of the interception was to reach forward right up to the moment of a verdict. If this was what Parliament intended I can see no reason why it should not have said so in plain language. That a means to do so was ready at hand is shown by the new section 45 of the Act of 1984, as substituted by section 11(1) of and Schedule 2 to the Act of 1985, where the contrast between prevention on the one hand and criminal proceedings on the other is plain to see. This was not the result of a thoughtless borrowing of the previous wording without regard to the new context, since as I have shown the shape and language of the substituted section is different from the old. The only tenable explanation is that when Parliament used two different expressions in the same Act in each case it meant what it said.

This conclusion accords with the practicalities of section 6, the plain intention of which was to allow the narrowest possible currency to the physical products of the interception. With the handful of people in the public service engaged in the use of intercepts for the forestalling and detection of crimes this makes sense, but if the purpose includes the prosecution of offenders it is impossible to imagine any "arrangements" made by the Secretary of State under section 6 which would prevent the materials from being liberated into the trial process, as happened in Effik, 95 Cr.App.R. 427 , after which any attempt to control their wider dispersion would be hopeless, thus compromising both the secrecy of the interception process and the privacy of those whose messages had been overheard.

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The narrower reading also makes sense of the otherwise impenetrable section 9. If the purpose of Parliament was to allow the intercept materials to become part of the prosecution process it is hard to see any point in a provision which would make it wholly or at least partially (according to how the section is read) impossible to use them in that process; and if that had been the intention it is equally hard to understand why Parliament did not say so in plain language. By contrast, on the narrower reading of section 2 there would be no need to make explicit provision for the admissibility of materials which by virtue of section 6 would no longer exist, and the purpose of section 9 can be seen as the protection, not of the fruits of the intercepts, but of information as to the manner in which they were authorised and carried out. Inquiries as to these matters were to be confined to the tribunal under section 7, and the defendant was not to have the opportunity to muddy the waters at a trial by cross-examination designed to elicit the Secretary of State's sources of knowledge or the surveillance authorities' confidential methods of work. Evidently the proscription of questioning on the existence of warrants was seen as an economical means of achieving this result.

The narrower reading of section 2 is strongly supported by the history of the Act. I need not repeat this. The criticisms in Malone v. United Kingdom, 7 E.H.R.R. 14 , which prompted the Government to change its mind and legislate were directed not to the long-established practice but to its inaccessibility, imprecision and lack of formal safeguards. The Act was plainly designed to put these matters right, and I can see no reason to suppose that the Government had suddenly and spontaneously decided to go much further and overturn the practice which had persisted for decades of separating the process of surveillance from the prosecution of offenders.

My Lords, if this were all I would have felt little doubt. A solution which seems tolerably clear must however be reconciled with the general law on disclosure and the forensic handling of "sensitive" materials. Here, counsel for the defendants have forcefully and rightly emphasised some disturbing problems which may, I believe, fairly be seen as having two aspects. First, to what if any extent may favourable materials (i.e those which point towards the possibility that the defendant is innocent) be disclosed to those who have it in their power to see that injustice is avoided? Second, if the prosecutor's argument is sound, by whom does the statute contemplate that this power will be exercised? The dilemma will already be plain. At the one extreme the only intellectual ground ever advanced for saying that the materials should not be disclosed at all, namely the Attorney-General's argument on admissibility, will not hold water. At the other, the notion that intercepted material should be disclosed in the same way as other unused material, subject to the same restrictions (mediated by prosecuting counsel and the judge) as in the case of any other "sensitive" material is inconsistent with the hypothesis on which we currently proceed, and must be discarded. There must accordingly, so the argument runs, be some intermediate solution whereby someone in the chain consisting of telephone engineer-transcriber-notetaker-officer in the intelligence unit-senior police officer in the case-Crown Prosecution Service official, decides that the material is favourable ***168** to the defendant, and causes (by some mechanism not explained) a prosecution which would otherwise have been brought to be aborted. This decision must be taken high up the chain, for of the two supposed functions of the intercept "prevention" is immaterial since a crime has not been prevented (otherwise the question of shortcircuiting a prosecution would not arise) and "detection" has come to an end once the machinery of prosecution begins to revolve. The decision must also be taken at an early stage, for on the prosecutor's reading of section 2, and the account of the current practice furnished to the House in writing during the argument of Mr. Moses, the relevant documents and tapes are destroyed within weeks and the listeners and note-takers will soon have forgotten what they heard and wrote.

My Lords, the difficulties which face the decision-maker if the prosecutor's argument is correct need little elaboration. Psychologically, he is conditioned to apply the strictest of self-discipline to the collection and use of the materials, resisting the temptation to reveal anything which would enable the criminal whose offences he is helping to detect to be held to account; yet at the same time he is required in this one respect to contradict that discipline by disclosing materials which may benefit the defendant at a trial. The practical problems are equally great. The decision-maker has to decide whether what he hears may be helpful to a defendant not yet identified, not yet charged in relation to offences not yet determined, and perhaps not even committed, who may raise defences which under current practice can be concealed until the trial is well under way. It may be that in practice the difficulties are not as great as they have been made to seem, but the system nevertheless seems a poor substitute for the formal methods applied in the ordinary case of sensitive materials, which invoke the participation of prosecuting counsel and the judge, fully informed of the current state of the issues and having the conduct of the trial as their only objective.

Moreover, in the only two cases of which the House has detailed knowledge the system has broken down. When invited to explain how it happened that in Effik, 95 Cr.App.R. 427 , the prosecution had successfully pressed for the admission of evidence which according to the stance now taken should have been destroyed long before it reached counsel for the prosecution, let alone a trial, Mr. Moses could do no more than say that counsel in Effik had been wrongly instructed. This total failure to understand and apply even the elements of the system does not inspire confidence in the delicate balance between destruction and disclosure which the decision-maker is required to perform. Again, even in the present case, where prosecuting counsel and the court were at pains to see that the statute was adhered to, some information had been furnished to counsel and the senior police officer (by whom, when and in what terms we still do not know) which on the Crown's present case should not have been revealed.

In the end, however, I consider that the very real apprehensions voiced by counsel for the defendants cannot prevail over the plain intent and wording of the Act. The need for surveillance and the need to keep it secret are undeniable. So also is the need to protect to the feasible maximum the privacy of those whose conversations are overheard without ***169** their consent. Hence sections 2 and 6. These policies are in flat contradiction to current opinions on the "transparency" of the trial process. Something has to give way, and the history, structure and terms of the statute leave me in little doubt that this must be the duty to give complete disclosure of unused materials. The result is a vulnerable compromise, but it may be the best that can be achieved. At all events I conclude that it is the one which the statute does achieve, and I therefore accept the argument for the prosecutor on the principal issue in the appeal.

My Lords, I am conscious that in giving my reasons for this opinion I have omitted any detailed analysis of the judgments of the Court of Appeal in Effik, 95 Cr.App.R. 427 , and in the present case. In doing so I intend no discourtesy whatever to the Court of Appeal whose judgments I have studied with care and profit. The fact is, however, that the arguments addressed in Effik were fundamentally different from those which your Lordships have heard, and the concentration on section 2 rather than section 9 has given a new perspective to the arguments in the present case. I therefore believe it permissible not to prolong an already long judgment by discussion of these cases, and simply to say that I agree with the decision of the Court of Appeal in the present case albeit not altogether with the reasons for it, and that in my opinion the decision in Effik, 95 Cr.App.R. 427 , should be overruled. Nor do I believe it necessary to discuss the decision of a very strong Court of Appeal in Reg. v. Hennessey (Timothy) (1978) 68 Cr.App.R. 419 . Since this antedated both the Act of 1985 and the recent group of authorities on disclosure I see nothing in its general sense inconsistent with the view which I propose.

Section 78(1) of the Police and Criminal Evidence Act 1984

I turn to the alternative argument for the defendants, that if the physical intercept materials were rightly destroyed and their contents irretrievably lost the interests of fairness demanded that the evidence derived from the "metering" of the telephone calls should have been ruled out under section 78(1) of the Police and Criminal Evidence Act 1984 . (The expression "metering," conveniently used in argument, denotes the recording by the telecommunications authorities of the making of telephone calls, though not of their contents.) It will be recalled that we are here concerned with the exercise of a discretion by the trial judge. This should not lightly be overruled, and still less so (as it seems to me) by this House when the Court of Appeal has declined to intervene. Nevertheless the discretion must of course be set aside if it is wrong in principle or manifestly ill-judged.

My Lords, I must own that this question has caused me considerable anxiety. I am now satisfied however not only that was the decision of the trial judge within the bounds of a reasonable exercise of his discretion but that it was right, essentially for the reasons given by the judge at the time. Take first the case where there are no intercepts at all. There, it would be impossible to argue with success that evidence derived from "metering" should not be admitted, or that the jury should not be invited to draw inferences from it, simply on the off-chance that there might have been something in the conversations tending to show that the inference was ***170** unsound. Next, assume that some of the calls had been intercepted; that the contents had been screened and nothing found which might benefit the defence; and that the system had been operated in accordance with the method for which the Crown now contends, so that no information at all reached the prosecuting authorities. If it afterwards came to light that interception had taken place, could it be argued that admission of evidence of metering was unfair? Surely not. Surveillance which produces no relevant material must for this purpose be the same as surveillance which has never happened. Take one step further and assume that some material, none of it usable, has been mistakenly disclosed to prosecuting counsel but has got no further. I can see no distinction in principle. Finally, the present case, which differs only in that counsel for Stephen Preston had begun to open up a line of questioning forbidden by section 9, and indeed by the whole thrust of the Act. This led, in the anxiety of all concerned to comply so far as possible with the general obligations of disclosure, to a confused situation in which a quantity of information was revealed which could, and in some respects should, properly have been kept secret. This may well have then fostered the impression that the Crown was choosing the favourable parts of the material and suppressing the rest, founding an argument that it should all be allowed in, or none. Nevertheless having now read the transcripts of all the relevant parts of the trial, and reconsidered in the light of them what has been said on behalf of the Crown both in the Court of Appeal and before your Lordships' House I am satisfied that this is not what happened. It may well be that those standing behind prosecuting counsel had not sufficiently worked out the implications of the statute under which they were required to operate, and the resulting unsteadiness of aim created understandable suspicions. The judge however did very clearly see the point, that Stephen Preston could not take advantage of suspicions which would never have arisen but for the attempts made on his behalf to cross-examine in a manner prohibited by the Act. In every case where evidence of metering is admitted there is a risk (albeit probably not large) that the inference sought to be drawn is ill-founded, and would be contradicted if all the conversations were recorded and put in evidence. But this is a risk regularly accepted in cases of this kind. The additional factor that someone does know what was said, but is not allowed to tell, except for the purpose of preventing an unjust prosecution, cannot alter the logic of the position. Parliament has grasped the nettle and put the interests of secrecy first. The notion that by doing so it has inferentially rendered inadmissible evidence of metering which would otherwise be unobjectionable, and which is recognised as such by the new section 45, cannot in my opinion be sustained. In company with the Court of Appeal I would reject this ground of appeal.

Hearings in private

Counsel for the prosecutor did not seek to justify the extent to which the defendants and their counsel were excluded from the trial. It is not the function of the House to conduct a post mortem.

The present appeals were brought to resolve questions of principle. All trials are different, and the House has neither the duty nor in this case the means to form a general impression of the trial. I emphasise the words "in this case the ***171** means." The combined resources of six groups of solicitors and seven junior counsel were unable to muster more for the House by way of basic factual and procedural information than six rival agreed statements of facts and issues and a wretched jumble of fragments from the transcripts. No clear picture emerged during argument, and although a dozen volumes of transcript were subsequently obtained, thus enabling the issues to be put in context, these were plainly insufficient to give a true perspective on the trial. It would therefore be unfair as well as inappropriate to labour the history of what is now accepted to have been a serious irregularity in the course of the trial. At the same time I think it right to make four points. First, the lucid, balanced and structured direction to the jury demonstrated great care in preparation. Second, the judge was required to apply the emerging law on disclosure and sensitive materials without the benefit of Reg. v. Ward [1993] 1 W.L.R. 619 and Reg. v. King , 25 November 1992, a task further complicated by the overlay of the Act of 1985. Third, the judge had to tackle the administrative as well as the purely legal problems as they arose, whilst trying to maintain the faltering momentum of a trial which had already been much interrupted. Finally, the judge made a number of rulings on crucial issues which in my opinion were quite right.

All this being said, however, I think it undeniable that in the conduct of the trial two important errors were made. First, the exclusion of the defendants and their solicitors for such long periods. I need not repeat what I have said about the time attributable to the accomplice question and to plea bargaining. As regards the third element I cannot see why it was necessary to exclude the defendants from the legal argument about how the question of disclosure should be dealt with. The judge may have been justly apprehensive about the disclosure itself, but the argument about what if anything it should comprise could have contained nothing detrimental to the public interest or to the safety of an informant, as witness the fact that the defendants were allowed to be present during argument on the same issue in the Court of Appeal. Secondly, although I appreciate why it should have been thought necessary, as a holding measure, to prevent counsel from telling their own clients what was going on, once the judge had been enabled to assess the position there was no need to keep the interdiction in force. In reality, I doubt whether the defendants failed to learn by less orthodox routes what they should have been told by their legal advisers, but the principle is important. Reg. v. Davis [1993] 1 W.L.R. 613 demonstrates after the event that the trial was in this respect also irregular.

My Lords, a situation therefore exists which will only rarely arise before the House. That it may be necessary for the House on occasion to apply the proviso to section 2(1) of the Criminal Appeal Act 1968 is obvious, for it may happen that where the Court of Appeal has held that (for example) there has been no material irregularity in the course of a trial and the House has taken a different view, there is no tribunal except the House available to consider the proviso. But this must be the exceptional case. I find it hard to envisage an instance where the House would agree with the Court of Appeal that there had been a material irregularity, and yet disagree with the opinion of that court that no ***172** substantial injustice had resulted. Even if it were a matter on which a question of law could properly be certified, which it was not here and in my opinion could not have been, the matter is far better left to the up-to-date practical experience of the judges who sit in the Criminal Division of the Court of Appeal. This being said, I feel no doubt that the proviso can be properly applied in the case of an irregularity such as the present; and also no doubt, having studied the evidence against Zena Preston (on whose behalf the principal arguments on this score were addressed), that although the exclusion of the defendants from the trial brought about a real hardship of which they had every right to complain, the unsatisfactory aspects of the trial do not cast doubt on the reliability of the verdicts. I therefore reject this ground of appeal.

SUBSIDIARY QUESTIONS

The opinions so far expressed are sufficient to dispose of the appeals. There are however three matters to which I will briefly draw attention. The first concerns section 9 of the Act of 1984, which has hitherto loomed so large in the proceedings. The Court of Appeal, 95 Cr.App.R. 355 , 365, decided, following Reg. v. Effik, 95 Cr.App.R. 427 , in this respect, that the section did not operate to render inadmissible in evidence the contents of intercepts, and I am inclined to agree that if the parties were by agreement or admission to put the material before the court there is nothing in the section to prevent them. In practice, however, the point is of little or no importance, since if the system established by the Act is working properly the material will have been destroyed long before the trial, and if it is favourable to the defendant the prosecution will not have been pursued.

Secondly, there has been discussion of whether prosecuting counsel should and properly could disclose the fact of an intercept. This is of no materiality here, since everyone concerned (with the exception of the defendants), knew that there had been intercepts, and the matter was open to all in the Court of Appeal. It is sufficient to say that I agree with the opinion of the Court of Appeal, 95 Cr.App.R. 355 , 365, that there is no way in which the defence can compel disclosure of interceptions. On the other hand, I cannot see anything in the Act which would prevent the prosecution from making disclosures if it chose to do so. Such a choice would in the great majority of cases be withheld, since it would be contrary to the thrust of the Act, but it may be possible to envisage cases where the interests of justice would demand that the fact of the intercept, although not its contents, should be disclosed. Further than this it is unnecessary and undesirable to do so.

Finally, I prefer to reserve for another occasion the question whether an appellant can complain of a material irregularity if he has pleaded guilty. For present purposes I have been content to assume without deciding that he can, and therefore need not enter into the matters discussed in *Archbold, Criminal Pleading Evidence and Practice,* 45th ed., vol. 1, (1993), pp. 1134-1135, para. 7-33 et seq. Nor is there any cause to discuss how in theory the proviso to section 2(1) of the Criminal Appeal Act 1968 may apply to cases of material non-disclosure and to wrongful failure to exclude evidence under ***173** section 78(1) of the Police and CriminalEvidence Act 1984 , for it was plain that in the circumstances of this case, and indeed ultimately conceded by counsel for the prosecutor, that if the defendants were right in their submissions on these two main issues the convictions could not stand.

My Lords, for these reasons I would dismiss these appeals.

Representation

Solicitors: Offenbach & Co. ; Ralph Haeems & Co. ; Joy Merriam & Co. ; Lizzimore Braithwaites ; Crown Prosecution Service Headquarters .

Appeals dismissed. (A. R./C. T. B.)

Footnotes

1 Interception of Communications Act 1985, s. 2(2)(b) : see post, p. 149E. S. 6: see post, p. 150B-D. S. 9(1): see post, p. 151G.

[1994] 2 A.C. 130