Tre Palmer, Christopher Gyamfi, Kirk Cooke v Regina

No Substantial Judicial Treatment

Court
Court of Appeal (Criminal Division)

Judgment Date
7 August 2014

Case No: 201301893B2

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Court of Appeal (Criminal Division)

[2014] EWCA Crim 1681, 2014 WL 3843325

Before: Lady Justice Hallett , Vice President of the CACD Mr Justice Andrew Smith and His Honour Judge Zeidman QC

Date: Thursday 7th August 2014

On Appeal from Wood Green Crown Court

His Honour Judge Pawlak

Hearing dates: Wednesday 9th and Thursday 10th July 2014

Representation

Miss Sally O'Neill QC & Miss Wibberly for the Appellant Palmer.
Miss Harris for the Appellant Gyamfi.
Miss Sally O'Neill QC & Miss Wilson for the Appellant Cooke.
Miss Zoe Johnson QC for the Crown.

Judgment

Lady Justice Hallett DBE Vice President of the Court of Appeal Criminal Division:

Introduction

1. These three appeals have been heard together because they each stem from the same police operation and because the same three issues arise: disclosure, entrapment and what is said to be fresh evidence from a former undercover police officer.

2. All three appellants were young unemployed men who lived in North West London. They each sold stolen property to a shop set up and run by undercover police officers. When their attempts to stay proceedings against them failed, they each pleaded guilty to a variety of offences of dishonesty.

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3. On 23 April 2013 His Honour Judge Pawlak sentenced them as follows: for two offences of possession of identity documents with improper intent and one offence of supplying an article for use in fraud Palmer received a total sentence of 32 months imprisonment. For one offence of possession of identity documents with improper intent, supplying an article used in fraud, two offences of handling stolen property and an offence of burglary, Cooke received a total sentence of 27 months imprisonment ordered to run consecutively to an existing sentence. For two offences of possession of identity documents with improper intent and one of supplying articles for fraud, Gyamfi was imprisoned for 9 months ordered to run consecutively to an existing sentence.

4. Palmer and Cooke apply for leave to appeal against conviction and Gyamfi applies for an extension of time (32 days) in which to apply for leave to appeal against conviction. The Registrar has referred all the applications to the Full Court. We grant the extension of time.

Operation Gemini

5. The offences stem from a police operation known as Operation Gemini. Parts of the London Borough of Barnet have suffered for many years from a high level of residential burglaries. The number of offences rose year by year so that by 2011- 2012, one in every 40 homes had been burgled. As those who have been the victim of a burglary can testify, residential burglary is a crime which can have devastating and long term consequences for the householder. Hence the present emphasis in sentencing practice upon the harm caused to victims by the burglar and the handler of property stolen in a burglary. Conscious of the financial and emotional impact of burglary upon the citizens they served, senior Metropolitan Police officers decided to try to reverse the trend. Conventional methods had not worked and according to one officer “burglary is one of the hardest crimes to detect” particularly in densely populated areas with good transport links like Barnet.

6. The less conventional, but not unknown, method chosen was to establish a shop (TJ's Trading Post) operated by undercover officers in which those in possession of stolen property could sell their ill gotten gains. The operational objectives were said to be four fold: one, to provide a sustainable reduction in all acquisitive crime, but in particular residential burglary in the target area; two, to arrest and prosecute those responsible for the criminality; three, to gather detailed intelligence for future policing of the area; four, to re-assure the local community.

7. The surveillance and use of the covert human intelligence sources (the undercover officers or CHIS) were authorised under the Regulation of Investigatory Powers Act 2000 (RIPA) by various senior officers. Detective Superintendent Strugnall and Superintendent Bennett authorised the directed surveillance and the operation was managed by Detective Inspector Wood and Detective Chief Inspector Raphael. Commander Spindler then Commander Streeter authorised the use of undercover officers with DI Wood and DCI Raphael again the managers.

8. The original directed surveillance authorisation was granted on 4 January 2011, cancelled a month later and a new authorisation issued. Thereafter it was renewed and reviewed on a monthly basis until 2 October 2012 when it was cancelled. The original CHIS authorisation for the use of undercover officers was granted on 12 November 2010. It was cancelled a year later and re-granted the same day. It too was regularly reviewed and renewed and eventually cancelled on 4 July 2012. The Crown Prosecution Service (CPS) maintained an operational oversight throughout. It was the prosecution case that the UCOs acted within their authorised parameters and as directed at all times. DI Wood gave evidence that he instructed his officers on each occasion they were deployed not to act as agent provocateurs. This instruction was recorded in their individual note books and they were de-briefed at the end of each session.

9. Operation Gemini began with ‘community infiltration’. Undercover officers set about ‘building their legend’. For a three to four month period they lived in the area, joined the local gymnasium and visited the public houses. They distributed flyers

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and business cards for the shop, advertised online and in the local press. They offered to buy gold and silver and anything else of value, and provide a discreet service. This part of the operation was not recorded.

10. On 24th January 2011 the shop opened in Cricklewood Lane, NW2. It had a front counter and a back room. It was staffed by the officers of whom only two, Terry and Jason, were involved in the applicants' cases. None of the three applicants were specifically targeted and the identities of those individuals who had been specifically targeted were not disclosed.

11. The shop had a number of separate cameras providing a constant record of both the front counter and the back room. Only certain customers were given access to the back room and it was there that conversations were very open about criminal behaviour. The UCOs offered cheap designer clothing, alcohol and cigarettes to selected customers. Everything was video and audio recorded including the UCOs interactions with the three applicants. At another location, other officers, including DS Eaton and DS Goodwin, monitored in real time everything that the UCOs were doing. It was the job of DI Wood to ensure that the UCOs stayed within the parameters of the authorisations granted for the operation.

12. The shop eventually closed in May 2012. In July and August of that year a number of arrests were made. In total 118 persons were charged with offences arising out of the operation and, at the time of the abuse hearing in the present matter, about 80 people had appeared before the Courts and pleaded guilty. In total some 2,360 items of stolen property were recovered including jewellery, electrical equipment, 541 passports, 334 driving licences, and 357 bank cards.

13. However, as well as stolen items, 19 people attending the shop also sold their own identity documents. Of a total of 807 documents bought, 491 were not ‘linked to any crime’ by which we understand that the documents had not been reported stolen or that they belonged to the seller.

The case against Palmer

14. Palmer, aged 19 years at the time of the offences, had previous convictions for drugs offences but none for offences of dishonesty. He first attended the shop on 7 July 2011 in the company of a friend, Craig, who was there to sell a stolen laptop computer. During the conversation UCO Jason indicated to Craig that he was interested in buying ID documents such as passports, driving licences, and cards. Palmer entered the conversation and asked how much one would get for a driving licence to which Jason replied: “£40 but more for a passport”. The following day Craig and Palmer returned to the shop. During the conversation Craig informed UCO Terry that Palmer had a driving licence for him. Terry stated that he was happy with that but went on to say that he preferred passports. Later in the conversation Palmer asked how much he could get for selling Indian gold.

15. Over the period covered by the indictment Palmer sold to the shop a total of five driving licences: one was counterfeit, one belonged to him or a member of his family, one was stolen in a burglary, and two were from thefts.

16. On 27th July 2011 Palmer returned to the shop alone and sold to Jason two Romanian passports that had been stolen in a residential burglary three days earlier. When asked what was the story behind them, Palmer replied, “They're good… you know already what it is with me. They're from a house.” Palmer returned on a number of further occasions to sell passports, many of which had been stolen in residential burglaries just days before. In total Palmer sold 37 passports to the UCOs. Twenty six of these were taken during a total of seven separate residential burglaries – the general nature of which suggested that the passports had not been stolen to order. One was stolen, two were counterfeit, and eight were reported as lost or not reported at all. On 29th July 2011 Palmer also sold his own passport, an offence in its own right under the Fraud Act 2006 .

17. As well as the ID documents Palmer also sold, or attempted to sell, a computer, two gold chains, two credit cards, a paying-in book, some forged £20 notes, and memory cards. He attended the shop and had interactions with the UCOs on a total of 31 occasions and was paid a total of £5,505 by the UCOs. On two occasions the UCOs tried to engage him in

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conversation about whether he knew anyone with “metalwork and stuff or anything like that” (meaning firearms). Palmer replied, “I'm not really on this game”. UCO Terry asked Palmer to let him know if anyone was trying to get rid of one.

18. Upon arrest a total of £1,620 in cash was found at Palmer's address. Following charge, and having made no comment in interview, Palmer gave a prepared statement in which he stated that he had not previously been aware of the prevalence of ID documents in his area. He was unaware that you could sell ID documents in a shop until he had been told by his friend that he could sell driving-licences, and then told by the UCO shop assistant that he could sell passports and cards. Before that he would not have thought of selling such items in a shop or anywhere else.

19. Following the Judge's ruling on the abuse of process application, Palmer pleaded guilty on the following basis:

> “I understand that I am bound by the ruling on entrapment. However, I was not operating as or known as a fence prior to visiting TJ's Trading Post. I would not have committed these offences if it wasn't for the shop”.

20. A Newton hearing was held in respect of Palmer at which he gave evidence to the following effect: the first sale of property to the shop was from a wallet he and a friend had found in the street. They had become aware that the shop paid money for driving licences and bank cards and therefore thought they could make some cash from their find. He then sold his own passport and kept the cash. He claimed in the remainder of the sales he acted as an agent for friends and family or his cannabis dealer. He claimed he made no money from any of the sales. The Judge rejected Palmer's evidence in its entirety.

The case against Cooke

21. Cooke, aged about 22 at the time of the offences, had no previous convictions. He first attended the shop on 14 May 2011 and asked UCO Terry about purchasing cigarettes. Terry said to Cooke, “If you come across anything, bring it in and we'll look after you”. Cooke asked about their taking cards and said that he had sent someone in with six cards the previous day. Terry informed him that they also took passports and Cooke enquired as to how much they paid. On 21 May 2011 at 14:42 Cooke texted UCO Terry to inform him that he had an Apple laptop computer available. The laptop had been stolen just hours before in a residential burglary. Cooke said that his mate had obtained it, did not know where it was from, and would not bring it to the shop. Cooke met UCO Terry at a railway station on the same date and sold the laptop for £250.

22. On 26 July 2011 at 13:49 he texted one of the UCOs to state that he had an Apple Mac computer and attended the shop forty minutes later together with his co-accused, Brown. They agreed a sale price of £380 and informed the UCOs that there might also be a television available. Again, the computer had been stolen from a residential property a little earlier that day together with other items such as jewellery. The burglars left a television in the front garden.

23. Between 22 May 2011 and 4 April 2012 Cooke sold the UCOs a total of fourteen passports, none in his own name, and three of which were stolen in a residential burglary on 26 October 2011 and sold at the shop just two days later. Between 3 July and 21 August 2011 he sold a quantity of bank cards, although there was no evidence as to the theft of those cards. On 20 July he sold a Suzuki motorcycle which had been stolen just two days earlier.

24. In all Cooke met the UCOs about twenty-five times for the purposes of selling property and was paid a total of £4,070 in respect of items sold at the shop.

The case against Gyamfi

25. Gyamfi was aged 20 years. He had no previous convictions at the time of the offences, but had subsequently been convicted of drugs offences.

26. His first appearance in the shop was on 15 August 2011. Gyamfi began by asking UCO Terry, “What can you do for me? A mate of mine usually comes in for me.” Gyamfi said that he had “a few cards and a few books and a few passports and stuff like that.” The two men had a conversation about exactly what the UCOs were looking for in terms of ID documents and also discussed Gyamfi bringing gold into the shop. On that occasion Gyamfi sold two driving licences.

27. He also sold the UCOs three debit or credit cards on the same date. Between then and 19 September he returned to the shop on three further occasions to sell a total of 21 credit / debit cards. On 18 October 2011 he arrived with twelve more cards but was informed by UCO Terry that they were not buying them any more. They remained interested in passports.

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28. On 22 August, Gyamfi was offered cheap tobacco and champagne by the UCOs at the back of the shop. Gyamfi's final sale of ID documents at the shop was on 17 April 2012 when he sold two passports.

29. Gyamfi visited the shop on a total of six occasions and was paid £1,050 for the items he sold. Only one item was linked to a specific crime, the theft of a passport from a motor vehicle in October 2011. He made no comment in interview.

30. Gyamfi pleaded guilty on the following basis:

"The defendant had no involvement in the theft of the items traded (if indeed they were stolen).

The defendant was told at the shop what to say in order to be served, and was supplied with the items, which he sold at a profit."

The statutory regime under the Regulation of Investigatory Powers Act 2000

31. The right to respect for private and family life enshrined in Article 8 of the European Convention of Human Rights makes it unlawful for a public authority to act in a way that is incompatible with these convention rights. The Regulation of Investigatory Powers Act 2000 (RIPA) allows public bodies to interfere with the right to privacy in certain strictly defined circumstances. The Act provides a legal framework for the interception of communications, the acquisition and use of data, the use of surveillance and covert intelligence sources. Part II of the Act covers Surveillance and Covert Intelligence Sources. It applies to 'directed surveillance', 'intrusive surveillance' and the conduct and use of 'covert human intelligence sources'.

32. Section 26 (where relevant) provides a definition of directed and intrusive surveillance and covert human intelligence sources:

"(2) Subject to subsection (6), surveillance is directed for the purposes of this Part if it is covert but not intrusive and is undertaken— "

(a) for the purposes of a specific investigation or a specific operation;

(b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and

(c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance.

(3) Subject to subsections (4) to (6), surveillance is intrusive for the purposes of this Part if, and only if, it is covert surveillance that—

(a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and

(b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device.

…

(8) For the purposes of this Part a person is a covert human intelligence source if—

(a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

(b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or

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(c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship"..

33. Section 27 provides that conduct to which Part II of the Act applies shall be "lawful for all purposes if an authorisation is in place and the conduct is in accordance with the authorisation".

34. A designated person may grant an authorisation for directed surveillance of the kind seen in Operation Gemini provided he/she believes it is necessary and proportionate for the purpose of preventing or detecting crime (section 28). Similarly a designated person may grant an authorisation for the use of a covert human intelligence source provided he/she believes it is necessary and proportionate for the purpose of preventing or detecting crime (section 29).

35. The entire statutory scheme is subject to Codes of Practice (section 71) which a court must take into account (section 72). At all times there must be a person holding an office, rank or position with the relevant investigating authority who has day-to-day responsibility for dealing with the source, and for the source's security and welfare, general oversight of the use made of the source and responsibility for maintaining a record of the use made of the source.

36. Further, the Office of Surveillance Commissioners carries out regular inspections of Law Enforcement Agencies to ensure compliance with the Act in so far as directed surveillance and the use or conduct of a covert human intelligence source is concerned. The Chief Surveillance Commissioner presents an annual report to Parliament.

Procedural history

37. The cases of Palmer and Gyamfi were listed for a voir dire hearing on 5 October 2012 but adjourned and listed for mention on 26 October. In preparation for that hearing Counsel for Palmer served an application for disclosure to which the Crown failed to respond. The Crown accepted that any documentation relevant to the issue of entrapment would be disclosable but asserted that the RIPA authorisations and other documents relating to the supervision and conduct of the operation were protected by Public Interest Immunity (PII). At a hearing on 28 November for all three cases (which were by this time linked), the Judge gave directions that the Crown were to disclose details as to the scope and purpose of the operation and the limits of the authorisations provided to the UCOs, in is far as such information was not to be subject to a PII application.

38. Prior to a hearing listed for 8 January 2013, the CPS requested what it called an ex-parte 'notification hearing' in order to show the initial RIPA authorisation to the Judge to satisfy him as to the lawfulness of the operation. There was to be no PII application by the Crown because 'the material was deemed not to meet the test for disclosure'.

39. On 10 January the Judge gave an initial ruling. By that stage he had not had time to read all the documents put before him but he had "checked all the authorisations and monthly renewals and the cancellation and dipped into, at random, the reports on progress."

40. He was very critical of the prosecution. He described the service of documents and statements as piecemeal. He was unhappy about their suggested 'ex parte notification' procedure. He accepted there were many documents that were neither relevant nor disclosable but in principle, he was persuaded that once the lawfulness of the authorisation was challenged, the document itself becomes disclosable "subject to other considerations".

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41. The voir dire took three days between 5 and 8 February. UCOs Terry and Jason, DI Wood, Superintendents Strugnell and Bennett, Commander Spindler, DS Goodwin all gave evidence. Another undercover officer called Nat who had also played a part in the Operation was not required.

42. The defence submitted that there had been an abuse of process and applied for the prosecution to be stayed. It was submitted that the police had used entrapment to lure each of the three applicants into committing the offences. Each also applied under s.78 Police and Criminal Evidence Act 1984 for the evidence to be excluded on the ground of procedural unfairness. It was ultimately agreed that the matter should proceed by way of the abuse application because the same considerations applied to both.

43. On 27 February, the judge ruled that the position taken by the CPS in respect of disclosure was correct in law in light of the judgment in R v H and C [2004] UKHL . He had found nothing which required disclosure because it weakened the prosecution case or strengthened the defence. He understood that provided the Crown asserted that all documents which it was necessary to disclose had been disclosed, even where the defence challenged the lawfulness of the authorisation, the authorisations themselves are not disclosable. For his part, he could not see why they could not be routinely disclosed, suitably redacted, if only by way of reassurance.

44. He remained highly critical of the Crown (who by this stage did not yet have the benefit of the services of Zoe Johnson QC who appeared before us). He described the preparation and presentation of the case as “unattractive, unprofessional and unhelpful”. This was because statements were served haphazardly, unsigned and undated, the Crown's skeleton made no attempt to address the RIPA issues, and the schedules of unused material made no reference to relevant material including CCTV footage. The Crown's paperwork was said to be “pathetic”. The Judge did not therefore have confidence in assuming that what he was being told was necessarily correct.

45. On the specific issue of entrapment, the judge considered in detail the exchanges between each of the applicants and the UCOs. He rejected the propositions that any of them had been incited to commit offences, that the underlying offences of burglary would not have occurred but for the fact the shop existed and that the shop had led to a spike in crime rates. He dismissed as entirely unjustified the proposition that this was a state orchestrated, wholesale ‘virtue testing’ of an economically deprived community during a recession. He considered that the operation was performed in good faith as a potential solution to a chronic problem. He noted that it was overseen by officers watching real time footage and by the CPS and the operation had been selected at random by the office of the Chief Surveillance Commissioner to scrutinise its lawfulness and nothing untoward was found.

46. The judge did not accept that the focus of the operation had moved from burglary to identity theft, which was not specifically covered by the authorisations. Even if it did, identity theft still fell within the remit of acquisitive crime. If there was any technical breach, the judge concluded it did not make the operation overall unlawful.

Grounds of Appeal

47. There are three grounds common to each of the applicants: it should be said that none of them specifically addresses the point that following the judge's ruling they pleaded guilty.

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Disclosure

48. Disclosure began as a free standing ground of appeal on the basis it was said to be an abuse of process of the court to pursue the prosecution in the light of the Crown's many failings as to disclosure. By the time of the ruling on abuse there remained just two matters the Crown had failed to disclose: the authorisations (including reviews and renewals) and the existence of a possible witness Christian Plowman.

49. Miss Johnson for the Crown accepted the argument that once the defence challenged the lawfulness of the authorisation, the prosecution could and should have disclosed the authorisation documents in redacted form. We should make clear, therefore, that we have heard no argument on the principle of disclosing authorisation documents in these circumstances. Nor have we heard argument on the issue of the extent to which the lawfulness of an operation may be challenged in the light of the provisions of section 27 . We proceed on the basis as conceded by Miss Johnson. However, she went on to assure us that she herself has considered every document in the authorisation files and has discovered nothing which in her opinion would undermine the prosecution or assist the defence. She states firmly therefore that nothing needs to be disclosed.

50. Sally O'Neill QC for two of the applicants obviously accepts Miss Johnson's assurance; nevertheless she argued it is for the defence to decide to what use they may put a properly disclosed document. There may well be lines of inquiry or argument which would not have been apparent to a prosecutor which would be apparent to defence counsel.

51. The only other outstanding issue of disclosure is the existence of Mr Christian Plowman. He was one of the undercover officers who worked as part of the ‘legend building’ and in the shop as part of Operation Gemini. The fact he worked on Operation Gemini was revealed when he published a book on his experiences as a Metropolitan Police Officer. The defence argue that the prosecution was bound to reveal the existence of every undercover officer involved in the Operation even if, as with Mr Plowman, they played no part in buying from or selling to the applicants.

52. The judge did not rule upon disclosure as a free standing ground to stay the proceedings and considered it as part of the overall abuse argument. During the course of argument, it became apparent that we were being invited to do the same.

Fresh evidence

53. In a statement dated 25 May 2013 Mr Plowman states that he worked on operation Gemini from March to May 2011 and spent some time at TJ's Trading Post. He was known as Chris. He states that he had ethical concerns about the operation which he felt amounted to tacit encouragement for people to sell and / or steal identity documents. He felt that there was a lack of selective targeting of those from whom the police bought property. He eventually resigned from the police for a number of reasons including his concerns about undercover operations in which he was involved including Gemini. He produced a chapter of his book as evidence of his concerns. Miss O'Neill for Palmer and Cooke and Miss Harris for Gyamfi both urge the court to receive his evidence in support of their argument that Operation Gemini was unlawful.

54. Initially Mr Plowman, who now lives abroad, refused to return to this country to give evidence because he claimed he was in fear of his former colleagues. The original application was therefore to treat his statement as hearsay. He was eventually prevailed upon to attend at court in person and we heard his evidence de bene esse.

Abuse of Process

55. The applicants maintain that the initial authorisation for the undercover operation was unlawful because it was neither necessary nor proportionate and or that it became unlawful because it extended beyond its authorised limits.

56. Counsel claim that the operation was not necessary because burglary was not particularly prevalent in the area. Burglary is a serious offence but not so serious as to justify what they called an ‘intrusive’ operation (in the general rather than the statutory sense) whereby visitors to the shop were fully recorded. Conventional methods of prevention and detection should have sufficed. They urged the court to scrutinise with care the “use of secret police shops to infiltrate communities”.

57. The operation is said to be disproportionate because it involved targeting an entire community and putting temptation in their way. What were described as vulnerable young unemployed people were allegedly enticed into the shop by the prospect of buying cheap goods and/or being supplied with free alcohol, cigarettes and clothing. Two older male undercover officers there impressed young people with the relatively large sums of money that could be made by trading in the shop and with the ‘glamorous’ lifestyle associated with crime.

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58. Further, counsel complained that the operation may have begun as an operation to combat burglary and other acquisitive crime but it 'mutated' into an operation to trade in identity documents, many of which were not stolen. Even after the police realised people were coming in and selling their own and their friends'/acquaintances' documents, the officers continued to buy them. This was said to be ill conceived as a policing tactic to target burglary/ acquisitive crime.

59. We were invited to take the applicant Palmer as an example. First the officers built up their 'legend' in what was described as an unsavoury and unsupervised way. Then when Palmer was 'lured' into the shop, CCTV footage recorded Terry bragging to Palmer about his earnings, his car, and his sexual conquests as he gave Palmer access to alcohol, cigarettes or clothes, sometimes free, sometimes at very reduced prices. Peppered throughout the conversation were references to the types of identity documents Terry wished to buy. Palmer was given the clear impression he could make good money from selling them. The officers were accused by counsel of acclimatising young men like Palmer to criminal conduct by virtue of the 'special treatment' in the backroom and thereby inciting and entrapping them into committing offences.

60. When Palmer began to supply identity documents, the officers tested him further. On two occasions, the officers mentioned the possible purchase of a gun. The applicants submitted that this was the epitome of entrapment and indicative of 'a policing operation that had lost its way'.

61. Counsel also criticised the length of the operation and claimed it began to generate crime, not reduce it. Accordingly we were invited to conclude that prosecutions arising from police conduct such as this bring the administration of justice into disrepute.

The law

62. The starting point for this court in considering the approach to the issue of entrapment in England and Wales is *R v Looseley A.G. Ref (No. 3 of 2000) [2002] 1 Cr.App.R.29* .

63. At paragraph 1 Lord Nicholls of Birkenhead introduced his speech as follows:

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen."

64. At paragraph 36 Lord Hoffman provided a succinct summary of the principles of entrapment.

> "First, entrapment is not a substantive defence in the sense of providing a ground upon which the accused is entitled to an acquittal. Secondly, the court has jurisdiction in a case of entrapment to stay the prosecution on the ground that the integrity of the criminal justice system would be compromised by allowing the state to punish someone whom the state itself has caused to transgress. Thirdly, although the court has a discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings, the exclusion of evidence is not an appropriate response to entrapment. The question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all."

65. Their Lordships declared themselves satisfied that there is no appreciable difference between these principles and the requirements of article 6 of the European Convention of Human Rights and the Strasbourg jurisprudence. English law does not in any way conflict with the decision in *Teixeira de Castro v Portugal (1998) 28 EHRR 101* which was based very much on

the cumulative effect of a number of factors. Mr De Castro had been the target of an unwarranted, unauthorised, unsupervised police operation in which undercover officers incited him to supply drugs. Thus, there is no principle of European or English law that whenever a police officer gives a person the opportunity to commit a crime, he falls foul of article 6 . Police officers are not bound to remain passive and act only as investigators. The difficulty comes, as Lord Nicholls observed, in identifying conduct which steps over the line between what is proper and improper.

66. The court in R v Harmes & Crane [2006] EWCA 928 considered what the limits are in the context of an undercover operation purportedly authorised under RIPA . The appellant Harmes ran a public house and was suspected of involvement in the distribution of Class A drugs and money laundering. An undercover police operation was launched and approved which lasted approximately 3 months. One of the undercover police officers offered to supply Harmes with cheap soft drinks and another suggested they could be paid in cocaine. The trial judge concluded that three of the supplies of drugs would not have been made had it not been for the officers' conduct and stayed those proceedings, but she allowed a count of conspiracy to proceed to conviction. Moses LJ giving the judgment of the court at paragraph 12 described the essence of the appeal as "the conduct of the officers in agreeing to supply soft drinks in exchange for cocaine was so seriously improper as to bring the administration of justice into disrepute"..

67. At paragraph 18 he observed:

> "The statutory scheme and the Code, thus, emphasise the importance of authorisation to ensure that the requirements of necessity and proportionality are achieved and to provide a proper system for close scrutiny. That is particularly of importance where, as the Act envisages by Sections 71 and 72 , the court may need to assess the legality of the operation. Inadequate compliance with the Code frustrates the essential task of the courts in assessing the legality of an undercover operation by reference to the provisions of the Code (see in particular paragraph 66 in the speech of Lord Hoffmann in Looseley (qv supra)".

68. Counsel for the applicants derived from *Harmes and Crane* the principle that compliance with both the RIPA Act itself and the Code are extremely important, as is close scrutiny of that compliance by the court. Further, if it is necessary to keep a careful record of the authorisation process to enable the court to perform its function, they suggested defence counsel must be allowed to see that record and, where appropriate, deploy it in argument.

69. They did not dwell upon the result of the *Harmes and Crane* appeal other than to try to distinguish it from the facts of the instant cases. They observed that conspiracies to import Class A drugs are exceedingly serious and prevalent offences, in the detection and prevention of which unconventional police tactics may be justified. In our view, the result in *Harmes and Crane* is worthy of rather more attention. Despite the clear findings of the Court of Appeal that there were significant breaches of the Code and the Act and that the police officers' conduct had been "criminal", the court concluded their conduct was not exceptional and did not go beyond what was necessary to show their willingness to deal in drugs. The officers conduct "viewed as a whole, did not stray beyond that which was permissible to investigate and prosecute crime".

Conclusions

Fresh evidence

70. We shall first consider the application to adduce fresh evidence from Mr Plowman. His role in the shop lasted little more than a week or two and he had no dealings with these three applicants. He provided no detail of what was said or done by him or his colleagues. He simply stated that he had "ethical concerns" and proffered his opinion that his talents were wasted on an operation of this kind. According to him, it was targeted at the wrong people. There seemed to be a "tacit encouragement of

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the people who came to the shop to sell their own and their friends' personal ID and banking documents. The encouragement came simply from the fact that the shop existed…"

71. We found his evidence as to his involvement in Operation Gemini exaggerated, unreliable and unhelpful. His memory of events appears to have been tainted by his distressed state at the time and by his attitude to the Metropolitan Police. In any event, he had nothing useful to add about the operation. The court had the best evidence available- the audio and visual recordings. It could make up its own mind.

72. In our judgment, Mr Plowman' evidence failed by a long margin to meet the criteria for admission under section 23 of the Criminal Appeal Act 1968 .

73. Further, given the extensive material available to the defence with which to challenge the lawfulness and propriety of the operation and the fact that Mr Plowman had no dealings with the accused, there was no duty on the Crown to inform the defence of his existence.

Disclosure

74. The only relevant and disclosable documents not yet disclosed are the authorisation documents. We too can see no reason why they could not have been disclosed in redacted form. The Judge believed that had they been disclosed, or had at least one page of them been disclosed, the concerns of defence counsel would have been allayed. Miss Johnson concedes they should have been disclosed. However, the fact that they were not disclosed is now of no consequence. The Judge was satisfied on the material before him that the documents did not need to be disclosed to meet the Crown's general duties of disclosure and every document has now been considered with care by very senior and experienced counsel. Miss Johnson, knowing exactly the nature of the argument the defence wished to advance, assured us there is nothing in the documentation which would assist them or undermine the prosecution. Accordingly, we reject Miss O'Neill's proposition that the documents must be disclosed (so that she can form her own conclusions) or the conviction quashed as an abuse.

Entrapment

75. To our mind, there are several very high hurdles in the applicants' path. They include the findings of fact made by the judge. His Honour Judge Pawlak heard evidence from those involved in the operation (albeit not from the applicants themselves because they chose not to testify) from start to finish. He found as a fact that the designated officers who granted the authorisations had good reason to believe that the operation was necessary and proportionate. Burglary of dwelling houses is a far more serious crime than the defence acknowledged and it has very considerable consequences to victims. Burglary was particularly prevalent in the targeted areas of Barnet and conventional methods were not working. A less conventional approach was adopted with the legitimate aims of preventing and detecting burglary offences in the area; and it was to a significant degree successful.

76. Whereas other boroughs saw yet another increase in burglary of 8–10 %, Barnet saw an increase of just 3%. A large number of people were arrested, (of which the vast majority pleaded guilty) and many hundreds of items of stolen property were recovered and returned to their owners. The fact that many of those items were identity documents and not all of them stolen does not undermine the integrity of the whole operation. As the judge observed, the undercover officers could not refuse to buy identity documents and maintain their credibility as fundamentally dishonest. In any event, many of the identity documents were undoubtedly stolen (26 of those sold by Palmer were stolen in residential burglaries) and because identity documents are generally easier to trace, the officers thereby gathered useful evidence.

77. Further, the judge rejected in clear terms and on good evidence that the applicants were in any way vulnerable or enticed by the officers' conduct into committing crimes they would not otherwise have committed. He saw and heard the applicants on the surveillance tapes. Their only vulnerability was their greed. There was nothing exceptional about the opportunity presented to them. In the words of Lord Taylor CJ in R v Christou and Wright 1992 1 QB 979 . they "voluntarily applied themselves to the trick".

78. The only area which might have caused us some concern was the possibility that the officers had encouraged Palmer to sell them firearms. However, we note that the officers' comments fell short of encouragement and when the applicant showed no interest, they did not pursue the matter. Putting those remarks into the context of their conversations with Palmer and the overall context of the operation we are satisfied that the officers did not thereby overstep the line. In any event, these exchanges had nothing to do with the charges against Palmer and could not have vitiated the proceedings against him.

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79. In our judgment the judge's approach to his task was impeccable. All his findings were, in our judgment, open to him and explained in his clear, careful and cogent ruling. He expressed reservations and criticisms of the Crown, where necessary, and put their failings into the balance when considering whether or not it would be an abuse of process for the trial to continue. He had no doubt the balance came down in favour of the trial continuing and nor do we. The way in which Operation Gemini was planned and implemented does not come close to police misconduct. The surveillance was no where near as intrusive as the defence suggested. These were commercial premises open to the public; no-one was forced or badgered into entering them. The officers were instructed on how to behave, and reminded repeatedly of their obligations. Everything relevant was recorded and retained. The operation was constantly monitored and the officers properly supervised. The Surveillance Commissioner was satisfied there was nothing untoward in what they were doing. The operation may have lasted for over a year but that was to be expected given its scale and the fact that the officers had to build up trade and develop the confidence of those with stolen property to sell. The length of the operation overall was not excessive in all the circumstances.

80. For those reasons we reject the argument on entrapment. There is no affront to justice here. Thus, taking the grounds of appeal individually and or cumulatively, we are satisfied the applicants were properly prosecuted and the convictions are safe. Accordingly, we reject the applications for leave to appeal conviction.

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